IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Amjad Ali Sahito

Criminal Jail Appeal No.164 of 2018

Appellant:	Ahmed S/o Allah Bachayo Through Mr. Iftikhar Ahmed, Advocate
Respondent:	The State through Mr. Talib Ali Memon, Assistant Prosecutor General, Sindh
Date of hearing:	29.09.2020
Date of Judgment:	01.10.2020

J U D G M E N T

AMJAD ALI SAHITO, J-. Being aggrieved and dissatisfied with the judgment dated 15.02.2007 passed by the learned IInd Addl. Sessions Judge, Thatta in Sessions Case No.167 of 2003 arising out of the FIR No.31/2003 for an offence punishable under section 302 PPC registered at PS Ghorabari; whereby the appellant was convicted and sentenced to imprisonment for life as Tazir. He was further directed to pay Rs.100,000/- (one lac) to the legal heirs of deceased Feroze as compensation under Section 544-A Cr.P.C.

2. Brief facts of the prosecution case as per FIR lodged by complainant Pir Muhammad son of Abdullah on 01.10.2003 at 0300 hours at P.S. Ghorabari are that he was labourer, his son namely Feroze aged about 27/28 years was doing his job as Starter at Bus stop Pir Patho and used to sleep at night time at Dargah Pir Patho. On 29.09.2003 his son Feroze and Ahmed son of Allah Bachayo Khaskheli exchanged hot words. In the meanwhile, Ahmed Khaskheli received an inquiry on his head. On 30.09.2003 complainant had gone to his relative for his work. On the next date morning time his son Mukhtiar Ali came there and disclosed to him that on the night viz. 30.09.2003 he and his brother Feroze was accompanied and went to Dargah Pir Patho for sleeping where Jumoo son of Anghario by caste Khadim was available there and was sleeping jointly. On 01.10.2003 at about 03:00 AM night time they heard the noise of foot and woke up and

saw on the light of bulb that Ahmed son of Allah Bachayo Khaskheli having one stone in his hand and hit his brother on his head and went away and they found him died and blood was oozing from his injuries. Thereafter he left Jumo on the dead body and he went to his house for informing his father. On this information, the complainant accompanied with his son went to Dargah Pir Patho and saw his son Feroze sustained injuries on his head and he died away. Thereafter he appeared at police station Ghorbari and lodged his FIR against accused Ahmed Khaskheli who killed his son utilizing stone.

3. After completing the investigation of the case, the challan was submitted by the Investigating Officer against the above named accused before the concerned Court.

4. The trial Court framed the charge against the appellant/accused, to which he pleaded not guilty and claimed to be tried. To establish accusation against the accused, the prosecution examined as many as 06 witnesses.

5. The learned trial Court, after hearing the learned counsel for the parties and appraisal of the evidence, convicted and sentenced the appellant in a manner as stated above. The conviction and sentence, recorded by the learned trial Court, have been impugned by the appellant before this Court by way of filing the instant Criminal Appeal.

6. Learned counsel for the appellant mainly contended that the appellant is innocent and has falsely been implicated; that there are major contradictions in the evidence of PWs; that as per prosecution story the incident is motiveless, however, mere assertion of anger by the appellant is the weakest type of motive; that the complainant is not an eye witness of the incident and there is no independent person has been shown as a witness to believe that the appellant has committed the offence. Lastly, he contended that the prosecution has miserably failed to prove its case against the appellant and thus, according to him, the appellant is entitled to his acquittal. In support of his contentions, learned counsel has relied upon the cases of (1) Muhammad

Ibrahim v. Ahmed Ali and others (2010 SCMR 637), (2) Muhammad Arif v. The State (2019 SCMR 631), (3) Imtiaz alias Taj v. The State and others (2018 SCMR 344) and (4) Muhammad Hussain v. The State (2011 SCMR 1127).

7. Conversely, the learned A.P.G. while supporting the impugned judgment argued that all the prosecution witnesses have fully supported the case against the appellant beyond any shadow of reasonable doubt; however he admits that the case of the appellant falls within the clause of section 302 (c) PPC. Not 302 (b) PPC.

8. I have heard the learned counsel for the parties and have gone through the evidence as well as an impugned judgment with their able assistance.

9. On careful perusal of the material brought on record, it appears that the prosecution case solely depends upon the evidence of eyewitness namely Jumo (PW-2), who in his evidence has deposed that on the day of the incident, he was available at Dargah Pir Petho where he was serving as Khadim. The deceased Feroze was doing the job as Starter at the bus stop and used to sleep at night time on the said Dargah. On an eventful day, he along with brother deceased Feroze and Mukhtiar were sleeping adjacent to each other when at about 3 A.M. they heard the noise of foot and saw the appellant while inflicting blows of stones upon deceased Feroze. He and Mukhtiar went to deceased Feroze and found him dead. After committing the murder, the appellant went away by jumping over the wall. PW Mukhtiar left him on the dead body and went to his house for information of his father Pir Mahar, who later on registered the instant FIR. In cross-examination, he admits that the boundary wall of the shrine was at about 30/35 foot and again says it was about 20/25 foot. He admits that "**It is fact that we had seen the accused person from his backside while running away after committing the murder. The stone was weighing about 8 to 10 kilos".** The ocular evidence finds support from the medical evidence. The claim of the eyewitness that deceased Feroze died on the spot; whereas the opinion of the doctor was that the duration between

the injury and death was about one and half hour. Further, the complainant of this case is not an eyewitness of the incident. PW Mukhtiar informed him about the incident but the prosecution has failed to examine him/PW Mukhtiar. Because of Article 129 of Qanoon-e-Shahadat,1984 presumption would be that if produced same would have gone against the prosecution.

10. In cross-examination, the complainant admits that he has demanded the hand of the daughter of Ramoo for his deceased son Feroze but Raamo has refused to give his daughter to his son and therefore dispute had arisen between the parties. To support the ocular version, the prosecution examined PW-4 Dr. Nazeer Ahmed, who received the dead body of the deceased at about 10:30 a.m. He started the postmortem on the dead body at 11:00 am and completed the same at 12:30 noon. On external examination, he found the following injuries:

Injury No1: 'Lacerted wound 4 cm x 1.5 cm in to ex at left frontal region of skull just left eye bro.

Injury No.2: Lacerated wound 4 cm x 1 cm at left 1 region of skull just to cm just to injury No.1 causing departure fracture parital bone of skull. Both injury cause hard and blunt substance. Both injury ante-mortem in nature.

11. Prosecution also examined PW-5 ASI-Amir Bux, registered the FIR of the case, who in his cross-examination admits that the covered stones were not sent to finger expert nor it was weighted but it was about 5/6 Kg. Further, I.O. of the case also recorded the statement of PWs Mukhtiar and Jammu and other witnesses. The appellant was arrested on 08.10.2003 and after completing the investigation, he has submitted the challan and recovery articles were sent to the chemical examiner which report received stained with human blood.

12. The law of land is that normal sentence for an offence of murder is death which is to be awarded as a matter of course except where the Court finds some mitigating circumstances which may warrant the imposition of a lesser sentence. Since the

death of deceased in view of the above discussion appears to have caused while inflicting the blows of stone upon the deceased Feroze by the appellant. The trial Court has awarded sentence to the appellant for an offence under section 302 (b) PPC. For the sake of convenience, the definition of section 300 PPC is reproduced as under:-

> *"300. Qatl-i-amd. --- Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-i-amd."*

From a reading of the above provision of law, it reflects that section 300 PPC gave three situations and divided into three parts mentioned below where the act would fall under the definition of *Qatl-i-Amd.*

> *(a) If a person causes death of any person with intention to kill him;*
> *(b) If the act is done with intention to cause bodily injury to any person and such injury, in the ordinary course of nature is likely to cause death;*
> *(c) If the act is done with knowledge that the act is imminently dangerous and it must in all probability cause the death.*

The Exception 4 to Section 300 and section 304 PPC are reproduced as under:-

*"**Exception 4**: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner."*

*"**304**. Punishment for culpable homicide not amounting to murder: Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention, of causing death, or of causing such bodily injury as is likely to cause death;*

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but

without any intention to cause death or to cause such bodily injury as is likely to cause death."

The punishment as provided under section 302 PPC is also reproduced as under:-

"**302. Punishment of qatl-i-amd**- Whoever commits qatl-i-amd shall, subject to the provisions of this Chapter be -

(a) punisshed with death as qisas;

(b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of forms specified in section 304 is not available; or

(c) punished with imprisonment of either description for a term which may extend to twenty-five years where according to the injunctions of Islam the punishment of qisas is not applicable;

Provided that nothing in this clause shall apply to the offence of qatl-i-amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be".

13. On the assessment of evidence, I have found that the motive set up by the prosecution was quite vague and admittedly no independent witness was brought by the prosecution even not a single word deposed by any of the witnesses regarding the background of any ill-will or bitterness between the appellant and deceased and that the incident had erupted all of sudden without any premeditation whatsoever. Furthermore, the complainant and eyewitness Jamo have not disclosed any ill-will of the appellant with the deceased. In this regard, the investigation is appeared to be silent as I.O. of the case has failed to collect any evidence in respect of motive. The medical officer also confirms the injuries on the head of the deceased. Further, from the perusal of the medical report, it reveals that 'Lacerted wound 4 cm x 1.5 cm x exposing bone at the left frontal region of the skull just left eyebrow. Lacerated wound 4 cm x 1 cm at the left region of the skull just to 2cm from to injury No.1 causing departure fracture parietal bone of the skull. Both injuries cause hard and blunt substance. Both injury ante-mortem in nature.

14. But it is not clear whether the deceased has received one or two injuries. As per Post Mortem report the injury No.2 is at a distance of 2cm. The eyewitness of the incident namely Jamo

deposed that after hearing the noise of foot, woke up and saw the accused while inflicting the blows on the deceased but failed to disclose whether they have heard hue and cry of the deceased. and no reason has been given by the prosecution.

15. As stated above, nothing has been brought on record by the prosecution to prove that the incident of the altercation between accused and the deceased was ever taken place or reported with the police. The appellant has not repeated the stone blows upon the deceased, therefore; I observe that appellant has no intention to kill the deceased as defined in Para (b) of section 300 PPC. In such circumstances, his case would come within clause (c) of section 302 PPC. In this regard, we are also fortified with the cases of ****AMJAD SHAH v. THE STATE* [PLD 2017 Supreme Court 152], *ZEESHAN @ Shani v. THE STATE* [PLD 2017 Supreme Court 165], *AZMAT ULLAH v. The STATE* [2014 SCMR 1178].***

In the case of ****ZEESHAN @ Shani* [supra],*** the Honorable Supreme has held that:-

> ***11.*** ***The appellant did not premeditate the killing, nor could he have since the complainant party had arrived unannounced at his house. Needless to state that if the complainant side had not sought out the appellant no fight would have occurred. Be that as it may, the appellant should not have struck the deceased with force and that too on a vital part of his body. The appellant, however, struck only a single blow with a simple stick and not with any weapon. Both the victim and the perpetrator were young men and had joined hands to render slaughtering services together. Unfortunately, a dispute over the share of the takings resulted in the death of one of them. There is no reason for us to take a different view from the one taken in the afore-cited precedents. In this case the appellant without premeditation and in the heat of a free fight had struck the deceased with a single blow of a stick. In such circumstances, his case would come within clause (c) of section 302 PPC.***
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> ***12.*** ***Therefore, in view of the facts and circumstances of the case it would be appropriate to alter the conviction of the appellant recorded under section 302 (b) PPC to one under section 302(c) PPC and, consequently, reduce his sentence to ten years rigorous imprisonment whilst maintaining the sentence of fine and the simple imprisonment to be undergone for failure to pay fine. As held by the Courts below the appellant will also receive the benefit of section 382-B of the Cr.P.C."***

In another case of ****AZMAT ULLAH* [supra],*** the Honorable Supreme has held that:-

> ***"4. ……A bare perusal of the F.I.R., the statements made by the eye-witnesses before the learned trial Court and the findings recorded by the learned courts below clearly shows that there was no background of any ill-will or bitterness between the appellant and his deceased brother and that the incident in issue had erupted all of a sudden without any premeditation whatsoever. The medical evidence shows that the deceased had received one blow of a chhurri on his chest whereas another blow was received by him on the outer aspect of his***

left upper arm. The doctor conducting the post-mortem of the dead body had categorically observed that both the injuries found on the deadbody of the deceased could be a result of one blow of chhurri. These factors of the case squarely attract Exception 4 contained in the erstwhile provisions of section 300, P.P.C. It has already been held by this Court in the case of Ali Muhammad v. Ali Muhammad and another (PLD 1996 SC 274) that the cases falling in the exceptions contained in the erstwhile provisions of section 300, P.P.C. now, attract the provisions of section 302(c), P.P.C. The case in hand was surely a case of lack of premeditation, the incident was one of a sudden fight which was a result of heat of passion developed upon a sudden quarrel and no undue advantage had been taken by the appellant nor had he acted in a brutal or unusual manner. In these circumstances Exception 4 contained in the erstwhile section 300, P.P.C. squarely stood attracted to the case in hand and, thus, the case against the appellant fell within the purview of the provisions of section 302(c), P.P.C.

5. Keeping in view the facts and circumstances of the case this appeal is partly allowed, the conviction of the appellant for an offence under section 302(b), P.P.C. is converted into that for an offence under section 302(c), P.P.C. and consequently his sentence is reduced from rigorous imprisonment for twenty-five years to rigorous imprisonment for ten years. The sentence of fine passed against the appellant by the learned trial court and upheld by the Lahore High Court, Lahore has been found by us to be unwarranted because section 302(b) or 302(c), P.P.C. do not contemplate any such sentence. Instead of fine we direct that the appellant shall pay a sum of Rs. 50,000 to the heirs of the deceased by way of compensation under section 544-A, Cr.P.C. or in default of payment thereof he shall undergo simple imprisonment for six months. The benefit under section 382-B, Cr.P.C. shall be extended to him. This appeal is disposed of in these terms."

16. As per jail roll dated 26.09.2020, the appellant has served out the sentence excluding remission 16 years, 11 months and 17 days and earned remission of 06 years, 06 months and 05 days. The total sentence served out by the appellant is 23 years, 05 months and 22 days.

17. For what has been discussed above, this appeal is dismissed to the extent of the appellant's conviction for an offence under section 302(b) PPC but his sentence to imprisonment for life as Tazir is converted into an offence under section 302(c) PPC. Consequently, his sentence is reduced from life imprisonment to R.I. for 22 years. The compensation amount is also reduced from Rs.100,000/- (Rupees one lac) to Rs.50,000/- (Rupees fifty thousand) to be paid to the legal heirs of the deceased as provided under Section 544-A Cr.P.C. In case of failure whereof, the appellant shall suffer S.I. for six months more. The benefit of section 382-B is also extended in favour of the appellant.

JUDGE