

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Amjad Ali Sahito

Criminal Jail Appeal No.167 of 2019

Appellants : (1) Asif Hussain S/o Sakhawat Hussain
(2) Atif Hussain S/o Sakhawat Hussain
(3) Amir Hussain S/o Sakhawat Hussain
Through Mr. Abdul Razzak, Advocate

Complainant : Mst. Amina D/o Muhammad Azeem
Through Mr. Muhammad Hanif Qureshi, Advocate

Respondent : The State
Through Mr. Talib Ali Memon,
Assistant Prosecutor General Sindh.

Date of hearing : 24.09.2020 & 29.09.2020

Date of Short Order : _____.10.2020

J U D G M E N T

AMJAD ALI SAHITO, J.— Being aggrieved and dissatisfied with the judgment dated 21.02.2019 passed by learned Sessions Judge, Karachi-West, in Sessions Case No.1145/2014 arising out of the FIR No.65/2014 for the offence under sections 302, 324, 34 PPC registered at Police Station Docks, Karachi West; whereby the appellants were convicted and sentenced to suffer imprisonment for life (R.I.) and to pay fine of Rs.500,000/- to the legal heirs of deceased Muhammad Faheem as compensation. In case of non-payment of fine, the appellants were ordered to suffer S.I. for six months. The appellants were also convicted and sentenced to suffer R.I. for five years and to pay Daman of Rs.50,000/- to injured Mst. Lubna. In case of default of payment, they were ordered to suffer S.I. for one month more. The conviction and sentences were ordered to run concurrently. However, the benefit of section 382-B was extended to the appellants.

2. Concisely, the facts of the prosecution as depicted in the FIR lodged by one Mst. Amina on 02.03.2014 are that her sister Mst. Hina was married with accused Asif, however, since and half months, she was residing in the house of her parents due to constrained relations with her husband. On the eventful day viz. 02.03.2014 at about 05:00 p.m. Accused persons namely Asif, Atif and Amir being armed with churries/knives entered into the house of complainant and enquired about her brother Faheem. It is alleged that accused Asif slapped on her face and pulled her down. Meanwhile, Faheem came out from the room, Atif caught hold him, thenceforth, firstly accused Amir and then Asif stabbed him with knife blows at his chest. The complainant on seeing such a situation came out from the house by raising cries and noticed Mst. Seema, the wife of Sakhawat as available in the street. Subsequently, all three accused came out from the house and accused Asif once again caused slap to the complainant. Meantime, her elder sister Mst. Lubna wife of Jameel Ahmed also arrived there and accused Asif also stabbed churri blow into her abdomen. Her father came there and with the help of neighbours took injured Muhammad Faheem to Jinnah Hospital, but he succumbed to injuries in the way. Consequently, the instant FIR.

3. After completing the usual formalities, the I.O. submitted report under section 173 Cr.P.C. against the appellants by showing accused Mst. Seema as absconding accused, however, she after seeking pre-arrest bail joined the trial.

4. The learned trial Court framed charge against the appellants at Ex.7 to which they pleaded not guilty and claimed their trial vide pleas at Ex.7/A to 7/D. To establish the accusation against the accused persons, the prosecution examined complainant PW-1 Mst. Amina at Ex.8, who produced FIR at Ex.8/A. PW-2 Mst. Lubna examined at Ex.10, who produced photocopy of her Discharge Slip at Ex.10/A, Followup Record at Ex.10/B and her 164 Cr.P.C. statement at Ex.10/C. PW-3 Mst. Hina Asif at Ex.11, Mst. Soomiya at Ex.12, Jameel Ahmed at Ex.13, who produced memo of arrest of accused at Ex.13/A, memo of seizure of crime weapons at Ex.13/B and memo of seizure of shalwar & scarf/dupata of injured Mst.

Lubna at Ex.13/C, Dr. Dileep at Ex.15, who produced letter issued to him by the I.O. for issuance of cause of death certificate of deceased at Ex.15/A, post mortem report at Ex.15/B and cause of death certificate at Ex.15/C, Muhammad Azeem at Ex.17, who produced memo of inspection of dead body at Ex.17/A, inquest report at Ex.17/B, receipt of handing over dead body at Ex.17/C, memo of venue of occurrence at Ex.17/D, memo of arrest of accused at Ex.17/E, Mr. Azizullah, learned Judicial Magistrate at Ex.19, who produced application filed by I.O. at Ex.19/A, ASI Nafees Gul at Ex.20, who produced extract of roznamcha entry at Ex.20/A and I.O. SIP Ghazanfar Ali at Ex.21, who produced extract of roznamcha entry at Ex.21/A, four photographs of dead body, pasted on two pages at Ex.21/B & 21/C respectively, two photographs of venue of occurrence, pasted on a page at Ex.21/D, extracts of two Roznamcha entries dated 6.3.2014 at Ex.21/E & 21/F, three letters addressed to Incharge Chemical Examiner at Ex.21-G to Ex.21/I, three reports of Chemical Examiner at Ex.21/J to Ex.21/L and photocopies of three pages of record of Mst. Lubna at Ex.21/M to Ex.21/O. PWs Muhammad Sadiq and Muhammad Nadeem were given up vide statements at Ex.16 and 18 respectively. Thereafter, learned DDPP for the State closed the side of prosecution vide statement at Ex.22.

5. Statements of the appellants were recorded under section 342 Cr.P.C. at Ex.23 to Ex.26, wherein they denied the allegations levelled against them by pleading their innocence and also examined themselves on oath at Ex.27 to Ex.30; however, they did not examine any witness in their defence.

6. The learned trial Court, after hearing the parties and appraisal of the evidence, convicted and sentenced the appellants to vide judgment dated 21.02.2019. The convictions and sentences recorded by the learned trial Court have been impugned by the appellants before this Court by way of filing the instant Criminal Jail Appeal.

7. Learned counsel for the appellants mainly contended that the appellants are innocent and have falsely been implicated in this case due to matrimonial dispute; that there are major

contradictions in the evidence of PWs as all the witnesses are interested and related witnesses and brother and sisters of the deceased and injured; that there is no independent person has been shown as a witness to believe that appellants have committed any offence; that all the witnesses have improved their statement dishonestly to strengthen the prosecution case; that the ocular account was not such of character which would be relied in order to convict a person on capital charges; that the police officer while leaving police station neither made an entry of their arrival nor of their departure, therefore, recovery of churri has no value in the eyes of law. He has relied upon the cases of (1) Muhammad Arif v. The State (2019 SCMR 631), (2) Muhammad Asif v. The State (2017 SCMR 486), (3) Mst. Sughra Begum and another v. The State (2015 SCMR 1142), (4) Khalid @ Khalidi and 2 others v. The State (2012 SCMR 327), (5) Hamid Nadeem v. The State (2011 SCMR 1233), (6) Sabir Ali v. The State (2011 SCMR 629) (7) Abdul Jabbar and another v. The State (2019 SCMR 129).

8. On the other hand, learned counsel for the complainant as well as learned APG while supporting the impugned judgment have argued that all the prosecution witnesses have fully supported the case of complainant beyond any shadow of reasonable doubt; that there is no material brought on record to show that appellants are involved in the commission of offence; hence the ocular evidence finds corroboration from the medical evidence. Lastly, they pray for dismissal of the instant appeal. In support of his contentions, learned APG has relied upon the cases of (1) The State/ANF v. Muhammad Arshad (2017 SCMR 283), (2) PLD 2020 Supreme Court 295), (3) Muhammad Waris v. The State and another (2007 SCMR 1535) and (4) Abdul Khalique v. The State (2020 SCMR 178).

9. I have heard the learned counsel for the parties and have gone through the material available on record.

10. On careful perusal of material brought on record, it appears that the prosecution story solely depends upon the ocular testimony in the shape of evidence of the complainant and the eye witnesses supported by the medical as well as circumstantial evidence. The complainant PW-1 Mst. Amina

deposed that on the eventful day, she was present in the house. All of sudden appellants Atif, Asif and Amir entered into her house. All three persons armed with churries inquired from her about her brother Muhammad Faheem. On enquiry, the accused Asif slapped her and due to hue and cry, brother of the complainant came out from the room. Meanwhile, appellant Atif caught hold him and accused Amir caused churri blows on the chest of deceased Muhammad Faheem. Appellant Asif also caused churri blow to deceased in following of accused/appellant Amir. She was slapped by accused Asif. Meanwhile, PW Lubna Jamil entered into the house. On seeing her accused Asif caused churri within right side on her belly, after receiving such injury she became unconscious and felt down and thereafter, appellants made their escaped good from the place of incident. Eyewitness/injured Mst. Lubna Jameel PW-2 has supported the version of the complainant and stated in her evidence that the door of the house was opened when she entered into the house and saw that appellant Amir, Atif and Asif having churries in their hands are quarrelling with her brother Muhammad Faheem inside of her house. Appellants Asif and Amir caused churri on his chest. She proceeded towards them in order to rescue his brother but appellant Asif caused churri within her right side on her stomach and she felt down and lost her senses. She was shifted to PNS Shifa Hospital as such she produced discharge certificate and follow-up record slip at Ex.10-A & B. In support of contentions of both the witnesses the prosecution examined Mst. Hina Asif (PW-3), wife of appellant Asif, who in her deposition has deposed that she was present in the house when she heard commotion, she came out from the washroom and saw Lubna lying on the ground and she was not in senses when she went inside the room, her brother Muhammad Faheem was lying on bed in pool of blood. She identified all three appellants in the Court room by saying that all accused are same who committed the offence. PW-4 Mst. Soomiya is also an eye witness of the incident. She has also disclosed almost same story and supported the version of complainant as well as eye witnesses. The prosecution also examined PW-5 Jameel Ahmed, who is said to be mashir of arrest and recovery of crime weapon viz. churries,

who in his evidence deposed that on 03.03.2014 police arrested accused Asif in his presence. Such memo of arrest at Ex.13/A was prepared in his presence and after his arrest, accused Asif produced crime weapon and in his presence, co-mashir produced one blue colour shopper. The said shopper was opened by police in which three churries with blood stained were found, as such, memo of recovery was prepared in his presence alongwith co-mashir. He has produced memo of arrest as Ex.13-A and memo of recovery as Ex.13-B. Learned counsel for the appellants put multiple questions to the witnesses but he could not extract anything from them which believes to support the version of the appellants.

11. The direct evidence also finds corroboration from the medical evidence concerning the cause of death and time of incident and weapon used in the commission of the offence. It is established from the evidence of PW-06 Medical Officer Dr. Dileep, who received the dead body of deceased on 02.03.2014 at about 1735 hours. He started postmortem at 1840 hours and completed the same at 1910 hours. From examination over the body of the deceased, he found the following injury:-

Surface Injuries:

1. Stab wound cavity deep 2.5 x 1 cm left side chest just below the nipple.
2. Stab wound 3 x 2 cm right side chest in front, cavity deep.

12. The Medical Officer from external as well as internal examination opined that the cause of death of deceased was cardio-respiratory failure due to severe shock and haemorrhage resulting from injuries to vital organs by Sharpe and pointed weapons. The doctor produced a post mortem report of the deceased at Ex.15/B. The time between injury and death was 15 to 30 minutes and the time between death and postmortem was 1:30 hours to 2:30 hours which is sufficient to say that the cause of death was unnatural and thus, this also corroborates the evidence furnished by the prosecution witnesses. The ocular evidence also finds corroboration from the medical evidence that the death of the deceased was unnatural. Hence, another piece of

evidence connecting the appellants with the commission of the offence.

13. The medical evidence also supported the ocular version. The ocular version is further supported by the recovery of churries from the appellants so also bloodstained clothes and chaddar of the deceased. The churries and other articles were sent to the Chemical Examiner and found their result stained with human blood. The I.O. of the case PW-10 Ghazanfar arrested the accused and recovered weapon viz. three churries. He sent the bloodstained chaddar, churri/knives to the office of chemical examiner and received such report as **Positive**. All the articles including chadar, churri/knives are stained with human blood. He also sent wearing clothes of injured Lubna in the office of Chemical Examiner which he has produced at Ex.22/I. He received the chemical examiner reports and produced the same at Ex.22/J to Ex.22/L. I.O. further disclosed that the motive behind this incident was matrimonial dispute between the parties as Mst. Hina Asif PW-3 wife of the appellant has gone to house of her father alongwith three children and all the accused had gone to house of Muhammad Azeem for taking custody of children where such incident took place. The prosecution witnesses are in line in respect of the vital points in their depositions and they could not be shaken during cross-examination. The availability of the appellants at the place of incident is also established through the evidence of eye witnesses. I have not observed that no any major contradiction in the depositions. The eye witnesses have satisfactorily explained date, time and place of occurrence as well as each and every event of occurrence in clear cut manners. The parties are known to each other as is evident from their evidence, so there was no chance of mistaken identity of the appellants. I would not hesitate that where the witnesses fall within the category of natural witnesses and detail of the incident in a confidence inspiring manner then only escape available to the accused/appellants is to satisfactorily establish that witnesses are not the witnesses of truth but interested one. However, learned counsel for the appellant failed to point out any material

available on record to believe that the witnesses are interested one.

14. In the instant matter, the eyewitnesses have sufficiently explained the date, time and place of occurrence as well as each and every event of occurrence in a clear cut manner. The witnesses are employees of the Factory, hence, they were natural witnesses and we would not hesitate that where the witnesses fall within the category of “**natural witnesses**” and detail the manner of the incident in a confidence, inspiring manner then only scope available to the appellant is that to satisfactorily establish that witnesses are not the witnesses of truth but “**interested**”. However, in such circumstances, normally the possibility of substitution of witnesses becomes rare. In the instant matter, the complainant is the brother of the deceased while other witnesses are employees of the Factory, who were present at the time of the incident. No substance has been brought on record by the appellant to justify his false implication at the hands of the complainant party on any account or previous enmity.

15. The minor discrepancies in statements of all the witnesses are not enough to demolish the case of prosecution because these discrepancies always occurred on account of lapse of time which can be ignored. It is also settled principle that statements of witnesses have to be read as a whole and the Court should not pick up a sentence in isolation from the entire statement and ignoring its proper reference, use the same against or in favour of a party, the contradictions must be material and substantial to adversely affect the case of the prosecution. In this context, the reliance can safely be placed on the case of **Lal Khan v. The State (2006 SCMR 1846)** wherein at Rel. P-1854 it is held as:-

“...the mere fact that a witness is closely related to the accused or deceased or he is not related to either party, is not a sole criterion to judge his independence or to accept or reject his testimony rather the true test is whether the evidence of a witness is probable and consistent with the circumstances or the case or not.”

16. 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 due to the fire shot of Repeater by the appellant, however, 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) punished 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".

17. The upshot of above discussion is that the prosecution has successfully established its case against the appellants through ocular account furnished by eye witnesses, which is corroborated by the medical evidence coupled with circumstantial evidence. Learned counsel for the appellants has failed to point out any material illegality or serious infirmity committed by learned trial Court while passing the impugned judgment, which in my humble view, is based on appreciation of the evidence and the same does not call for any interference by this Court. Thus, the conviction and sentenced awarded to the appellants by learned trial Court is hereby **maintained** and the instant appeal filed by the appellants merits no consideration, which is **dismissed** accordingly.

J U D G E

Karachi
Dated ___ -10-2020