IN THE HIGH COURT OF SINDH, KARACHI

Cr. Jail Appeal No. 81 of 2014

Confirmation Case No. 11 of 2014

Before:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio JJ-

Appellant: Karim Bux Lashari,
through Mr. Muhammad Farooq, advocate.

The State: through Mr. Khadim Hussain Khoonharo, A.P.G.

Date of hearing: **29.08.2019 & 02.09.2019**

Date of announcement: **11.09.2019**

J U D G M E N T

KHADIM HUSSAIN TUNIO, J- Through captioned criminal jail appeal, the appellant has impugned the judgment dated 26.02.2014, passed by learned Sessions Judge, Thatta in Sessions Case No. 12 of 2011, culminated from F.I.R No. 38 of 2010 registered with P.S Gharo, whereby the appellant was convicted for the offence punishable u/s 302 PPC and sentenced to death along with a fine of Rs. 100,000/- to be paid to the legal heirs of the deceased. Confirmation case No. 11 of 2014 for confirmation or otherwise of the death sentence of the appellant shall be decided through this judgment as well.

2. Brief facts of the instant appeal are that the complainant lodged an F.I.R at Police Station Gharo thereby stating that his brother aged about 55 years and one Karim Bux were residing in

village Haji Umer Khan Lashari situated in Deh Khamoon. He stated that the present appellant was forcing the brother of complainant to get his daughter married to which the complainant's brother refused and therefore the appellant was on inimical terms with him. On the day of incident *i.e.* 23.12.2010, early morning, while the complainant was present with his brother near bank of river, the appellant came running at the complainant's brother, armed with a spade, and caused several blows to his head and face and thereafter went away. The complainant party was unable to arrange a vehicle in time and complainant's brother succumbed to his injuries.

3. After completion of investigation, the appellant was challaned. The learned trial Court framed a formal charge against the appellant to which he pleaded not guilty and claimed to be tried.

4. The prosecution, in order to substantiate its charge against the appellant examined in all 8 witnesses, produced several documents in evidence. Thereafter, vide statement, the prosecution side was closed.

5. Statement of appellant u/s 342 Cr.P.C was recorded wherein he denied all the allegations levelled against him and deposed that he was being falsely implicated by the prosecution witnesses due to their close relationship with the deceased and due to matrimonial dispute between the parties, therefore, he prayed for justice. However, he neither examined himself on oath nor produced any evidence in his defence.

6. Learned trial Court, after hearing the arguments advanced by the parties and perusing the material available on record, convicted and sentenced the appellant as stated above.

7. The evidence of the case finds an elaborate mention in the judgment of the trial Court, therefore the same will not be reproduced hereunder for the sake of brevity and to avoid repetition.

8. Learned counsel for the appellant has argued that the appellant is innocent and has been falsely implicated by the complainant due to enmity; that the impugned judgment passed by the learned trial Court is perverse, shocking and illegal; that the evidence adduced by the prosecution was not properly assessed and evaluated by the trial Court; that the incident took place at 9:30 a.m whereas the post-mortem was conducted at 12:15 p.m with delay; that there is insufficient material available on record to warrant the conviction of the appellant; that the ocular testimony in the case is unreliable and not worthy of any credence; that there are several contradictions in the evidence of P.Ws; that the alleged eye-witnesses examined in the case are related to each other and to the deceased as well, therefore they are interested, hostile, partisan and inimical towards the appellant; that the testimony of interested witnesses requires independent corroboration which is missing in the present case; that the dispute over matrimonial issues has been admitted by both the parties; that the P.W Juman s/o deceased had not been examined by the prosecution; that it is the prime duty of the prosecution to establish its case against the accused beyond shadow of doubt and this burden never shifts; that the entire

story of the alleged incident is concocted, managed, engineered one and lodged after due deliberation; that the motive of the incident is absurd and does not appear to be true and convincing; that the ocular evidence is belied by the medical evidence; that prosecution has miserably failed to bring home the guilt of the appellant, therefore he prays that the appellant be acquitted from the charge. He has relied on the case law reported as ***2019 SCMR 274 (Altaf Hussain v. The State), 2018 SCMR 344 (Imtiaz alias Taj v. The State and others), 2018 SCMR 153 (Nadeem alias KALA v. The State and others), 2018 SCMR 71 (Muhammad Saddique v. The State, 2016 SCMR 1241 (Javaid Akbar v. The State), 2011 SCMR 208 (Abid Ali and 2 others v. The State) and 2010 SCMR 949 (Nadeem alias NANHA alias BILLA SHER v. The State).***

9. Conversely, learned A.P.G for the state, while supporting the impugned judgment, contended that the medical evidence corroborates the ocular account and the learned trial Court has rightly convicted the appellant; that the F.I.R was lodged promptly; that the name of the appellant had been mentioned in the F.I.R with a specific role; that the motive behind the incident has been proved; that both the P.Ws fully supported the version of the complainant. He has relied on the case law reported as ***2011 SCMR 429 (Khizar Hayat v. The State), 2002 YLR 2813 (Muslim Khan v. The State) and 2000 SCMR 1784 (Muhammad Amin v. The State).***

10. We have heard the learned counsel for the appellant, recorded the contentions of learned D.P.G and have perused the record available before us.

11. After perusing the evidence available on record, this Court has come to the conclusion that prosecution has undeniably proven its case against the appellant for the offence alleged against him by examining numerous witnesses, whose evidence remained un-shattered on material aspects of the case even after lengthy cross-examinations. The deceased had been done to death by the appellant brutally by striking the sharp side of the spade *(kodhar)* to his face and head. The appellant had been arrested promptly by the police on the same day, *i.e.* 23.12.2010, who subsequently during interrogation led the police to the recovery of crime weapon. The alleged spade had been recovered by the investigation officer and the same was sent for analysis to the chemical examiner and the report was in positive. So far the contention of defence counsel is concerned regarding the medical evidence being contradictory to ocular account, it is a matter of record that the medical evidence suggested injuries from a sharp edged weapon such as a hatchet *(kulhari)* whereas the eye-witnesses deposed that the same had been caused by a spade *(kodhar)*. Here, it is observed that both, a hatchet and a spade, are sharp edged weapons, therefore such an argument of the defence counsel has no substance. Moreover, the submission of the defence counsel regarding there being a delay in the conducting of post-mortem is concerned, the same is again baseless as the incident, per the defence counsel itself, occurred at 9:30 a.m. whereas the post-mortem was conducted at 12:15 p.m on the same day, *i.e.* after 2 hours 45 minutes of the occurrence. It was clearly mentioned in the post-mortem report that the injuries were 3-4 hours old which also backs up the prosecution story. Coming to the allegation of learned counsel for appellant regarding the

witnesses being interested due to their relationship with the complainant and deceased is concerned, the same is baseless as it is a well-established principle of law that mere relationship of an eye-witness with the deceased or complainant does not brand the eye-witness as interested if his/her evidence is confidence inspiring and corroborated by an independent source. In this respect, reliance is placed on the case law reported as ***2016 SCMR 2152 (Nasir Iqbal @ NASRA and another v. The State)***, wherein a larger bench of the Hon'ble Apex Court has been pleased to observe that:-

> *"The testimony of both the eye-witnesses is confidence inspiring and from the facts and circumstances of the case, as mentioned above, they cannot in any manner be considered to be chance witnesses. Moreover, mere relationship or enmity is not always enough to declare a witness to be partisan or interested witness when his testimony is confidence inspiring and trustworthy. The motive of the instant occurrence is fully established atleast to the extent of appellant Muhammad Ashraf being accused in the previous murder case of Naveed Akram who was extending threats to the complainant party to effect compromise and being proclaimed offenders such like modus operandi are usually adopted to clear themselves and to get rid of the murder cases and in the given circumstances the prosecution has amply succeeded to establish motive part of occurrence atleast against appellant Muhammad Ashraf. Further we have observed that the medical evidence corroborate the ocular account. Recoveries have been effected which also corroborate the prosecution version. The parties were known to each other and FIR was promptly lodged all this rules out any possibility of substitution or consultation to falsely rope in or involve the accused persons."*

Even otherwise, if the evidence of the two other eye-witnesses is taken out of consideration, the evidence of the complainant is, consistent, straight forward, confidence inspiring and his

presence at the time of incident has been explained, therefore the evidence of the complainant alone is sufficient to hold the appellant guilty of the charge. Reliance in this respect can be made to the case law reported as ***2011 SCMR 725 (Niaz-ud-Din and another v. The State)***.

12. However, the only point needing determination before this Court is whether there are enough mitigating circumstances or a single circumstance on record which would show just cause for a reduction of sentence from a death sentence to imprisonment for life. It is well-established principle of law that even a single mitigating factor can be considered sufficient to award a lesser sentence. The Court can exercise its discretion where a case qualifies for awarding of both, imprisonment for life and death penalty, in the presence of a mitigating circumstance to award the lesser sentence. We are fortified in our view by the case law titled ***Ghulam Mohy-ud-Din alias Haji Baby and others v. The State (2014 SCMR 1034)***.

13. Now adverting to the mitigating circumstance(s) of the case, it would be relevant to discuss the allegation of motive behind the crime. The motive, as set up by the prosecution in the F.I.R was that the deceased had refused to give the hand of his daughter in marriage to the appellant due to which the appellant had remained annoyed with him and had quarrels on multiple occasions and in pursuance of that motive, the deceased was done to death by the appellant. Suffice it to say that the prosecution has failed to establish the motive behind the occurrence even though the charge has been proved. It is well-settled principle of law that when the prosecution fails to prove the motive behind the

murder, it is a valid consideration for the reduction of sentence. In this respect, reliance is placed on the case law reported as ***2015 SCMR 993 (Ahmed v. The State)***, wherein the Hon'ble Apex Court has observed that:-

> *After attending to the said pieces of evidence we have felt convinced that all those pieces of evidence did point towards the appellant's culpability but the motive set up by the prosecution had remained far from being established beyond reasonable doubt. Some prosecution witnesses had stated about the alleged motive but they had admitted before the learned trial Court in so many words that they had no personal knowledge about the alleged motive or the details thereof and all they knew was that there was some on-going dispute between the appellant and the deceased on the issue of an outstanding amount. This kind of evidence could hardly be accepted by any court of law to conclude that the motive set up by the prosecution had been proved by it to the satisfaction of the Court. It may be of some importance to mention here that the motive part of the case was not relevant to the case against Munir Ahmed co-convict at all and, thus, the absence of motive or failure of the prosecution to prove the motive could not have any bearing upon the question of guilt or even punishment of the said co-convict. Culpability of the said co-convict as well as his -punishment had been determined by the learned courts below as well as by this Court on the strength of the prosecution's case against him based upon many other factors available on the record.*

14. The Hon'ble Apex Court in the case reported as ***PLD 2017 SC 152 (Amjad Shah v. The State)*** held that:-

> *Notwithstanding that the participation of the appellant in the commission of offence is duly established, his intention, guilty mind or motive to commit the same remains shrouded in mystery and is therefore unproven. In such like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a*

> *convict. Reference is made to Zeeshan Afzal v. The State (2013 SCMR 1602). Another ground for mitigation in sentence of the appellant is the fact that about two months after the occurrence, on 10.06.2002 the learned Trial Court whilst framing the charge has recorded the appellant's age to be 24 years and that of his co-accused to be 19/20 years. Youthful tendency toward excitement and impulsiveness are also treated by the law as a mitigating circumstance. Under Section 302(b) P.P.C. imprisonment for life is one of the lawful sentences for the commission of offence under Section 302, P.P.C. In the light of the aforesaid discussion the sentence of the appellant merits reduction from death to life imprisonment.*

15. Similar view had been taken by the Hon'ble Apex Court in the case law titled ***Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Haq Nawaz v. The State (2018 SCMR 21)*** *and* ***Nadeem Ramzan v. The State (2018 SCMR 149)***

16. In the light of above discussion, we convert the death sentence of Karim Bux (appellant) into imprisonment of life with the benefit of section 382-B Cr.P.C. However, the appellant shall pay the compensation of Rs. 100,000/- to the legal heirs of the deceased under section 544-A Cr.P.C and in the event of default he shall further undergo simple imprisonment for six months. With this modification in the sentence of appellant, Criminal Jail Appeal No. 81 of 2014 stands dismissed.

17. Resultantly, Confirmation Case No. 11 of 2014 is answered in the negative and death sentence awarded to Shahmeer Ahmed is not confirmed.

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