

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Crl. Jail Appeal No. D-427 of 2010

Crl. Jail Appeal No.D-428 of 2010

Confirmation case No.21 of 2010

Before;

Mr. Justice Muhammad Iqbal Mahar

Mr. Justice Irshad Ali Shah

Appellants: Ghulam Mohammad son of Imam Bux Khaskheli, Allahdino son of Soomar Khaskheli, Muhammad Bux son of Dhani Parto Khaskheli and Khan Muhammad son of Allah Warayo Khaskheli. Through Mr. Ghulamullah Chang, Advocate

Complainant: Murad Khan son of Khuda Bux Leghari, Through Mr. Mumtaz Alam Leghari, advocate.

Respondent: The State, through Ms. Sana Memon, A.P.G.

Date of hearing: 17-10-2019.

Date of decision: 29-10-2019.

J U D G M E N T

The appellants by preferring captioned Criminal Appeals have impugned judgment dated 13.11.2010 passed by learned Ist Additional Sessions Judge, Badin, whereby appellants Khan Muhammad and Muhammad Bux have been awarded **death** penalty subject to confirmation by this Court, while appellants Ghulam Muhammad and Allahdino have been convicted and sentenced to undergo rigorous imprisonment for **life** and to pay compensation of Rs.200,000/-each to the legal heirs of deceased

Khuda Bux and in case of their failure to make payment of compensation to undergo Simple Imprisonment for six months.

2. It is alleged by the prosecution that the appellants in furtherance of their common intention in order to satisfy old enmity committed Qatl-e-amd of Khuda Bux by causing him hatchets and fire shot injuries, for that they were booked and reported upon

3. At trial, the appellants did not plead guilty to the charge and the prosecution to prove it, examined PW-1 complainant Murad Ali at (Ex.11); PW-2 Raza Muhammad at (Ex.12), he produced his 164 Cr.P.C statement; PW-3 Muhammad Ali at (Ex.13), he produced his 164 Cr.P.C statement; PW-4 Dr. Ghazi Amanullah at (Ex.14), he produced post mortem report on dead body of deceased Khuda Bux; PW-5 Tapedar Abdul Majeed at (Ex.15), he produced sketch of wardat; PW-6 SIO / SIP Raj Kumar at (Ex.16), he produced memo of arrest of appellants Ghulam Muhammad and Muhammad Bux; PW-7 Ahmed Khan at (Ex.17); PW-8 PC Abdul Aziz at (Ex.18); PW-9 mashir Abdul Rasheed at (Ex.19), he produced memo of dead body of deceased, Danishnama, memo of place of incident, memo of recovery of clothes of the deceased, memo of arrest of appellants Allahdino and Khan Muhammad alias Khan, memo of recovery of pistol and hatchet; PW10 SIO / SIP Zulfiquar Ali Lashari at (Ex.20), he produced receipt, whereby dead body of deceased Khuda Bux was handed over to his legal heirs, FIR crime No.27 of 2014 u/s 13(e)

A.O. of PS Matli, reports of chemical and ballistic experts, letter and FIR crime No.25 of 2004 u/s 13(d) A.O of PS Matli; PW-11 SIO/ ASI Ghulam Shabir at (Ex.21) and then closed the side.

4. The appellants in their statements recorded u/s 342 Cr.P.C denied the prosecutions' allegation by pleading innocence, by stating that they have been implicated in this case falsely by the complainant party on account of previous enmity relating to death of their brother / relative and to prove such fact they produced copy of FIR crime No.147 of 2003 u/s 302 PPC of PS Matli. It was further stated by them that the pistols and hatchets have been foisted upon them by the police. They did not examine anyone in their defence or themselves on oath to disprove the case of prosecution allegation against them.

5. On conclusion of the trial, learned trial Court found the appellants to be guilty for the above said offence and then convicted and sentenced them as is detailed above and then made a reference with this Court u/s 374 Cr.P.C. for confirmation of death sentence(s) to awarded to appellant Khan Muhammad and Muhammad Bux.

6. The captioned appeals preferred by the appellants and the reference made by learned trial Court for confirmation of death sentence to appellants Khan Muhammad and Muhammad Bux now are being disposed of by this Court, by way of single judgment.

7. It is contended by learned counsel for the appellants that the appellants being innocent have been involved in this case falsely by the complainant party in order to satisfy their enmity with them; memo of arrest of appellant Khan Muhammad and Muhammad Bux was not prepared by the police at the place of incident; by stating so an impression was created that investigation was dishonest one; there is no independent witness to the incident; the complainant and his witnesses are not natural witnesses to the incident; in post mortem report it is not disclosed as to who brought the dead body of the deceased to hospital; the recovery of pistols and hatchets have been foisted upon the appellants; the investigation of the case was dishonest and learned trial Court has mis-appraised the evidence, which according to him was unreliable. By contending so, he sought for acquittal of the appellants. In support of his contention he relied upon case of ***G.M. Niaz vs The State (2018 SCMR 506)***, ***(2) Muhammad Hussain vs The State (2011 SCMR 1127)***, ***(3) Muhammad Ameer and another vs Riyat Khan and others (2016 SCMR 1233)***, ***(4) Muhammad Raf Que alias Feeqa vs The State (2019 SCMR 1068)***, ***(5) Mst. Rukhsana Begum and others vs Sajjad and others (2017 SCMR 596)***, ***(6) Rohtas Khan vs The State (2010 SCMR 566)***, ***(7) Azhar Iqbal vs The State (2013 SCMR 383)***, ***(8) Irfan Ali vs The State (2015 SCMR 840)***, ***(9) Muhammad Ali vs The State (2015 SCMR 137)***, ***(10) Muhammad Arif vs The State***

(2019 SCMR 631) and (11) Mohammad Younus Khan vs The State (1992 SCMR 545).

8. It is contended by learned APG for the State and learned counsel for the complainant that the appellants have committed the death of deceased in a brutal manner in order to satisfy their enmity with him in broad day light and two amongst them (Khan Muhammad and Muhammad Bux) were apprehended at the spot together with their respective crime weapons while two amongst them (Ghulam Muhammad and Allahdino) made their escape good from the place of incident; there is no question of mistaken identity; the witnesses were natural; circumstantial evidence was strong and the evidence which is produced by the prosecution has rightly been believed by learned trial Court and the conviction and sentence recorded against the appellants for being in possession of unlicensed weapon after dismissal of their appeals has attained finality. By contending so, they sought for dismissal of the appeals of the appellant and confirmation of death sentence to appellants Khan Muhammad and Muhammad Bux.

9. We have considered the above arguments and perused the record.

10. As per medical officer Dr. Ghazi Amanullah, deceased Khuda Bux has died of un-natural death and such fact is not disputed even by the appellants. Only thing which remains to be determined is the

liability of the appellants towards the alleged incident. Complainant Murad Khan, PWs Raza Muhammad and Muhammad Ali during course of their examination have inter-alia stated that on 07.04.2004, when they and the deceased Khuda Bux came adjacent to Civil Court building Matli there came the appellants, out of them Ghulam Muhammad and Allahdino caused pistol shot injuries to Khuda Bux, while Muhammad Bux and Khan alias Khan Muhammad caused hatchet injuries to Khuda Bux, who by sustaining pistol shots and hatchets injuries died within their sight. Police and private person gathered at the spot and apprehended appellants Ghulam Muhammad and Muhammad Bux with their weapons while appellants Allahdino and Khan alias Khan Muhammad made their escape good. By this version they have stood successfully, on all material points despite lengthy cross examination. They could not be dis-believed only for the reason that they are relatives of the deceased and were also having the enmity with the appellants. They indeed are appearing to be natural witness to the incident. On arrest from the appellants, have been secured the crime weapons, which on Expert examination have been found similar with the crime empties secured from the place of incident. The FIR has been lodged promptly within shortest possible time, which also signify the availability of the complainant and his witnesses at the place of incident. In that situation, it would be hard to opine that the involvement of the appellants is free from doubt. It is true, that

memo of arrest and recovery of appellants Ghulam Muhammad and Muhammad Bux as per SIO / SIP Raj Kumar was prepared at PS Matli, but this fact is not enough to disbelieve the arrest of the appellants Ghulam Muhammad and Muhammad Bux at the place of incident simply for the reason that the place of incident is situated at the distance of two furlongs from PS Matli. SIO / SIP Zulfiquar Ali indeed was having no reason to have conducted dishonest investigation of the appellants as he was an independent person. In these circumstances, learned trial Court was right to make a conclusion that the prosecution has been able to prove its case against the appellants beyond shadow of doubt.

11. The incident as per prosecution was committed by the appellants in furtherance of their common intention, therefore, the liability of the appellants ought to have been same as per the mandate contained by section 34 P.P.C. If the mitigating circumstances, for awarding lesser punishment were found available for appellants Ghulam Muhammad and Allahdino, then such circumstances ought to have been considered by learned trial Court for awarding punishment to appellants Muhammad Bux and Khan alias Khan Muhammad, therefore, the quantum of sentence ought to have been the same and similar.

12. In case of ***Ghulam Mohiuddin alias Haji Babu & ors Vs. The State (2014 SCMR-1034)***, it has been observed by the Honourable Supreme Court that;

“---S.302(b)---Qatl-e-amd---Sentence---Death sentence or imprisonment for life—Single mitigating circumstance—Sufficient to award life imprisonment instead of death penalty---Single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment-- -If a single doubt or ground was available, creating reasonable doubt in the mind of Court/Judge to award either death penalty or life imprisonment, it would be sufficient circumstance to adopt alternative course by awarding life imprisonment instead of death sentence---No clear guideline, in such regard could be laid down because facts and circumstances of one case differed from the other, however, it became the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case---If the Judge/Judges entertained some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows---Better to respect human life, as far as possible, rather than to put it at end, by assessing the evidence, facts and circumstances

of a particular murder case, under which it was committed”.

13. The case law which is relied upon by learned counsel for the appellants is on distinguishable facts and circumstances. In case of ***G.M. Niaz (supra)***, the deceased was taken to hospital not by the witnesses but by the police constable, which made the presence of the witnesses at the place of incident to be doubtful. In the instant matter, as per medical officer Dr. Amanullah the dead body of deceased was brought at hospital by police as well as relatives of the deceased. In case of ***Muhammad Hussain (supra)***, the main reason for acquittal of the accused was that the dead body of deceased was recovered from the house of another person and nothing was brought on record by the prosecution to suggest that such house was on rent with the accused. In the instant case, no issue of recovery of dead body of the deceased from house is involved. In case of ***Muhammad Ameer (supra)***, the memo of recovery of crime weapon was signed by the mashirs at police station and it is why the accused was acquitted. In the instant case, the police station was found to be adjacent to the place of incident at the distance of two furlongs and this was the reason for attesting the memo of arrest and recovery of appellants Ghulam Muhammad and Muhammad Bux at PS Matli. Even otherwise, for recovery of crime weapons appellants have been convicted by Magistrate having jurisdiction and such conviction as per learned A.P.G and

learned counsel for the complainant has attained finality after dismissal of their appeals. In case of ***Muhammad Rafique alias Feeqa (supra)***, the main reason for acquittal of the accused was unexplained delay in conducting post mortem report. In the instant case, there is no delay in conducting the post mortem on the dead body of the deceased. In case of ***Mst. Ruksana Begum and others (supra)***, the main reason for acquittal of the accused was that there was dispute with regard to time of incident in FIR and in inquest report. In the instant matter there is no dispute with regard to time of incident in FIR and in inquest report. In case of ***Rohtas Khan (supra)***, the main reason for acquittal of the accused was that there was inherent defects in testimony of the ocular witnesses. In the instant case, no inherent defect in testimony of ocular witnesses is pointed out. In case of ***Azhar Iqbal (supra)***, the main reason for acquittal of the accused was that he was convicted on the basis of his admission to guilt. In the instant case, there is no admission to guilt, on the part of accused. It is the prosecution which has proved its case against the accused through cogent evidence. In case of ***Irfan Ali (supra)***, the main reason for acquittal of the accused was that deceased beside fire shot injury was also found sustaining six incised wounds and statement of the complainant to recorded by the police to such effect was disowned by the complainant at trial. In the instant case, there is no further statement of the complainant narrating further injuries to the deceased. In case of ***Muhammad Ali***

(supra), the main reason for acquittal of the accused was that there was conflict between medical and ocular evidence and the eye witnesses admitted that accused has having no direct enmity to commit the offence. In the instant case, there is hardly a conflict between medical and ocular evidence and there is direct enmity between the parties. In case of ***Muhammad Arif (supra)***, the main reason for acquittal of the accused was that the co-accused who was attributed causing fire arm injury on the person of injured was acquitted by learned trial Court. In the instant case, no co-accused is acquitted by learned trial Court. In case of ***Muhammad Younis Khan (supra)***, the main reason for acquittal of the accused was that no motive was disclosed. In the instant case motive is disclosed.

14. As discussed above, quantum of sentence is to be made unanimous and similar within ambit of section 34 PPC, therefore, while considering the mitigating circumstances of the case. The death sentence awarded to the appellants Khan alias Khan Muhammad and Muhammad Bux is modified with Rigorous Imprisonment for life with fine of Rs.50,000/=each payable to the legal heirs of deceased Khuda Bux as compensation and in case of their failure, they would undergo Simple Imprisonment for six months with benefit of section 382-B Cr.P.c.

15. Subject to above modification, the captioned appeals fail and are dismissed accordingly. ***Death sentence is not confirmed.***

16. Appellants Ghulam Muhammad and Allahdino were on bail, they have remained absent without intimation, their bail bonds are forfeited, they to be taken into custody by learned trial Court to serve out the remaining portion of their conviction / sentence in accordance with law.

17. The surety papers to be sent to learned trial Court for further action in accordance with law.

Judge
Judge

Ahmed/Pa