

IN THE HIGH COURT OF SINDH, KARACHI

Before:

**Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi**

**Criminal Appeal No.318 of 2019
Confirmation Case No.08 of 2019**

Appellant : Muhammad Bilal S/o Ghulam Hussain
Through Mr. Munawar Ali Memon,
Advocate

Complainant : Jaan Muhammad S/o Haji Muhammad
M/s. Abdul Ghulam Rasool Mangi and
Farhan Ahmed Mangi, Advocates

Respondent : The State
Through Mr. Muhammad Iqbal Awan
Deputy Prosecutor General, Sindh

Date of Hearing : 02-12-2019

Date of Order : 17-12-2019

ORDER

ZULFIQAR ALI SANGI---J., The appellant on being aggrieved and dissatisfied with the judgment dated 16.05.2019 passed by 1st Additional Sessions Judge (Model Criminal Trial Court), Karachi South in S.C. No.464/2011 under FIR No.260/2011 for the offence under section 302 PPC registered at PS Baloch Colony, Karachi South whereby the appellant was convicted under section 265-H(2), Cr.P.C. and sentenced to **Death** subject to confirmation by this Court. He was also liable to pay compensation of Rs.100,000/- (Rupees One Lac) under section 544-A, Cr.P.C. to the legal heirs of deceased. In case of failure in payment of compensation, he shall suffer S.I. for six months more. However, benefit of section 382-B Cr.P.C. was extended to the appellant.

2. The brief facts of the case are that the FIR was lodged on 30.09.2011 at about 0150 hours by complainant Jaan Muhammad

S/o Haji Muhammad through his statement under section 154 Cr.P.C. on the murder of his brother. He was present at Ayesha Manzil, Madni Masjid alongwith Ameer-e-Jamat Aijaz, who brought him at Jinnah Hospital at about 10:00 PM where he saw dead body of his brother Waseem lying in KKF ambulance, who died due to fire shot and eye witness namely Muhammad Siddique Niazi S/o Ghulam Abbas aged about 17/18 years informed him as under:

“Today, on 29.09.2011 at about 08:00 PM he alongwith Waseem were sitting at corner of the Street No.4 situated at Liaquat Ashraf Colony No.2, Sector-I, Manzoor Colony and were talking with each other. Today it was birth day of Muhammad Waseem and Muhammad Bilal S/o Muhammad Mushtaq, resident of another street, came and asked Muhammad Waseem to get his hands checked. Waseem raised his both hands up, whereupon he abruptly made fire shot on him from his pistol which by hitting on his thumb also crossed front side of his chest and exited from the left shoulder of Waseem, whose hand and feet were shaken. Bilal stopped one motorcyclist, who asked from him what happened on which Bilal told him that he was checking pistol and all of sudden, it hit Waseem then they both brought the deceased at Bismillah Taqi Hospital on motorcycle of unknown rider and got admitted in emergency ward of said hospital. He asked Bilal to stay there so that he may inform his parents as well as Waseem’s parents, as such when they reached at Bismillah Taqi Hospital, Waseem succumbed to his injuries.

Thereafter, the complainant also stated in his statement that now he came to know that accused Muhammad Bilal S/o Muhammad Mushtaq has murdered his brother Waseem aged about 16/17 years while firing from his pistol for unknown reason and unknown enmity, hence such FIR was lodged.

3. During investigation, the present accused was arrested and after completion of investigation, the challan was submitted against him in court of law for his trial. After supply of the requisite copies to present accused in compliance of section 265-C, Cr.P.C. vide a

receipt at Ex.1, formal charge was framed against him at Ex.2, to which he pleaded not guilty and claimed for trial vide his plea at Ex.2/A.

4. In order to prove its case, prosecution examined eight (08) Prosecution Witnesses namely (1). PW-1 Jaan Muhammad complainant who is brother of deceased. (2). PW-2 Mumtaz Khan, (3). Muhammad Siddiq (He is the sole eye witness of incident), (4). Muhammad Naveed, (5). PW-5 SIP Muhammad Zahoor who conducted proceedings under section 174 Cr.P.C and recorded statement U/S 154 Cr.P.C. (6). PW-6 Dr Dileep Khatri who conducted post mortem of deceased. (7) PW-7 SIP Showkat Ali who was Mashir of recovery of Pistol. (8). PW-8 SIP Imran Saad who conducted the investigation of case and thereafter learned DDPP for the State closed the prosecution side. All the witnesses in support of their evidence exhibited certain documents which are available in the paper book.

5. Statement under section 342 Cr.P.C of the appellant was recorded wherein he denied the allegation leveled against him and has taken the specific plea that he had taken the deceased to the hospital in injured condition and the deceased died in the hospital and that the police arrested him from the hospital at the same time when deceased died.

6. Learned trial Court after hearing the arguments of the parties passed an impugned Judgment dated: 08-11-2017 and convicted the appellant and awarded death sentence beside other sentences. The appellant challenged his conviction before this court in Cr.

Appeal No: 543 of 2013. This court vide Judgment dated: 30-10-2018, set-aside the conviction of appellant and remanded the case back to the trial court only to the extent of recording his statement U/S 342 Cr.P.C a fresh and then passing Judgment. After the remand by this Court fresh statement U/S 342 was recorded, appellant claimed his innocence and he was examined on oath U/S 342 (2) Cr.P.C so also he produced two defense witnesses, After hearing the parties the trial court passed the impugned Judgment and again awarded death sentence beside other sentences which are subject to the confirmation by this court.

7. Learned counsel for appellant contended that the appellant is innocent; that there is delay in registration of FIR for about 6-30 hours which has not been explained by the complainant; that no motive was set out by the prosecution and nor was it proved by the prosecution; that the appellant helped the deceased and took him to hospital where deceased died; that police arrested the appellant from the hospital on the same day but with malafide intention appellant was kept in illegal confinement and illegal gratification was demanded by police and on refusal he was falsely booked in the case; that nothing was recovered from the appellant and the pistol was foisted upon him; that PW-3 namely Muhammad Siddiq who is the sole eye witness through his evidence made improvements in the prosecution case; that there are several contradictions in the evidence of the prosecution witnesses which creates doubt in the prosecution case; that empty and pistol was sent to FSL with delay of about 12 days; that hospital authorities also confirm the version of appellant about the arrest as appellant was arrested from hospital when he brought the deceased in

injured condition; however after reading the evidence and during the course of his submissions, learned counsel for appellant conceded that it was not intentional murder but the appellant was checking his pistol and fire was made mistakenly which hit the deceased and the appellant then arranged the motorbike of nomi and took him to the hospital for his treatment where the police arrested him; that at the most it is case punishable under section 302(c) PPC and not of 302(b) PPC; that finding the evidence available in the file requested that conviction of appellant may be converted to one under section 302 (c) PPC instead of 302 (b) PPC. He relied upon the cases of Attique Ahmed Kamal V. The State and another (2010 SCMR 748), Nazeer Ahmed V. The State and others. (2019 SCMR 594), Fatah Jan V. The State (2006 SCMR 1234), Mst. Rukhsana Begum and others V. Sajjad and others (2017 SCMR 596), Muhammad Arif V. The State (2019 SCMR 631), Ali Sher and others V. The State (2008 SCMR 707), Muhammad Akram V. The State (2009 SCMR 230), and Mst. Shamshad V. The State (1999 SCMR 2844).

8. Learned DPG for the state contended that delay in the FIR was explained by the complainant as he was not eye witness and he received information about the murder of his brother then he rushed to hospital where police made necessary proceedings U/S 174 Cr.P.C and statement of complainant was also recorded U/S 154 Cr. P.C and the delay was fully explained and as such was not fatal to the prosecution; that prosecution has proved its case beyond reasonable doubt by producing reliable, trustworthy and confidence inspiring evidence; that no major contradiction is pointed out by the learned counsel for appellant which made the

case as doubtful; that appellant admitted his presence during recoding his statement U/S 342 Cr.P.C so also statement on oath U/S 342 (2) Cr.P.C; that pistol was recovered on the pointation of appellant which he used at the time of incident; that pistol and empty recovered from place of wardat were sent for FSL and report of FSL is positive and against the appellant; lastly he prayed that conviction and sentence awarded by the trial court to the appellant may be maintained and appeal may be dismissed or in the alternative the appellant be sentenced under section 302(c) PPC.

9. Learned counsel for complainant adopted the arguments of the learned DPG and further contended that though the prosecution had not set out any motive against the appellant nor any evidence produced by prosecution even then the capital punishment can be awarded he relied upon the case reported as 2012 P.Cr.L.J 63; that trial court appreciated the evidence according to law; that minor contradiction cannot be made basis for acquittal; that eye witness Muhammad Siddiq fully supported the case of prosecution; that oral evidence is supported by the medical evidence so also circumstantial evidence; that recoveries can be used as corroborative evidence; lastly he also prayed that appeal of the appellant may be dismissed.

10. We have heard the arguments of learned counsel of the parties and perused the material available in the file with their able assistance and considered the relevant law.

11. As per evidence of the Complainant he was informed by Muhammad Siddiq who was the sole eye witness of the incident

that he and Waseem were sitting at the Gali No-2, near Dairy Farm, Liaqat Ashraf Colony and were talking to each other about the school matters and in the meantime Bilal came who lived in the back street and asked Waseem to get his hands check out, Waseem raised his hands and Bilal abruptly pulled out pistol and fired at him and bullet hit to him at right shoulder and penetrated from the left side and then went through and through. Deceased Waseem fell down and Siddiq was rubbing his hands as was taking breath at that time. The complainant further deposed that he was informed that accused Bilal stopped the motorcycle of Nomi and got the injured and him (Siddiq) seated in motorcycle and took them away to Bismillah Taqi Hospital. He admitted during cross examination that accused Bilal was arrested on the same day of the incident but police had shown his arrest on 03-10-2011.

12. The sole eye witness of the incident Muhammad Siddiq was also examined and deposed that on 29-09-2011 he and Waseem were standing at a corner of street No.4, Liaqat Ashraf colony No.2 where both were talking to each other, meantime Bilal arrived there and directed Waseem to raise his hands and suddenly Bilal fired through a firearm weapon which hit him at the thumb of right hand crossed through right part region of his chest and thereby exit from left side arm. This witness however admitted during cross examination that accused Bilal was arrested on the very day from Bismillah Taqi Hospital viz on 29-09-2011 at night time.

13. The investigation officer collected the record of deceased from Bismillah Taqi Hospital where deceased was declared as dead and thereafter was taken to JPMC for post mortem. Letter issued to

SHO by the Hospital authorities available at page 253 of the paper book showed that deceased was brought to them by one unknown person on declaration as dead police was informed and dead body was handed over to the police along **with the unknown person who brought that body.**

14. We have carefully considered the entire evidence available in the file with the able assistance of counsel of the parties and found that the prosecution has proved its case beyond any shadow of reasonable doubt that the appellant murdered the deceased Waseem by producing reliable, trustworthy and confidence inspiring evidence. The oral evidence is supported by medical evidence, recovery of empty and pistol with positive FSL report and admission of the appellant at the time of offence of taking the deceased to hospital in injured condition. The only issue now before us is whether the offence fell with Section 302(b) PPC or 302(c) PPC.

15. We also carefully examined the statement under section 342 Cr.P.C of the appellant wherein he admitted his presence and admitted that he took the deceased in injured condition to the Hospital and was arrested by the police from the Hospital. This version of the appellant also has support from the FIR registered by the brother of deceased wherein it is mentioned that complainant was informed by Muhammad Siddiq that he (Siddiq) and Waseem (deceased) were sitting at corner of street at Manzoor town, Gali No-4 and were chit chatting with each other, Bilal came asked Waseem to make your hands check, whereupon Waseem raised his hands in the meantime he made fire shot with his pistol which ruptured the thumb of the right hand from front side and hit on the chest and

passed through and through from left neck. He was rubbing hands and feet of the Waseem, in the meantime Bilal hurriedly intercepted a biker who asked what happened and Bilal replied that he was checking pistol but hit to Waseem then said boys took Waseem to Bismillah Taki Hospital. During arguments learned counsel also contended appellant was checking the pistol and during checking fire was made which hit the deceased.

16. Turning to quantum of sentence we have to see that the trial court was justified in awarding the punishment under section 302 (b) PPC or the appellant was to be convicted under section 302 (c) PPC under the particular facts and circumstances of the present case.

17. No motive was alleged against the appellant for murdering deceased nor any evidence was brought by the prosecution to establish the cause for the murder. The complainant deposed before the trial court during cross examination that **“It is correct that my deceased brother Waseem has not disclosed me in respect of enmity in between my deceased brother and Bilal”**.

18. It is established from the evidence that the appellant after the injury to deceased arranged motorbike and took him to Hospital to save the life of deceased but deceased died which clearly suggests that appellant had no intention to kill the deceased. Further more a single fire was made by appellant and he has not repeated the same. The cause of death as stated by the prosecution is that bullet first hit at the thumb of right hand of deceased then it move to other parts which too suggests that it was not fired upon the

deceased on vital part of the body but after hitting at thumb its direction was changed and caused damage to vital parts of the deceased resulting in the death of the deceased.

19. In view of the above discussion and by relying on the cases of **Zeeshan @ Shani V. The State (PLD 2017 SC 165), Alamgir V. Gul Zaman and others (2019 SCMR 1415) and Nazeer Ahmed V. The State and others (2019 SCMR 594)**, we are of the view that conviction/ sentence of death awarded by the trial court to appellant under section 302 (b) PPC was not justified. In our view as discussed above on our reassessment of the evidence we find that the appellant has not committed an offence under section 302(b) PPC but an offence under section 302(c) PPC. Therefore, the conviction is altered/modified to one under section 302 (c) PPC and the appellant is therefore convicted and sentenced to undergo fifteen (15) years Rigorous imprisonment and he is also liable to pay compensation of Rs. 1,00,000/= (one lac rupee) under section 544-A Cr.P.C to the legal heirs of deceased. In case of default in payment of compensation, appellant would also suffer SI for (06) six months more. Benefit of section 382-B Cr.P.C is also extended to the appellant and all the sentences shall run concurrently.

20. The confirmation reference made by the trial court is answered in the negative and the appeal of the appellant is dismissed with above modification.

JUDGE

JUDGE