

IN THE HIGH COURT OF SINDH, AT KARACHI

Criminal Appeal No. 273 of 2019

Appellant : Muhammad Usman, through Dilbar Aijaz, Advocate.
Respondent : The State through Seema Zaidi, DPG
Complainant : Shamim Mai, through Muhammad Naeem Ahmed, Advocate.
Date of hearing : 29.03.2021, 05.04.2021 & 19.04.2021

JUDGMENT

YOUSUF ALI SAYEED, J. The Appellant has assailed the Judgment dated 16.04.2019 passed by the 1st Additional Sessions Judge/Model Criminal Trial Court, Karachi, Central (the “**Trial Court**”) in Sessions Case 101 of 2012 emanating from FIR No. No.53 of 2012 registered at P.S. Taimoria (the “**FIR**”), whereby he was found guilty of the murder of one Muhammad Irfan (the “**Deceased**”), constituting an offence under Section 300 punishable under Section 302 (b) PPC, hence was convicted under Section 265-H (ii) Cr. P.C and sentenced to imprisonment for life as tazir and to pay compensation under Section 544-A Cr P.C to the legal heirs of the Deceased in the sum of Rs.3,00,000/= (Rupees three lacs only), and in case of default of payment of compensation, to suffer SI for three months, with the benefit of Section 382-B Cr. P.C also being extended.

2. Succinctly stated, the backdrop to the matter is that Appellant and his wife, Shazia, were implicated in having committed the murder of the Deceased on 01.02.2012, with the FIR being registered in that regard on that very date at the behest of the victim’s mother, namely Shamim Mai (the “**Complainant**”), and it being disclosed therein that the Appellant and the Deceased had been friends, with the latter having left his own house earlier that day in response to a telephonic call. Thereafter, the Complainant came to be informed by her son in law, Muhammad Azhar, that he had received a call from the Deceased, alerting him that he was

being attacked by the Appellant with a knife. Ergo, they (i.e. the Complainant and Muhammad Azhar) rushed to the house of the Appellant, which they found locked, but in the meanwhile the Appellant arrived on the scene accompanied by police officials, and on the lock of the house being opened, the corpse of the Deceased was found within. The motive for the murder was stated to be a dispute over payment of an amount from an investment committee.

3. Pursuant to the FIR, the investigation of the case was carried out, with the Appellant firstly making a confession before the police and his statement under S.164 Cr. P.C to that effect subsequently being recorded by the learned Judicial Magistrate No.11, Karachi Central on 06.02.2012 (the “**Confessional Statement**”). The Appellant was then sent sent up to face trial, whereas his wife, who had also initially been arrested, was later released under S. 169 Cr. P.C due to insufficient evidence, with her name being shown in Column No. II of the challan submitted under S. 173 Cr. P.C.
4. Notwithstanding his earlier confessions, upon a formal Charge being framed in the aforementioned Special Case, the Appellant entered a ‘not guilty’ plea and claimed trial.
5. During the course of the proceedings that then ensued, the prosecution examined several witnesses, commencing with the Complainant Shamim Mai @ Tasneem Mai (PW-1), whose deposition was marked as Ex.3 and who produced her statement under Section 154 Cr.P.C. as Exh.3/A; Muhammad Azhar (PW-2), whose deposition was marked as Ex.4; SIP Muhammad Safdar (PW-3), whose deposition was marked as Ex.5 and who produced an entry as Ex.5/A, the Memo of Inspection of the Dead Body as Ex.5/B, the Inquest Report as Ex.5/C, the Memo of Arrest & Recovery as Ex.5/D, the Application for Post Mortem as Ex.5/E, Cause of Death as Ex.5/F, Receipt as to Receiving of Dead Body as Ex.5/G, Rahdari Receipt as Ex.5/H, Memo of

Arrest of Mst. Shazia as Ex.5/I, letter to MLO as Ex.5/J, MLO certificate as Ex.5/K, FIR at Ex.5/L, entry as Ex.5/M, Memo of Site Inspection as Ex.5/N; ASI Ahmed Bux (PW-4), whose deposition was marked as Ex.6; Mr. Asif Ahmed, the then learned Judicial Magistrate who recorded the Appellants confessional statement (PW-5), whose deposition was recorded as Ex.8, who produced the Application dated 06.02.2012, copy of Statement dated 05.02.2012 and the Confessional Statement on prescribed performa as Ex.8/A to 8/C respectively; Dr. Shahid Nizam, the Medico-Legal Officer (PW-6) whose deposition was recorded as Ex 9 and who produced the Post Mortem Report as Ex.9/A and the Cause of Death Certificate as Exh.9/B; and SI-Muhammad Ilyas, the Investigating Officer (PW-7), whose deposition was recorded as Ex.10 and who produced a letter addressed to the Chemical Examiner and the relevant report as Ex.10/A and 10/B and Four photographs as Ex.10/C/A to Exh.10/C/D respectively.

6. After the learned DDPP for the State closed the side of prosecution, the statement of the Appellant was recorded under Section 342 Cr. P.C at Exh.12 in which he admitted the allegations and stated that during his absence, the Deceased had come to his house on the day in question and had tried to commit zina with his wife 2/3 times. He further admitted that he had made a confession before the Magistrate on 06.02.2012. However, he did not examine himself on oath under Section 340(2) Cr. P.C, but examined his wife, Shazia as a defense witness, whose deposition was recorded as Ex.13.
7. Upon an appraisal of the evidence, the trial Court noted that the Appellant had firstly admitted his guilt before the police authorities and formally recorded the Confessional Statement before the concerned Judicial Magistrate on the aforementioned date following requisite formalities, with the same being sealed and sent to Nazir for safe custody prior to being produced in evidence as Ex.08/B, and albeit the

defense being afforded the right of cross-examination, no attempt was made to establish that there had been any illegality or irregularity in the recording of that confession by the Learned Magistrate. On the contrary, even at the time of his statement under S. 342 Cr. P.C., the Appellant unqualifiedly acknowledged the confession, with it being observed by the learned trial Judge that the same could not be brushed aside merely because the Appellant had then pleaded not guilty to the charge. Based on the depositions of the witnesses and the evidence produced, including the Confessional Statement, the trial Court arrived at the conclusion that charge stood successfully proven, with a finding of guilt accordingly being recorded against the Appellant in terms of the impugned Judgment and his being sentenced as aforementioned.

8. Learned counsel for the Appellant commenced his submission on the note that the numbers/telephones from which the calls had allegedly been made by the Deceased and received by Muhammad Azhar were never produced in evidence, nor was any material brought on record to demonstrate the motive ascribed by the Complainant, being that of a dispute over payment of an investment committee amount, however, when questioned as to the confessional statements made by the Appellant, he conceded that the Appellant had indeed caused the death of the Deceased, but sought to contend that the facts and the circumstances of the case brought it within the parameters of Section 302(c) PPC, which does not prescribe a minimum punishment and the maximum punishment under this provision is twenty-five years. He also contended that the sentence awarded to the Appellant merited reduction. In this regard his submission was that there was no element of pre-meditation on the part of the Appellant as the crime had been committed during a sudden fight and as a consequence of grave and sudden provocation constituted by the Deceased forcing himself upon the Appellant's wife.

9. Conversely, the learned APG, assisted by learned counsel appearing on behalf of the Complainant, defended the impugned Judgment as being unexceptionable. It was submitted that no misreading or non-reading of the evidence had been pointed out and it was apparent from the record that the Appellant had committed the murder of the Deceased with premeditation, without any grave and sudden provocation as was now being argued on his behalf. It was submitted that such a plea was patently misconceived and the Appeal was liable to be dismissed.
10. Having heard the arguments advanced and examined the material on record, it is noteworthy for purpose of appreciating the matter in its proper perspective that the relevant provisions of Section 302 PPC stipulate that:
- “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 the 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.”
11. Adverting to the contention that the matter falls within the parameters of Section 302(c) PPC on the premise that there was no element of pre-meditation the part of the Appellant, and that the crime was committed by him as a consequence of grave and sudden provocation, it merits consideration that in the judgment of the Honourable Supreme Court in the case reported as Ali Muhammad v. The State PLD 1996 Supreme Court 274, it was held that Section 302(c) PPC covers those cases which came within any one of the five listed exceptions of the erstwhile Section 300 PPC. The relevant passage from that judgment reads as follows:

“Section 302 of the P.P.C. therefore, itself contemplates plainly clearly a category of cases which are within the definition of *Qatl-i -Amd* but for which the punishment can, under the Islamic Law, be one other than death or life imprisonment. As to what are the cases falling under clause (c) of section 302, the law-maker has left it to the Courts to decide on a case to case basis. But keeping in mind the majority view in Gul Hassan case PLD 1989 SC 633, there should be no doubt that the cases covered by the Exception to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C.”

12. In the matter at hand, learned counsel for the Appellant has sought to rely on Exceptions 1 and 4 of the erstwhile Section 300 PPC, the former relating to the case of an offender who is '*deprived of the power of self-control by grave and sudden provocation*', and the latter to those cases where an offender causes death '*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 unusual manner*'.

13. As it happens, from the standpoint of those defences, the Apex Court had occasion to consider a like matter in the case reported as Javed Akhtar v. The State PLD 2020 SC 419, where after considering the case of Ali Muhammad (Supra), it was held that to attract Exceptions 1 or 4 there must be some tangible evidence of the necessary elements, viz - sudden provocation or a sudden fight in the heat of passion, with the relevant excerpt from that judgment reading as follows:

“11. In the present case the learned counsel for the petitioner relies on Exceptions 1 and 4 of the erstwhile section 300 PPC. Exception 1 attends to the case of an offender who is '*deprived of the power of self-control by grave and sudden provocation*'. If for the sake of argument it be accepted that the petitioner had been deprived of the power of self-control by grave and sudden provocation but by going to fetch his shotgun broke or should have dissipated the purported loss of the *power of self-control*. Moreover, loss of self-control may at best account for the first fire made by the petitioner. But, then the petitioner opened the shotgun, removed the

spent cartridge, took out a loaded cartridge, inserted it in the barrel, aimed and fired, and repeated this action thrice. To attract the said exception there must also be some evidence of what had happened that caused *sudden provocation*. In this case there is none. On the contrary the petitioner got the benefit of a reduced sentence because the motive had not been proved. Motive suggests pre-meditation whereas *sudden provocation* tends to exclude it. The petitioner cannot say that, because motive was not established he should get the benefit of a reduced sentence and then go on to say that he was provoked, which brings back an element of motive. In any event there is nothing on record to suggest that the petitioner had been suddenly provoked. Therefore, Exception 1 of the erstwhile section 300 is not attracted to the facts of this case.

12. Exception 4 of the erstwhile section 300 covered those cases where an offender causes death '*without premeditation in a sudden flight 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*'. In *Muhammad Asif v Muhammad Akhtar* (2016 SCMR 2035) it was held in relation to Exception 4, that:

In order to attract provisions of Exception 4 to the erstwhile section 300, P.P.C it had not only to be established that the case was one of a sudden fight taking place without any premeditation in the heat of passion upon a sudden quarrel but it was also required as a necessary ingredient that the offender must not have taken undue advantage or must not have acted in a cruel or unusual manner. (at page 2038)

In the present case there is no evidence of a sudden fight, let alone a in the heat of passion. The petitioner armed himself with a shotgun against unarmed persons, this in itself constitutes undue advantage and excludes his case from the purview of the Exception 4. He also acted in a most cruel manner which is yet another factor that makes him ineligible for the benefit of the said exception. Neither of the two cited Exceptions apply. The petitioner after the altercation went to fetch a shotgun. He loaded it and fired it. He then reloaded and re-fired it thrice more, which demonstrates extreme cruelty and brutality. There is no factual basis to bring the petitioner's case under section 302(c) PPC."

14. The meaning and scope of 'grave and sudden provocation' was also considered by the Honourable Supreme Court in the case reported as *Ali Ahmad and another v. The State and others* PLD 2020 SC 201, where it was observed that:

13. The expression "grave and sudden provocation" was used by the Legislature in Exception-1 to the erstwhile section 300 of P.P.C. as: "Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation." It is clearly spelt out from the said provisions that the provocation offered by the act of the victim must be so grave and sudden that it would deprive the offender of the power of self-control. Provocation in law thus consists mainly of three elements: (1) the act of provocation, (2) the loss of self-control, and (3) the retaliation/ reaction proportionate to the provocation. The relationship of these elements to each other, particularly in point of time, is of the foremost importance to determine whether there was time for passion to cool and reason to resume. The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice which is the formation of an intention to kill or to inflict grievous bodily harm, is negated. The proportionality of the reaction to the provocation is tested on the touchstone of the reaction expected from a reasonable person. What a reasonable man will do in certain circumstances depends upon various factors including the customs, traditions, social and cultural values, and way of life of the society to which he belongs. No abstract standard of reasonableness can be laid down, in this regard.

15. In the present case, while the Confessional Statement of the Appellant reflects that he claimed to have been incensed when told by his wife that the Deceased had tried to commit zina with her, it is evident that he did not commit the offence in the heat of that moment. On the contrary, it transpires that the Appellant overtly maintained cordial relations with the Deceased even after he claimed to have been informed of such alleged advances, and then committed the murder with premeditation after admittedly having called the Deceased to his residence for that purpose. Indeed, this is clearly discernible from the deposition of DW-1, the wife of the Appellant, who confirmed that there was friendship between them and the Deceased, who used to visit their house, as well as from a plain reading of the Confessional Statement and the Appellant's subsequent Statement under Section 342 Cr. P.C. recorded by the Trial Court. The relevant excerpt from the Confessional Statement narrates that:

“My wife Shazia told me that the door of house was opened and suddenly Irfan appeared on upper, tried to sexual abuse with her and after throating her neck & thrown on cot. When I reached at home on evening then my wife exposed me about immoral act of Irfan upon which, I got enraged too but my wife intercepted me by doing any unlawful act. On 2nd day, I having left my wife at my in-laws and about 12:30 of evening/night came. Irfan got injured in accident so I went his home to see him where found all family there so I did not dare to commit his murder. On next day, I called him at my home but he refused me first then he called me on phone and said that he is coming, as Irfan entered into my home that time wife was standing on front, I pushed her and she gone into courtyard, I locked the room, taken out knife from my pocket and after apprehending to Irfan from neck and tried to inflict knife blows on his abdomen but he got released himself by pushing me then once again I captured his neck and inflicted knife attempt two or more times, due to which, he hit with wall, got injured & fell down thereafter, I kept my foot over his neck that time he was alive. I then changed my clothes, washed my hand and reached at PS & informed there that I have committed the murder of my friend Irfan. This much is my statement.”

16. It also falls to be considered that through his Statement under 342 Cr. P.C, the Appellant confirmed without any reservation or qualification that he had made the Confessional Statement before the Magistrate, while disclosing that the Deceased had made 2 to 3 attempts to commit zina with his wife prior to the day of the murder, thus reaffirming the premeditation demonstrated through that confession, with the relevant question and reply being:

“Q. No. 1:- You have heard the prosecution evidence and it has come on record that on 01.02.2012 at about 1230 hours at inside House No. P-649, Batha Town, Peoples Colony, Block-N, North Nazimabad, Karachi, you committed the murder/qatl-i-Amd son of the complainant namely Muhammad Irfan, by causing churri blows injuries on his throat, face and chest, what you have to say?

Ans:- Yes, sir It is correct. On that he had come in my house in my absence and he tried to commit Zina with my wife. Prior to that he had tried 2/3 times.”

17. As such, it is palpable that the murder of the Deceased was not committed at the spur of the moment due to a circumstance that could be considered as giving rise to sudden provocation or a sudden fight. On the contrary, albeit that there was sufficient time for passion to have cooled and reason to have prevailed, the Appellant formed the intention of killing the Deceased and after having armed himself with a knife had called the Deceased to his house with the intention of perpetrating the act, then proceeding to inflict as many as eight separate knife wounds, as recorded in the Post-Mortem Report.

18. It is thus manifest that the grounds advanced in support of the Appeal are completely devoid of substance and the impugned Judgment, being well reasoned on the basis of the evidence, does not warrant any interference. That being so, the Appeal fails and stands dismissed accordingly.

JUDGE