

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.**

Cr. Appeal No.S-57 of 2015

Cr. Appeal No.S-62 of 2015

Dates of hearings : 17.11.2022, 21.11.2022,
and 02.12.2022

Date of Judgment : 09.12.2022

Appellant Sikandar : Through Mr. Waheed Ali Lashari,
S/o Imam Bux Advocate.

Appellant Peral : Through Ms. Nasira Shaikh,
S/o Muhammad : Advocate
Hassan

The State : Through Mr. Muhammad Ali
Noonari, D.P.G Sindh.

Complainant : Through Mr. Muhammad Rahim
Ghulam Hyder Gajju, Advocate.

J U D G M E N T

Muhammad Saleem Jessar. J.- By this single judgment, I propose to dispose of above said two Criminal Appeals as both appeals have arisen from one and the common judgment dated 18.03.2015 passed by the trial Court.

2. Through these Criminal Appeals, appellants have assailed judgment dated 18.03.2015 passed by learned Sessions Judge, Mirpurkhas, in Sessions Case No.01 of 2016, (Re: The State v. Peral & others), arising out of F.I.R No.49 of 2002 registered at P.S Shadi Palli, under Sections 302, 324, 114, 337-A(i), 337-F(i), 34 PPC, whereby they have been convicted under Section 302(b) PPC and sentenced to suffer rigorous imprisonment for life and to pay compensation of Rs.200,000/- each, to be paid to legal heirs of deceased in terms of Section 544-A Cr.P.C which shall be recoverable as land revenue arrears, in default thereof, to suffer S.I for six months. Besides, the appellants/accused have been convicted for offences under Sections 324, 337-D, 337-A(ii), 337-

F(vi), 336 PPC and were burdened to pay Arsh/Daman to be paid to the injured; however, all the sentences were ordered to run concurrently with benefit of Section 382-B Cr.P.C.

3. The crux of the prosecution case is that complainant Ghulam Hyder lodged instant F.I.R alleging therein that his brother Saindad is employee in Railway Department. One Gulsher is their relatives and had friendship with a person namely Waheed. He and his brother Saindad repeatedly advised Waheed for 15/20 days not to do filthy jokes with Gulsher on which Waheed became annoyed. On 10.10.2002 complainant came to Pithoro to meet with his brother Saindad and other relatives. When he was present in the house, Saindad came there and disclosed him that Waheed and Dilber abused and threatened him; however, people available there intervened and rescued him. At about 1830 hours he was standing for purchasing cigarettes from cabin while his brother Saindad and Gulsher were standing in front of Saindad's house. Meanwhile, he heard noise and saw Waheed, Dilber, Sikandar and Peeral duly armed with hatchets were causing sharp sided hatchet blows to Saindad and Gulsher with intention to kill them. On such commotion, their relatives namely Bakhtawar, Ali Muhammad and Soomar came there. He saw that Hassan Roonjho was standing there who was instigating not to spare and kill them and then within his sight accused Dilber, Waheed and Peeral were causing sharp sided blows to his brother Saindad and other relatives. Accused Siknadar was also causing hatchet blows to his relatives. In the meantime, Saifal, Darya Khan and other relatives came at spot and accused seeing them fled away. The accused persons caused injuries to Bakhtawar, Muhammad Ali, Soomar, Gulsher and Saindad with intention to kill them. They brought the injured to Pithoro Hospital wherefrom injured Saindad, Bakhtawar, Muhammad Ali, Soomar and Gulsher were referred to Civil Hospital, Mirpurkhas where at about 2200 hours his brother Saindad died due to serious injuries on his head. Hence, instant F.I.R was lodged.

4. After registration of the case, investigation was carried out by the concerned I.O, who after completion of legal formalities,

submitted challan before the Court of law having jurisdiction, where a formal charge was framed against accused at Ex-2, to which they pleaded not guilty and claimed their trial vide their pleas at Ex-3 to 7.

5. In order to establish the charge, the prosecution examined PW-1/complainant Ghulam Hyder at Ex-8, PW-2 Gul Sher at Ex-9, PW-3 Muhammad Ali at Ex-10, PW-4 Muhammad Soomar at Ex-13. PW-5 Saif-ur-Rehman at Ex-14, PW-6 Lachman Das at Ex-16, PW-7 Muhammad Hassan at Ex-17, PW-8 Dr. Muhammad Moosa at Ex-19, PW-9 Dr. Dileep Kumar at Ex-20, PW-PW-10 ASI Tlib Hussain at Ex-24, PW-11 Shabbir Ahmed at Ex-25, who produced various documents in their evidence. Thereafter, prosecution side was closed vide his statement at Ex-26.

6. Thereafter, statements of the accused under Section 342 Cr.P.C were recorded at Ex.27 to 30, wherein they denied the allegations leveled by the prosecution and prayed for justice. The accused neither examined themselves on oath as provided under Section 340(2) Cr.P.C nor led any evidence in their defense in disproof of the charge.

7. After formulating the points for determination, recording evidence of the prosecution witnesses and hearing learned Counsel for the parties, trial Court vide impugned judgment convicted and sentenced the appellant in the terms as stated above and the appellants through these appeals have challenged their conviction recorded by the trial Court.

8. Learned Counsel for appellants argued that appellants are innocent and have falsely been implicated in this case. They further submitted that role attributed to appellants is that they had jointly caused hatchet blows to deceased Saindad and injured PWs Gulsher, Soomar, Bakhtawar and Muhammad Ali. They further submitted that recoveries of hatchets were jointly effected from the appellants Waheed, Peeral and Dilbar on 11.10.2002; whereas appellant Sikandar was arrested on 29.10.2002 alongwith hatchet. They next submitted that hatchet allegedly recovered from

appellant Sikandar was not sent to the Laboratory for its examination and report and that the hatchets recovered from appellant Peeral on 19.10.2002 and from Dilbar and Waheed on 18.10.2002 were sent to the Laboratory on 22.01.2013 with delay of about three months. They next submitted that though the fateful day was the day of general elections when PW Saif-ur-Rehman, who was the Polling Officer, had deposed that at 06:30 p.m. he was going towards his home which is impossible for the polling staff particularly in polling days when the counting of votes ends upto 09:00 to 10:00 p.m. Learned Counsel further submitted that injured Bakhtawar and PW Darya Khan were given up by the prosecution though their evidence was very much essential. They further submitted that Tapedar of the Beat had prepared the sketch plan of the place of incident on 28.02.2011 after about 10 years from the date of incident. They also submitted that appellant Sikandar has been awarded conviction under Section 337-D PPC; yet no charge was framed by the trial Court against him under this section, nor after conclusion of evidence it was altered by the trial Court; besides the hatchet allegedly used by appellant Sikandar was not found stained with blood; even it was not sent to the Laboratory for its examination and matching purpose. Learned Counsel lastly submitted that prosecution evidence is not confidence inspiring and in view of discrepancies in the evidence the appellants deserve leniency; hence, pray for conversion of their sentences from Section 302(b) to Section 302(c) PPC.

9. Learned Deputy Prosecutor General appearing for the State as well learned Counsel for complainant when confronted with above arguments and after going through the evidence as well record have very candidly recorded their no objection for conversion of the sentence recoded against appellants from 302(b) to 302(c) PPC.

10. Heard learned Counsel for the appellants as well learned D.P.G appearing for the State and learned counsel for the complainant and perused the record made available before me.

11. After perusal of evidence adduced by the prosecution being ocular as well medical evidence, it has transpired that deceased had died by an un-natural death. The prosecution has also succeeded in establishing its case that the appellants have committed murder of deceased by causing hatchet blows to deceased; besides they have caused hatchet blows to PWs/injured namely Gulsher, Soomar, Bakhtawar and Muhammad Ali. It has also transpired that prior to this incident deceased was under threat of the appellants on the pretext that why he (deceased) and his brother (complainant) advised one of the appellants namely Waheed not to use filthy language against Gulsher on which appellant Waheed became annoyed and thereby in league of other co-appellants caused hatchet blows to deceased as well injured/PWs named above. No doubt the prosecution has succeeded in proving its case against the appellants but when circumstantial evidence as well medical evidence is examined, it reflects that there is yet some burden upon shoulders of prosecution to prove its authenticity. It is alleged against the appellants that they have caused hatchet blows to deceased and other injured. On 11.10.2002 the recovery of hatchets were jointly effected from appellants Waheed, Peral and Dilbar and appellant Sikandar was arrested on 29.10.2002 with hatchet which hatchet was not sent to Laboratory for its examination and matching purpose. The hatchets allegedly recovered from appellant Peral on 19.10.2002 and likewise from Dilbar and Waheed on 18.10.2002; however, said hatchets were sent to Laboratory on 22.01.2003 with delay of about three months of its recoveries; besides, the hatchet allegedly used by appellant Sikandar was not found stained with blood. Moreover, the evidence of PW-5 Saif-ur-Rehman (Ex-14) is not confidence inspiring. On the fateful day of incident which was also the day of general elections when this witness was on duty as a Polling Officer. As per his evidence, he deposed that at about 6:00 p.m. polling process was completed and when he returned back to his house where he reached at 06:30 p.m. and saw that deceased Saindad and Gulsher were available in front of their house. How is it possible that this witness being Polling Officer has left

polling station at 06:00 p.m. as it is impossible for polling staff particularly in polling days when the counting of votes usually ends upto 09:00 to 10:00 p.m. Here it reflects that PW Saif-ur-Rehman might have been produced by prosecution to further strengthen their case but surprisingly was not enough. The other crucial aspect of the case is that appellants, besides having been convicted under Section 302 PPC, have also been convicted under Section 337-D PPC but the trial Court without framing of charge against them for that section has convicted them, the charge was not altered by the trial Court before concluding trial. Moreover, injured Bakhtawar and PW Darya Khan were given up by the prosecution though their evidence was very much essential. Non-examining of these star witnesses is also not in support of prosecution as it draws a presumption that if they were examined they would not have supported prosecution version.

12. Per prosecution evidence, the role attributed to appellant Sikandar is that he allegedly caused hatchet injury to PW Gul Sher which is punishable under Section 336 PPC and was sentenced to pay Arsh which shall be 1/3rd of Diyat amount and to suffer R.I for five years; besides he has been convicted for causing injuries to P.W Muhammad Ali punishable under Section 337-F(vi) PPC and was sentenced to suffer R.I for 05 years and to pay Daman amount of Rs.10,000/- to injured. He was also convicted for causing injuries to PW Muhammad Ali punishable under Section 337-D PPC and was sentenced to pay Arsh to the extent of 1/3rd of Diyat amount and to suffer R.I for 10 years. Since the hatchet allegedly recovered from appellant Sikandar was not found stained with blood, nor it was sent to Laboratory for its examination and report; therefore, his involvement in the present crime becomes doubtful. As far as allegation against him for causing injury to PW Muhammad Ali, punishable under Section 337-D is concerned, no charge against him was framed by the trial Court under Section 337-D PPC, nor the charge was altered before concluding trial; therefore, the sentence awarded to him in terms of Section 337-D PPC is also not of much consequence. As far as the injury allegedly caused by him to PW Gul Sher which is punishable

under Section 336 PPC for which he was sentenced to pay Arsh which shall be 1/3rd of Diayat amount, is concerned, the prosecution has not adduced any tangible evidence connecting him with the offence as the hatchet allegedly used by him in commission of offence was not stained with blood, nor was sent to Laboratory; therefore, appellant Sikandar by extending benefit of doubt is acquitted of all the charges leveled against him by the prosecution.

13. As far as the case of appellant Peeral is concerned. Though the incident had occurred on 10.10.2002 and appellant Peeral was arrested on 11.10.2002; yet recovery of hatchet was effected from him on 19.10.2002 and was sent to Laboratory on 22.01.2003 with delay of about three months; therefore, recovery of alleged offensive weapon viz. hatchet sent to Laboratory with delay of about three months has lost its evidentiary value. In such situation, appellant Peeral cannot be burdened with Arsh in view of mitigating circumstances as above. However, the sentences of five years R.I awarded to him for offence under Section 337-A(ii) PPC and besides imprisonment of life for offence under Section 302(b) PPC are hereby maintained to the extent of appellant Peeral. However, keeping in view the lacunas as well circumstances in the prosecution case as discussed above, the sentences awarded to appellant Peeral are considered to be altered/converted particularly when no objection from the side of complainant as well Assistant P.G has been extended. Reliance can be placed upon the case of MUHAMMAD ASHRAF alias NIKKA v. The STATE (2022 SCMR 1328) in which the Hon'ble Supreme Court of Pakistan has held as under:-

“6.....However, as discussed above, we have observed that the case advanced by the prosecution is based upon facts not properly brought forth, rather there are certain flaws in the narration of the same particularly manner of occurrence, number of accused persons and suppression of facts, hence as an abundant caution, we refrain to accept finding of both courts below rather consider it a case of sudden affair, coupled with the fact, material facts were suppressed, hence keeping in view the act of each individual, we consider that the case of the petitioner is covered by section 302(c), P.P.C. As he has already

served out major portion of sentence which is more than 15 years, hence it seems adequate to meet the ends of justice. As a consequence, we convict the petitioner under section 302(c), P.P.C. and sentence him to imprisonment for the period which he has already undergone.”

14. The upshot of the above discussion is that the Criminal Appeal No.S-57 of 2015 is **allowed** to the extent of appellant Sikandar, whereas appellants Dilber and Waheed after completion of their sentences and making payment of Daman have been released and they had not contested their appeals; therefore, the appeal to the extent of appellants Dilbar and Waheed is hereby **dismissed**. Whereas, Criminal Appeal No.S-62 of 2015 is **dismissed**, the conviction of appellant Peeral for an offence under Section 302(b) PPC is altered / converted into an offence under Section 302(c) PPC. Consequently, his sentences are modified and reduced from imprisonment of life to one already undergone by him. The impugned judgment of conviction and sentences passed by learned Sessions Judge, Mirpurkhas (Trial Court), vide Sessions Case No.01 of 2006, emanating from Crime No.49 of 2002 of P.S Shadi Palli, is modified accordingly to the extent of appellant Peeral. However, the compensation of Rs.200,000/- shall be paid by appellant Peeral, which if recovered from him, shall be paid to legal heirs of deceased Saindad as required under Section 544-A Cr.P.C, which shall be recoverable as land revenue arrears. In default of payment of compensation amount, appellant Peeral shall undergo S.I for six months as already directed by the trial Court. He shall be released from jail on payment of compensation or shall suffer S.I for six months more. Since the appellant Sikandar has been acquitted of all the charges; therefore, the jail authorities shall release him forthwith if not required in any other custody case.

15. These Criminal Appeals are disposed of in above terms alongwith pending application(s).

JUDGE

Shahid