

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.S-135 of 2020

Date of hearings: 05.05.2023

Date of decision: 05.05.2023

Appellant: Khadim Hussain,
Through Mian Taj Muhammad Keerio advocate.

The State: Through Ms. Sana Memon, Assistant PG.

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J.- On 22.09.2012 at about 06:00 pm, complainant Nabi Bux Nohri along with his uncle Abdul Karim and his father Manthar were going on a motorcycle towards their village Pir Taj Hussain Shah Jeelani. When they reached near Rehmatullah Wali graveyard, appellant Khadim Hussain along with eight other accused, nominated in FIR, duly armed with hatchets and lathies waylaid them. As soon as they stopped, appellant caused a sharp side hatchet blow on the head of father of complainant Manthar, accused Soomar Shar caused a hatchet blow on his back and accused Tajoo Shar caused lathi blow on his neck. Remaining accused caused sharp side hatchet blows to the complainant and his uncle Abdul Karim. The incident was intervened by PW Sher Khan and Hafiz Nazir. Complainant party then brought injured, father of the complainant namely Manthar, at Civil Hospital Pithoro from where he was referred to Civil Hospital Hyderabad, where complainant leaving him under care of PW Abdul Karim and Moulvi Nazeer appeared at Police Station and registered FIR against appellant and others u/s, among others, 324 PPC. However, when during treatment complainant's father succumbed to injuries on 29.09.2012 at Karachi, he communicated such information to the police and brought the dead body to the village for burial. The police on such information submitted the Challan u/s, among others, u/s 302 PPC against appellant and others.

2. During investigation, appellant and other accused were arrested except Wali Muhammad and Habib Shar who remained absconders. After framing of formal charge, the trial was commenced and prosecution examined all the necessary witnesses. After which statements of accused were recorded u/s 342 CrPC wherein they have

denied the allegations. At the culmination of trial, appellant was convicted u/s 302(b) PPC and sentenced to suffer imprisonment for life with fine of Rs.100,000/-, whereas, other accused were convicted and sentenced under different provisions of PPC, for maximum sentence of 03 years, vide judgment dated 31.05.2011. The said judgment was impugned before this court in Criminal Appeal No.S-102 of 2016 which was set-aside by this court by means of judgment dated 06.02.2020 whereby the case was remanded to the trial court with direction to record the statement of accused u/s 342 CrPC afresh. After such formalities, and hearing the parties, again vide impugned judgment dated 03.09.2020, appellant has been convicted u/s 302(b) PPC and sentenced to suffer imprisonment for life and to pay fine of Rs.100,000/-, in default of which to suffer six months more. Meanwhile the other accused completed their short sentence of 03 years and were released hence did not prefer any appeal.

3. Learned defense counsel has argued that appellant has already suffered more than 20 years in jail and this is a case of a single blow to the deceased by the appellant, therefore, the case does not fall within the scheme u/s 302(b) PPC; that the witnesses have made dishonest improvement in their evidence as in FIR and in evidence it is alleged that deceased had sustained two hatchet injuries: one by appellant Khadim Hussain on his head, the other by accused Soomar Shar (since died) on his back, whereas provisional medico legal certificate indicates that deceased had sustained only one injury on his head; that the deceased had died at Karachi allegedly out of the injuries caused to him but no final medico legal certificate establishing the same fact has been produced by the prosecution, nor postmortem of the deceased was conducted in support of the case as setup by the prosecution; that although in FIR motive as alleged by the complainant is old enmity but both the eyewitnesses in their examination-in-chief have not uttered a single word about the motive. He has further submitted that it appears that the incident occurred at the spur of moment and appellant and other accused had no intention to cause murder of the deceased, he was at their mercy at the place of incident but apart from a single injury no other blow was inflicted to him; that since deceased died after at least seven (07) days of the incident, therefore, vicarious liability cannot be assigned to the appellant without an element of suspicion; that seven (07) days' margin between death and injury has induced a question as to whether the deceased died from the injury or from

improper treatment and negligence of the doctors. To bring home his pint of view learned counsel has relied upon case law reported in 2022 SCMR 1085, 2022 SCMR 1328 and 2022 SCMR 2143.

4. Learned Assistant Prosecutor General has not controverted the above facts stated by the counsel in defense and has given no objection if the conviction of the appellant is maintained, but is converted u/s 302(c) PPC.

5. I have heard the parties and perused material available on record, and the case law. There is delay of 19 hours in registration of FIR which does not seem to be reasonably explained by the complainant. Although in FIR complainant has explicitly referred to animosity between his party and the accused party but in his evidence he has not uttered a single word about it. It has not been explained by him as to what was the reason or motive for the appellant and others for attacking the complainant party. It is apparent that the motive for committing murder of deceased is shrouded in mystery. Complainant has shown presence of at least 09 accused duly armed with hatchets and lathies but the deceased had received only one blow on his head. The other blows on his back etc. allegedly inflicted by co-accused Soomar Shar and Taj Muhammad are not established from any medical record. The medico legal certificate produced by the prosecution in the evidence indicates only a single injury on the head of deceased.

6. The death of the deceased after 07 days by the same injury is not indeed borne out of any record, as admittedly neither postmortem of the deceased was conducted, nor the final medico legal certificate confirming death of the deceased out of such injury was produced in the trial. There is a margin of at least 07 days between the injury of deceased and his death, as he was admitted in hospital for such period. In such circumstances, the pressing questions whether he was given a proper medical treatment and the doctors did their best to save his life were to be satisfactorily answered by the prosecution but it has failed to do so. There is lack of record to demonstrate that the intention of the appellant was to cause death of the deceased. Admittedly, the appellant dealt a single blow to the deceased and did not repeat himself, although the latter was at his mercy.

7. Since the motive is shrouded in mystery, and has not been proved by the prosecution; and the prosecution evidence does not show that

appellant had any prior information of passing of the complainant party from the place of incident or their exact arrival there at the given time, it can safely be inferred that this incident occurred at the spur of moment without any premeditation or preparation on the part of the appellant and other accused.

8. Although in this case allegedly blood stained hatchet was recovered from the appellant on 07.10.2012 but it was sent after one month on 07.11.2012 to the Lab for FSL Report. Proof of safe custody of the hatchet at Police Station meanwhile for whole month has not been substantiated. Moreso, in the Lab Report it has been opined only that the hatchet was stained with human blood. The test of cross-match profile to certify the blood on the hatchet was of the deceased was not carried out. Therefore, the recovery and the Lab Report in such circumstances are inconsequential and do not help the prosecution.

9. In such facts and circumstances and when there are certain dishonest improvements in the evidence of witnesses, as noted above, the point taken in defense that the case of the accused is covered by section 302(c) and not u/s 302(b) PPC is not without substance, not least because learned Assistant Prosecutor General has conceded to such position. The jail roll of the appellant received on 11.04.2023 indicates that he has remained in jail for 10 years 04 months 02 days, has earned remission of 09 years 09 months 18 days. His remaining portion is 05 years 04 months 10 days. By a simple calculus it is apparent that that the appellant has already remained in jail for more than 20 years. Neither u/s 302(b) nor u/s 302(c) PPC imposition of fine on the accused is provided. In the circumstances and in view of such legal position, the conviction of the appellant, otherwise based on the evidence of eyewitnesses, is maintained but is converted from section 302(b) to 302(c) PPC and his sentence is modified / altered to the period he has already undergone. The appellant shall however pay compensation of Rs.2,00,000/- to the legal heirs of deceased u/s 544-A CrPC which shall be recovered from him after his release as arrears of Land Revenue, in case he fails to pay the same to legal heirs of the deceased within six months. The appellant shall be released forthwith if not required in any other case.

Appeal is accordingly disposed of in above terms.

JUDGE

Ali Haider