

THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. Jail Appeal No.D-308 of 2019
Confirmation Case No.D-24 of 2019
Cr. Acquittal Appeal No.D-02 of 2020

Present

Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Arbab Ali Hakro

Date of hearing: **21-03-2024**

Date of decision: **21-03-2024**

Mr. Ubedullah Malano, Advocate for appellant in Crl. Jail Appeal No.D-308 of 2019 and for private respondents in Acquittal Appeal.

M/s Mehfooz Ahmed Awan and Farhan Ali Shaikh, Advocates for appellant in Crl. Acquittal and for complainant in Crl. Jail Appeal.

Mr. Aftab Ahmed Shar, Additional P.G for the State.

J U D G M E N T

MUHAMMAD IQBAL KALHORO, J:- Appellant Dilber son of Jumo (**Cr. Jail Appeal No.D-308 of 2019**) along with others was tried in a Sessions Case No.185 of 2004 (re-State-Versus Shabbir and others), arising out of Crime No.113 of 2003, registered at P.S, Daharki u/sections 302, 147, 148 & 149 PPC for committing murder of Muhammad Moosa by causing him a firearm injury with KK rifle on his chin with exit wound on back side of his head, whereas, absconding accused Shabbir is alleged to have caused murder of Abdul Ghani by causing him firearm injuries with KK, on 19.09.2003 at about 0700 hours at Kacha Sarak leading from Nihal Wah to Dahar Wah near agricultural land of Makhno Dahar, Daharki.. He has been convicted u/s 302(b) PPC vide impugned judgment dated 21.12.2019, by learned Additional Sessions Judge (MCTC), Ghotki, and sentenced to death and to pay compensation of Rs.5,00,000/- to legal heirs of deceased in terms of Section 544-A CrPC, and in case of default, the same to be recovered as land revenue arrears. The trial Court has also made a Reference to this Court for confirmation of death sentence under Section 374 CrPC.

2. The trial Court has acquitted the accused Hassan alias Baboo alias Bilawal, Zahoor Ahmed, Arz Muhammad and Abdul Malik of the

charge and kept the case on dormant file against absconding accused Shabbir alias Bakhat and Abdul Haque till their arrest/production before the Court.

3. Learned defence counsel after arguing the case at some length has submitted that he would not press this appeal on merits, if the death sentence of appellant is converted/reduced into imprisonment for life as there are extenuating circumstances for awarding lesser punishment of life imprisonment. Explaining the same, he submitted that motive of the offence has been alleged against the appellant but has not been established, that there is allegation of firing a burst of KK by the appellant at deceased Muhammad Moosa, but there is only one firearm injury and it is not confirmed by the Medical Officer whether it is a pellet or bullet injury. To support his contentions, he has relied upon the case law reported as *Fayyaz alias Fiazi v. The State*. (2017 SCMR 2024) and Tariq Pervaiz v. The State (1987 SCMR 967).

4. Learned counsel appearing on behalf of complainant as well as Additional P.G for the State have not opposed his request in view of ratio laid down in the aforesaid case.

5. We have heard the parties and perused material available on record. In the trial, prosecution has examined as many as seven witnesses including complainant, the eyewitnesses, Investigating Officer, Mashirs, Medical Officer and Tapedar etc. and has produced through them all the relevant documents: FIR, Danishnama, memos of inspection of dead body, place of incident, clothes, recovery of empties from scene of offence, arrest of appellant and recovery of crime weapons from absconding Shabbir alias Bakhat and Hassan alias Baboo alias Bilawal (since acquitted), inquest form, FSL reports and post-mortem reports etc. When such evidence was put to the appellant u/s 342 CrPC for his explanation, he has simply denied it without however examining himself on oath or leading any evidence in defence.

6. PW-1 Complainant, who happens to be a maternal uncle of deceased Abdul Ghani and landlord of deceased Muhammad Moosa, his Hari, in his evidence (Ex.61) has described the whole incident as narrated by him in FIR that on 19.09.2023 at about 0700 hours, on a

previous murderous enmity, absconding accused Shabbir alias Bakhat, present appellant Dilber armed with KKs, accused Hassan alias Babu alias Bilawal (since acquitted) armed with SBBL gun, Abdul Malik armed with rifle, Abdul Haque, Zahoor Ahmed and Arzan armed with pistols came at Nihal Wah near agricultural land of Makhno Dahar and in presence of PWs, absconding accused committed murder of deceased Abdul Ghani by causing him firearm injuries with his KK, whereas, appellant caused a firearm injury with KK rifle to deceased Muhammad Moosa hitting him on chin with exit wound on back side of his head who died at the spot. Complainant accordingly appeared at Police Station on the same day i.e. 19.09.2003 and lodged FIR at 0815 hours.

7. PW-2 Abdul Rauf, (Ex.62), the eye witness, in his evidence has supported the complainant. He has, in detail, described the story that appellant armed with a KK fired upon Muhammad Moosa. In his cross-examination, lengthy albeit, nothing substantial favouring the appellant over main features of the incident has come on record. PW-3 (Ex.63), the Mashir, has verified the inspection of place of incident. PW-5 is Tapedar Muhammad Ali (Ex.67), had visited the place of incident in presence of Mashirs and prepared such report and sketch. PW-6 is SIP Toto Mal, being author of FIR has verified its registration. PW-7, Medical Officer has verified presence of the injuries on the person of deceased and has opined that injuries were caused by firearm, leading to their death. PW-8 is ASI Peer Bux, who being well conversant with the handwriting and signature of late I.O Inspector Ali Hyder Rind has verified his signature on mashirnamas/ documents, prepared by him. PW-9 is Mashir Abdul Fattah, who has supported the version of second I.O and testified that accused Shabbir and Hassan alias Baboo voluntarily led them to place of recoveries and produced KK and SBBL gun before him.

8. PW-10 SIP Mushtaque Ahmed is I.O of the case, who arrested absconding accused Shabbir alias Bakhat and Hassan alias Baboo (since acquitted) from Central Prison-1, Sukkur and effected recovery of KK and SBBL gun on their pointation in presence of mashirs. PW-11 HC Noor Muhammad is corpse bearer, who verified receipts of handing over dead body to his legal hires. PW-12 is ASI Abdul Ali Pitafi, who arrested accused Zahoor Ahmed and PW-13 is ASI Haji

Muhammad, who has verified arrest of appellant Dilber. All these pieces of evidence are part of the prosecution case.

9. From a perusal of aforesaid evidence, it becomes quite clear that prosecution has been able to prove the charge against appellant beyond a reasonable doubt. Evidence of complainant, eye witness, Medico-Legal Officer, Mashirs and Investigating Officer support each other on relevant features of the case that were performed by them in the course of investigation. They all have complemented each other qua prosecution's version of incident and nothing is left out which may cloud the slightest part of the story. During cross-examination of witnesses, no material contradiction has come on record creating a doubt over veracity of the prosecution story. A reading of the ocular account furnished by the eye-witnesses confirms involvement of the appellant in the offence he has been charged with. The defence has failed to bring on record any material which may be considered to have prompted the complainant to implicate the appellant falsely in the murder of his brother by substituting the real culprit for him. When the entire evidence was put to the appellant for his explanation, he has simply pleaded his innocence in his statement u/s 342 CrPC.

10. We therefore, find no illegality in the impugned judgment as far as declaration of guilt/conviction of the appellant is concerned. Notwithstanding, the alleged motive that there was previous murderous enmity between the parties, has remained in mystery as there is no direct evidence establishing motive part of the story. Furthermore, in this case, the appellant is alleged to have acted under the influence of his brother Ghulam Shabeeer (co-accused) and not on his own. The burden to prove the motive as alleged was upon the prosecution but record of the case reveals that the same has not been established. The law in this regard is very much settled by now that absence of motive or absence of proof of the same would be a sufficient mitigating circumstance to determine the quantum of sentence. More so, no doubt, the appellant is alleged to have fired a direct burst of KK upon deceased Muhammad Moosa, but complainant in his evidence in clear terms has deposed that one fire had hit the deceased casting clouds over the mention of firing of burst by the appellant. The Medico-Legal Officer (Exh.28) has also

confirmed that deceased Muhammad Moosa sustained a solitary injury i.e. wound of exit and wound of entrance. He has further revealed in cross-examination that he cannot say whether said injury was caused by a pellet or bullet. We, therefore, are of the view that in presence of these mitigating circumstances, this is not a fit case to award capital punishment i.e. death and this appears to be the reason why learned counsel for complainant and learned Additional P.G both have not opposed alteration/reduction of sentence of the appellant from death to life imprisonment.

11. Consequently, in the light of above discussion and while following the dictum laid down in the cases of Fayyaz alias Fiazi and Tarique Pervaiz (**supra**), we maintain conviction of the appellant u/s 302(b) PPC, but alter his sentence of death and convert it to imprisonment for life. He is directed to pay compensation of Rs.5,00,000/-(Five Lac) to the legal heirs of the deceased under Section 544-A CrPC, and in case of default, same shall be recovered as land revenue arrears, as ordered by learned trial Court. However, benefit of section 382-B CrPC is extended to him. With such modification in the quantum of sentence of appellant Dilber son of Jumo, the CrI. Jail Appeal No.D-308 of 2019 is **dismissed**. Consequently, death reference (Confirmation Case No.D-24 of 2019) is hereby replied in negative and is accordingly **disposed of**. Whereas, CrI. Acquittal Appeal No.D-02 of 2020 is **dismissed as not pressed**.

Office to place a signed copy of this order in captioned connected matters.

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Ahmad