

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

Criminal Appeal No.D- 211 of 2019.  
[Confirmation case No.50 of 2019]  
Criminal Jail Appeal No.D- 221 of 2019

Present.  
Mr. Justice Naimatullah Phulpoto.  
Mr. Justice Shamsuddin Abbasi.

Date of hearing: 19.01.2022.  
Date of judgment: 02.02.2022.

Appellant: Zahid Nawaz son of Ali Nawaz by caste Saraz through Mr. Shakir Nawaz Shar, Advocate.

The State: through Mr. Shewak Rathore, Deputy Prosecutor General, Sindh.

Complainant: Muhammad Shah through Ms. Gul Bano, Advocate.

## **J U D G M E N T**

**NAIMATULLAH PHULPOTO, J:-** Zahid Nawaz appellant was tried by learned Additional Sessions Judge (MCTC-I), Hyderabad in Sessions case No.475 of 2007 for offences under Sections 302, 324, 147, 148, 149 PPC. After regular trial, the learned trial Court vide its' judgment dated 27.11.2019, convicted the appellant for committing Qatl-e-Amd of Shah Wali under section 302(b) PPC as Tazir and sentenced him to death. Appellant was directed to pay the compensation in terms of Section 544-A Cr.P.C to the tune of Rs.100,000/- (Rupees one lac) to be paid to the legal heirs of deceased Shah Wali; in case of default thereof, appellant was further directed to suffer SI for 06 months more. It was ordered that if the amount of compensation is realized, the same shall be disbursed amongst

the legal heirs of the deceased. Appellant / accused was also convicted u/s 148/149 PPC and sentenced to one year RI. However, death sentence was subject to confirmation by this court as required u/s 374 Cr.P.C.

2. The brief facts of the prosecution case as disclosed in the FIR are that Muhammad Shah lodged his report at P.S Tando Jam on 24.09.2007 at 2350 hours against the accused, alleging therein that complainant runs a Kiryana shop opposite Suzuki Stand, Moosa Khatian Road, Tando Jam. On 24.09.2007, the complainant, his brother Shah Muhammad, cousin Gul Muhammd and Shah Wali (deceased) were sitting at shop. It is stated that accused Zahid Ali s/o Loung by caste Saraz appeared at the shop and asked the complainant to give him some articles on credit, to which complainant refused and there was exchange of hot words. Accused Zahid Ali s/o Loung went home and returned after 15/20 minutes at about 08-00 p.m alongwith co-accused Shahid Ali alias Baboo s/o Loung, Zahid Nawaz s/o Ali Nawaz (appellant) armed with iron rod, Wahid Ali s/o Loung Khan, Zahid Ali s/o Ghulam Hyder and Zulfiqar alias Duroo armed with Churri and two unknown persons armed with lathis appeared to whom complainant claimed to identify them if they came before him. It is stated that accused Shahid Ali alias Baboo and Zahid Ali s/o Ghulam Hyder caught hold Shah Wali (deceased) from his arms and accused Zahid Nawaz s/o Ali Nawaz (appellant) inflicted iron rod to Shah Wali at his chest and bleeding started. He fell down. It is stated that accused Zahid Ali s/o Loung and Wahid Ali s/o Loung caught hold Shah Muhammad from the hands and accused Shahid Ali alias Baboo caused injuries to Shah Muhammad. Accused Wahid Ali s/o Loung and Zulfiqar alias Duro caught hold PW Gul Muhammad and the remaining accused caused him injuries. Complainant party raised cries which attracted PWs Ghulam Muhammad, Eid Muhammad and others who rescued the complainant party from the accused persons. Thereafter, accused succeeded in running away. It is stated that Shah Wali was taken to in injured condition to the Government Hospital Tando Jam where he succumbed to the injuries. Remaining

injured persons were admitted in the hospital. In the end of the FIR it is stated that accused persons attacked upon the complainant party, in the result Shah Wali sustained injuries and died. PWs Shah Muhammad and Gul Muhammad received injuries. FIR of the incident was lodged against accused under Sections, 302, 324, 504, 147, 148, 149 PPC.

3. After usual investigation, challan was submitted against accused in which accused Wahid Ali was shown as juvenile offender and trial court bifurcated his case for trial under the Juvenile Justice System Ordinance, 2000.

4. Trial Court framed charge against accused Zahid Nawaz son Ali Nawaz, Shahid alias Baboo son of Loung, Zahid Ali son of Loung, Zahid son of Ghulam Hyder, all by caste Saraz and Zulfiqar alias Duroo son of Ghulam Hyder under Sections 302, 324, 147, 148, 149 PPC at Ex.6. Accused pleaded not guilty and claimed to be tried.

5. At trial, prosecution examined in all eight (08) witnesses. Thereafter, prosecution side was closed.

6. Trial court recorded the statements of accused under Section 342 Cr.P.C to which accused claimed false implication in this case and denied the prosecution allegations. Accused did not lead any evidence in defence and declined to give statement on Oath in disproof of the prosecution allegations. Trial court after hearing the learned counsel for the parties and assessment of the evidence vide judgment dated 24<sup>th</sup> July 2013 convicted the accused and sentenced them as under:-

**“Point No.3:-**

**33. To sum up, the statement of star PWs No.1, 4 & 5 injured Shah Muhammad and Gul Muhammad duly corroborated by Medical evidence of Dr. Ramesh Babu, besides circumstantial evidence of PWs and SIP Muhammad Yousif established beyond reasonable doubt that on the stated date, time and place all the accused arrived in furtherance of their common intention and armed with iron rod and knives committed Qatl-i-Amd of deceased Shah Wali within the meanings of Section 302(b) PPC and so also caused injuries to**

**Shah Muhammad and Gul Muhammad committed Qatl-i-Amd of PWs No.2 & 3 which caused him injury within the meanings of section 324 r/w section 337-F(1) and 337-F(iv) PPC.**

**34. Therefore, all the accused Zahid Nawaz s/o Ali Nawaz, (2) Shahid alias Baboo, (3) Zahid s/o Loung, (4) Zahid s/o Ghulam Hyder and Zulfiqar alias Duroo s/o Ghulam Hyder are convicted and sentenced in exercise of powers conferred by section 265-H(2) Cr.P.C as under:-**

**U/S 302(b) r/w section 149 PPC.**

**35. As the fatal injury which took the life of deceased Shah Wali was caused by accused Zahid Nawaz s/o Ali Nawaz Saraz with Iron rod at the chest of deceased Shah Wali, he deserves no leniency and sentenced to death as Ta'zir. He be hanged by neck till he is dead. Accused Shahid alias Baboo, Zahid Ali s/o Loung, Zahid Ali s/o Ghulam Hyder and Zulfiqar alias Duroo were also with him in furtherance of common object and facilitated the main accused, therefore, they are sentenced to suffer rigorous imprisonment for life, as Tazir.**

**U/S 324/337-F(iv) & 337-F(i) r/w section 149 PPC.**

**36. As all the accused persons in furtherance of their common object caused injuries to PW-2 Shah Muhammad and PW-3 Gul Muhammad in a manner if committed their Qatl-i-Amd and injured them, therefore, they are sentenced to suffer RI for 10 years plus RI for 05 years and also to pay Daman to the tune of Rs.25000/- each plus RI for one year and also to pay Daman to the tune of Rs.25000/- each for actual injuries to injured PW-2 Shah Muhammad and PW-3 Gul Muhammad.**

**37. U/s 544-A Cr.P.C r/w the judgment of Honourable Supreme Court reported as 1995 SCMR 1776 the accused persons are directed to pay compensation of Rs.200,000/- jointly to the legal heirs of deceased Shah Wali. In default thereof, the accused shall suffer simple imprisonment for six months.**

**38. The sentences of imprisonment shall run concurrently. All the accused shall be entitled to benefit under section 382-B Cr.P.C, if any."**

Trial court made reference to this court for confirmation of death sentence as required u/s 374 Cr.P.C.

7. Appellant Zahid Nawaz filed Criminal Jail Appeal No.D-51 of 2013 against the impugned judgment dated 24<sup>th</sup> July 2013. All the appellants except appellant Zahid Nawaz entered into compromise with the complainant party and they were acquitted by way of compromise in

Criminal Appeal No.D-67 of 2013 vide order dated 28.01.2014. However, appeal No.D-51 of 2013 filed by appellant Zahid Nawaz was remanded back to the trial court vide order dated 02.05.2019 for recording the statement of accused 342 Cr.P.C afresh by putting all the incriminating pieces of evidence against the accused. Confirmation reference made by the trial court in terms of Section 374 Cr.P.C was answered in negative.

8. Trial court recorded the statement of appellant / accused afresh after remand of the case on 20.11.2019. Appellant denied the prosecution allegations leveled against him and raised plea that PWs have deposed against him due to enmity as they are interested. Appellant did not lead any evidence in defence and declined to give statement on Oath in disproof of the prosecution allegations. However, appellant has produced Photostat copy of newspaper dated 25.09.2017 at Ex.46/A in order to show that he has been falsely implicated in this case due to enmity.

9. Learned trial court after hearing the learned advocate for appellant, learned DDPP for the State and assessment of the evidence vide judgment dated 27.11.2019 convicted the appellant u/s 302(b) PPC as Ta'zir and sentenced him to death. Appellant was ordered to pay the compensation of Rs.100,000/- to be paid to the legal heirs of deceased Shah Wali in terms of Section 544-A Cr.P.C. In default in payment of compensation, appellant was ordered to suffer SI for 06 months. Appellant was also convicted u/s 148 r/w 149 PPC and sentenced to one year RI. Trial court made reference to this court for confirmation of death sentence as provided u/s 374 Cr.P.C. Hence, the appellant filed the instant appeal.

10. We have heard Mr. Shakir Nawaz Shar, learned counsel for appellant, Mr. Shewak Rathore, Deputy Prosecutor General Sindh and perused the evidence available on record.

11. Mr. Shakir Nawaz Shar, learned advocate for appellant after arguing the appeal at some length, submitted that he would not press the appeal on merits but prayed for reduction of sentence of death to the

imprisonment for life on the ground that there are several mitigating circumstances in this case such as prosecution has failed to prove the motive against appellant at trial and motive was shrouded in mystery. It is further submitted that life imprisonment is alternate sentence under section 302(b) PPC. In support of his submissions, learned counsel for the appellant has placed reliance upon the case of **HASIL KHAN v. THE STATE and others (2012 SCMR 1936)**, **Mst. Nazia Anwar v. The State and others (2018 SCMR 911)** and **Ghulam Mohyudin v. The State (2014 SCMR 1034)**.

12. On the other hand, Mr. Shewak Rathore, learned Deputy Prosecutor General Sindh argued that prosecution has established its' case against the appellant. However, he conceded to the contention raised by learned defence counsel that motive as set up by prosecution in FIR could not be established at trial and recorded no objection for reduction of sentence of death to imprisonment for life.

13. Ms. Gul Bano, learned advocate for complainant argued that prosecution has proved its' case against the appellant beyond reasonable doubt and appellant deserves no leniency for reduction of sentence of death to the imprisonment for life.

14. We have heard the arguments of learned counsel for the parties and scanned the entire material available on record with their assistance.

15. Learned advocate for appellant did not press the appeal on merits mainly on the ground that there are mitigating circumstances in the case. In FIR No.165/2007 lodged by complainant Muhammad Shah it is clearly mentioned that **accused Zahid Ali s/o Loung came to the shop of complainant for purchase of some articles on credit basis to which he was refused** then he went to the home and brought the other accused persons including the present appellant who was armed with iron rod. In the evidence of complainant once again he clearly stated that accused Zahid Ali s/o Loung had come to his shop and asked for a few articles on

credit but he refused and there was exchange of hot words. **Other injured namely Ghulam Muhammad has also deposed that accused Zahid s/o Loung had gone to the shop of complainant for purchase of articles and on refusal hot words were exchanged.** Thereafter, accused went home but returned back alongwith other accused persons including appellant who was armed with iron rod and inflicted such rod on the chest of deceased Shah Wali. **It is clear from the evidence of eye witnesses that there was exchange of hot words in between complainant and accused Zahid s/o Loung as to why brother of complainant namely Shah Wali was murdered. Deputy Prosecutor General failed to satisfy us as to why Shah Wali was killed by appellant, who had no ill will against deceased.** Appellant had no direct motive against the deceased. Moreover, prosecution has failed to prove the motive that which articles accused Zahid s/o Loung had asked from the complainant and what was the value of such articles. We are satisfied that prosecution has established its' case against the appellant but failed to prove the motive against appellant for commission of the offence. At the most it was the case of no direct motive against the appellant. It has not come on record that on which matter there was exchange of hot words in between complainant and accused Zahid s/o Loung even I.O has not bothered to investigate motive during investigation. Trial court was also not clear in mind about motive for the commission of offence. We have no hesitation to hold that origin of the offence remains shrouded in mystery. Un-natural death of the deceased by means of sharp edged weapon is not disputed. Presence of injured witnesses is not the controversy. Therefore, we hold that ocular evidence is corroborated by medical evidence. It is proved that appellant had committed the murder of Shah Wali by means of sharp edged weapon but motive against the appellant was shrouded in mystery. Rightly reliance has been placed upon the cases reported as **HASIL KHAN v. THE STATE and others (2012 SCMR 1936)**. The relevant para of the said judgment is reproduced as under:-

“9. Both the courts i.e. the learned trial Court and the learned High Court having appreciated the evidence led have found the same to be credible and have concurrently rendered findings of guilt against the appellant. We do not find the said appreciation of evidence to be reflective of any misreading, non-reading or violative of law declared. However, coming to the question of enhancement of sentence by the learned High Court, we find that the learned High Court did not appreciate that the motive alleged in the F.I.R. was rather weak and there was no reason why Saeed Bakhsh, deceased, should have been the victim of the said motive part of the prosecution story. Moreover, as rightly observed by the learned Trial Court the immediate motive remained shrouded in mystery and the Trial Court rightly did not award the maximum sentence of death provided under section 302(b), P.P.C. to the appellant. The enhancement of sentence by the learned High Court, we may observe with respect, is not in accord with the law laid down by this Court in Muhammad Ashraf Khan Tareen v. The State (1996 SCMR 1747) wherein at page 1755, the Court dismissed complainant's appeal and did not enhance the sentence by holding as follows:--

"In respect of sentence, learned counsel for the complainant/State wanted conversion of the life imprisonment into death sentence. Learned counsel cited case of Iftikhar Ahmad v. The State (PLD 1990 Supreme Court 820) where criminal petition by the complainant challenging reduction of sentence by the High Court, was dismissed by this Court on the ground that the principle of origin of offence remained shrouded in mystery. This authority does not further prayer of the complainant for awarding death penalty to the appellant. In the present case prosecution did not allege any specific motive for commission of the offence. In the circumstances, the appellant could not have been awarded the death penalty."

The next issue is whether there is sufficient mitigation to justify the reduction in sentence from death to that of life imprisonment which is the alternate sentence under section 302(b), P.P.C the potential resort to which has been made clear by the Supreme Court in the case of **Ghulam Mohy-Ud-Din v. State (2014 SCMR 1034)**.

16. For the above stated reasons while respectfully relying upon the above cited authorities, we have come to the conclusion that prosecution succeeded to prove its' case against the appellant beyond reasonable doubt but specific motive for commission of offence against appellant could not be proved at trial and the immediate motive remained shrouded in mystery. These are the mitigating circumstances in the case.



Maintaining the death sentence would be unwarranted in peculiar circumstances of this case and appellant has made out a case for reduction in his sentence from that of death to imprisonment for life.

17. For the above stated reasons, instant Criminal Appeal No.D-211 of 2019 and Criminal Jail Appeal No.D-221 of 2019 are dismissed to the extent of appellant's conviction for offence u/s 302(b) PPC as Ta'zir are concerned but the same are partly allowed to the extent of his sentence of death which is reduced to imprisonment for life. Appellant is ordered to pay compensation of Rs.1,00,000/- (Rupees one lac) to the legal heirs of deceased as directed by trial Court. In case of default thereof, appellant shall suffer SI for six months. Appellant shall be entitled to the benefit of Section 382-B Cr.P.C. Confirmation Reference No. 50 of 2019 made by trial Court for confirmation of death sentence is answered in **NEGATIVE** and death sentence is **NOT CONFIRMED**.

JUDGE

JUDGE

Tufail