

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Cr. Jail Appeal No.D-40 of 2020
Cr. Conf. Case No.D-36 of 2020

PRESENT:

**Mr. Justice Naimatullah Phulpoto,
Mr. Justice Khadim Hussain Tunio,**

Appellant : Ghulam Mahdi Abro, through Mr. Sarfraz Khan Jatoi,
Advocate.

Respondent : The State, through Mr. Ali Anwar Kandhro, Addl. P.G.

Date of hearing : 27.09.2022.

Date of Judgment : 27.09.2022.

J U D G M E N T .

Naimatullah Phulpoto, J.- Appellant Ghulam Mahdi Abro was tried along with accused Ali Gul by learned III-Additional Sessions Judge(MCTC), Larkana, in Sessions Case No.271/2017 re-The State v. Ghulam Mahdi & another, for offences under Sections 302, 504, 34, PPC, who found appellant guilty for the said offence and acquitted co-accused Ali Gul vide judgment dated 08.12.2020 and sentenced him to death, subject to confirmation by this Court. A reference is made to this Court for confirmation of death sentence awarded to the appellant. By this judgment, we propose to dispose of Cr. Appeal No.D-40/2020 and Confirmation Reference No.D-36/2020 together.

2. Episode leading to unnatural death of deceased Oshaque Ali Abro amounting to murder took place on or about 21.08.2004, at 1045 hours, at Imam

Bargah Shahnawaz Bukhari, Larkana. According to the prosecution, complainant Oshaque Ali (now deceased) had restrained appellant Ghulam Mahdi from taking hemp (Bhang) in the Imam Bargah. It is stated that appellant was annoyed with deceased for such objection. On 21.08.2004, deceased Oshaque Ali and PWs Zahid Hussain and Aandal Khan were standing at Imam Bargah, where, it is alleged that appellant Ghulam Mahdi son of Nazar Mohammad Abro armed with DBBL gun and Ali Gul armed with SBBL gun appeared. Ali Gul Abro asked the complainant as to why he had objected the appellant from taking hemp in the Imam Bargah and declared that he would not be spared. Thereafter, appellant Ghulam Mahdi fired from his gun, which hit the complainant at the knee of his right leg and he fell down. Complainant party raised cries and both accused ran away. Complainant was taken to the Police Station Rehmatpur, Larkana, where he lodged FIR against appellant and Ali Gul on 21.08.2004 at 1120 hours. It was recorded by incharge ASI Aijaz Ali Khan Pathan vide Crime No.45/2004, for offence under Sections 324, 504, 34, PPC. After completion of investigation, challan was submitted against the accused u/s 324, 504, 34, PPC.

3. Learned 1st Additional Sessions Judge, Larkana framed first charge against the appellant and co-accused Ali Gul on 15.12.2005 under Sections 324, 504 read with Section 34, PPC and recorded evidence of some PWs. Injured died on 02.09.2004. Amended charge under Section 302, 504 and 34, PPC was framed on 17.01.2007, but same evidence already recorded was adopted on 20.08.2007. On the conclusion of the trial, appellant Ghulam Mahdi and co-accused Ali Gul were convicted by the learned 6th Additional Sessions Judge, Larkana vide his judgment dated 14.12.2010 for offence u/s 302, PPC and sentenced to suffer the imprisonment for life. They filed Cr. Appeal No.S-141/2010 and this Court vide judgment dated 02.6.2017 remanded the case to

the trial Court for framing the amended charge and recording the evidence afresh. Thereafter, trial Court framed the amended charge in terms of the remand orders passed by this Court and recorded the evidence of 08 prosecution witnesses. Thereafter, statements of the accused were recorded u/s 342, Cr.P.C afresh. Appellant and co-accused Ali Gul claimed false implication in this case and denied the prosecution allegations. Accused, however, neither examined themselves on oath in disproof of the prosecution allegations nor led any evidence in their defence. Trial Court after hearing the learned Counsel for the parties and assessment of the evidence, convicted and sentenced appellant Ghulam Mahdi and awarded him death sentence subject to confirmation by this Court, however, co-accused Ali Gul was acquitted of the charges.

4. We have heard Mr. Sarfraz Khan Jatoi, learned Counsel for the appellant and Mr. Ali Anwar Kandhro, learned Addl. P.G. for the State. Latter has supported the impugned judgment.

5. The fact that deceased Oshaque Ali died an unnatural death is not open to controversy. Besides, the ocular testimony which we will discuss at proper time, there is evidence of Dr. Mushtaq Ahmed (EX.23) on record to prove this aspect of the case. He had conducted autopsy on the dead body of deceased Oshaque Ali and opined that deceased died an unnatural death by means of firearm injury at right leg.

6. PW Zahid Hussain (Ex.36) has deposed that on 20.8.2004 at 10.45 a.m. he along with Oshaque Ali (now deceased) was standing near the house of Saleem Raza Abro, at that appellant Ghulam Mahdi armed with DBBL gun and accused Ali Gul armed with SBBL gun appeared and asked deceased as to why he was stopping them from using Narcotics substance. Thereafter, appellant

Ghulam Mahdi got annoyed and fired upon Oshaque Ali, which hit him at his right leg. Thereafter, PWs Zahid Hussain and Darban Ali took injured to the police station for lodging the report and from there to the Civil Hospital, Larkana and subsequently to Karachi for better treatment. PW Zahid Hussain could not identify co-accused. He was cross-examined by the defence Counsel and denied the suggestion that he was deposing falsely against the appellant Ghulam Mahdi on the basis of previous enmity. PW Aandal (Ex.38) has also implicated the appellant while deposing that at the time of incident he was present inside the Imam Bargah, appellant fired upon deceased when he was going to the house from Imam Bargah. He heard firearm report and saw that complainant (now deceased) was lying in injured condition. Complainant lodged the FIR and succumbed to the injury later on. However, witness did not implicate the accused. SHO Aijaz Ali (Ex.42) has stated that on 21.08.2004 complainant Oshaque Ali (now deceased) appeared at police station and lodged FIR. Investigation has been carried out in this case by Inspector Abdul Ali. He had referred injured to Chandka Hospital for treatment and he inspected the place of wardhat and collected one empty of 12-bore and injured died on 02.09.2004 in hospital at Karachi and conducted further investigation of the case.

7. Re-appraisal of evidence reflects that occurrence in this case had taken place in brought daylight at Imam Bargah Shahnawaz Bukhari, Larkana. An FIR in respect of the alleged offence had been lodged by deceased complainant within 35 minutes, wherein present appellant was named as sole perpetrator of the alleged murder. PW Zahid Hussain was a natural witness of the occurrence being resident of the mohalla, where incident had taken place and the time of occurrence was such that PW Zahid Hussain was likely to be present at the place of incident. As far as the contention of defence Counsel that

eye-witness Zahid Hussain was closely related to deceased, therefore, his testimony cannot be believed to sustain the conviction of appellant. It is by now a well-established principle of law that mere relationship of the prosecution witness with deceased cannot be a ground to discard the testimony of such witness unless previous enmity or ill-will is established on record to falsely implicate the accused in the case. It is also held that conviction in a murder case can be based on the testimony of a single eye-witness, if Court is satisfied that he is reliable, it is quality of evidence and not the quantity which matters. Reliance is placed upon the case of *Ijaz Ahmed v. The State and others* (2022 SCMR 1577). The record of the case shows that FIR was lodged by the deceased himself promptly and complainant/injured succumbed to the injury on 02.09.2004 at Karachi hospital. Medical evidence had provided full support to the ocular account furnished by PW Zahid Hussain, in which he had specifically attributed role to the appellant in the commission of the offence. Learned trial Court had taken an exhaustive analysis of evidence available on record and had then concurred in its conclusion with the trial Court regarding guilt of the appellant having been established to the hilt and upon our independent re-examination and re-assessment of the evidence we have not been able to take a view of the matter different from that taken by the trial Court.

8. Prosecution has tried to establish motive through the evidence of PW Zahid. Evidence of PW Zahid, who speaks of a quarrel over use of narcotics substance/ selling of hemp (Bhang) by the appellant in the Imam Bargah, but it has not come on record, on which date, time and place deceased had quarreled/objected over use of narcotics substance by the appellant and in whose presence. Moreover, generally it is observed that use of narcotics substance in Imam Bargah premises is rare. It is also the question for

consideration before this Court as to why appellant selected lower part of the body of the deceased for firing and as to why fire was not repeated. In the FIR, it is mentioned that co-accused Ali Gul (since acquitted) had firstly abused the deceased complainant and was armed with firearm, as to why fire was not opened by him. Prosecution failed to explain the same. It clearly shows that motive was shrouded in mystery.

9. We have carefully attended to the sentence of death passed against the appellant and have come to the conclusion that motive set up by the prosecution had remained far from being established. According to the FIR (Ex.15), motive was based upon the objection of the complainant to the appellant for use of narcotics substance at Imam Bargah, but prosecution has examined PW Zahid Hussain only to prove the alleged motive, and PW Zahid Hussain in his evidence has not mentioned that deceased had objected to the appellant's for use of narcotics substance at the Imam Bargah. Date, time and place of such objection are not mentioned. Even it is not mentioned by PW Zahid that he was present when such objection was raised by the deceased. In these circumstances, it is quite obvious to us that motive asserted by the prosecution had remained utterly unproved. The law is settled by now that if the prosecution asserts a motive but fails to prove the same, then such failure on the part of the prosecution may react against sentence of death passed against a convict on the charge of murder.

10. After re-examination and re-assessment of the entire evidence, we have found that appellant was responsible for the murder of deceased, yet theory of prosecution has many inherent obscurities ingrained therein. Prosecution has failed to answer as to why appellant selected lower part of the deceased for

firing. We have, thus entertained no manner of doubt that real cause of occurrence was something different, which had been completely suppressed by both parties to the case and real cause of occurrence has remained shrouded in mystery. Such circumstances of this case have put us to caution in the matter of appellant's sentence and in particular the circumstance of the case we have decided to withhold the sentence of death passed against appellant. Reliance is placed upon the cases reported as Ahmad Nawaz and another v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaisar Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz and another v. The State and another (2012 SCMR 267), Muhammad Imran alias Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another v. The State and another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another v. The State (2014 SCMR 1658), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR 2035), Qaddan and others v. The State (2017 SCMR 148), Mst. Nazia Anwar v. The State and others (2018 SCMR 911) and Aijaz Ahmed v. The State and others (2022 SCMR 1577). Apart from that, co-accused Ali Gul who was armed with gun at the time of incident and had abused the deceased, has already been acquitted by the trial Court and, thus, some doubts about the veracity of the prosecution's case have emerged which doubts may not be sufficient to acquit the appellant but the same may well be considered towards exercising caution in the matter of the appellant's sentence of death, as held in the case of Abdul Nabi v. The State (2017 SCMR 335).

11. For what has been discussed above, this appeal is dismissed to the extent of appellant's conviction for offence u/s 302(b), PPC, but the same is

partly allowed to the extent of his sentence of death, which is reduced to imprisonment for life. Trial Court has failed to pass the orders regarding compensation to be paid to the legal heirs of deceased in terms of Section 544-A, Cr.P.C. It is ordered that appellant shall pay Rs.300,000/- to the legal heirs of the deceased; in case of default he shall suffer S.I. for 06 months more. However, appellant shall be entitled to the benefit of Section 382(B) Cr.P.C.

12. In the view of above, appeal as well as confirmation reference made by trial Court are disposed of in above terms.

JUDGE

JUDGE