

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

**Present:**

**Mr. Justice Salahuddin Panhwar.**

**Mr. Justice Fahim Ahmed Siddiqui.**

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Crl. Jail Appeal No.D-106 of 2014.

Nizamuddin . .....Appellant.

**Versus**

The State. ....Respondent.

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Crl. Appeal No.D-212 of 2012.

Gada Hussain. ....Appellant

**Versus**

The State. ....Respondent.

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Crl. Rev. App No.D-75 of 2014.

Mumtaz Ali. ....Applicant.

**Versus**

Nizamuddin alias Nazar and another. ....Respondents.

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**Appearance:**

Syed Madad Ali Shah, Advocate for appellant in Cr. Appeal No. D-212/2012

Miss. Ambreen Siyal, Advocate for appellant Nizamuddin in Cr. Jail Appeal No. D-106/2014 and for respondent No. 1 in Cr. Rev App No. D-75/2014

Mr. Ahsan Gul Dahri, Advocate for Applicant in Cr. Rev. Application No. D-75/2014 and for complainant in criminal appeals.

Mr. Shahzado Saleem Nahyoon, Deputy Prosecutor General.

Date of hearing: 29.09.2017.

Date of Judgment: 29.09.2017.

## **JUDGMENT**

**Fahim Ahmed Siddiqui, J-**. This single judgment will dispose of the aforementioned criminal appeals as well as criminal revision application. The present appellants-original accused in Sessions Case No.159 of 2007 are charged and tried by the Additional Sessions Judge-I, Shaheed Benazirabad for the offence punishable under Sections 302, 34 PPC. Initially, the appellant Gada Hussain and others were tried and only appellant Gada Hussain was convicted and sentenced vide judgment dated 30-06-2012, while the case against the appellant Nizamuddin was kept on dormant file, as he was absconder at such time. After the arrest of appellant Nizamuddin, he was separately tried, convicted and sentenced under almost an identical judgment dated 28-02-2014.

2. It is the case of the prosecution that the complainant Mumtaz Ali has reported at PS Kazi Ahmed that he along with his father Muhammad Saleh and brother Ali Akber is running a general store. There was an altercation on 20-03-2007 between his cousin and accused Gada Hussain @ Mumtaz on the issue of standing in front of the house of complainant's cousin. Due to such altercation, accused Gada Hussain was annoyed and used to say that he would take revenge. On the day of incident, complainant and his father were going to their house after leaving his brother Ali Akber at the store. At about 06-00 p.m., when they reached near the clinic of Dr Sahib Khan at National Highway, they met with accused Gada Hussain, Nizamuddin, Babu and three

unidentified persons, armed with iron rods and batons. Accused Gada Hussain after abusing his (complainant's) father Muhammad Saleh, caused iron bars blows on his head, who after sustaining injuries fell down. The remaining accused persons also caused batons blows on his head and other parts of body. They raised cries, which attracted the PWs, and the accused persons decamped. The complainant had taken his father to police station from where he was referred to Nawabshah Hospital, but he succumbed to injuries in the way to hospital.

3. Subsequently, accused were arrested and after investigation they were referred for trial by submitting a Final Report. After completing the requisite formalities, the case was entrusted to the trial Court, charge was framed against the accused persons including appellants.

4. In order to bring home the charge levelled against the accused persons, prosecution has examined in all seven witnesses as under:-

- |      |                              |              |
|------|------------------------------|--------------|
| i.   | Complainant Mumtaz Ali Siyal | (Exhibit-11) |
| ii.  | Ghulam Qadir Siyal           | (Exhibit-12) |
| iii. | Muhammad Raheem Siyal        | (Exhibit-13) |
| iv.  | Muhammad Eisa Dahri          | (Exhibit-14) |
| v.   | Dr Capt Sikandar Ali         | (Exhibit-15) |
| vi.  | SHO Abdul Haq Rajput         | (Exhibit-16) |
| vii. | Tapedar Masood Khan Jatoi    | (Exhibit-17) |

viii. Inspector Azizullah Morio (Exhibit-18)

5. To establish the culpability of the accused persons, prosecution also produced and relied upon the following documentary evidence.

- i. Copy of FIR No. 73/2007 of PS Kazi Ahmed. (Exhibit-11/A)
- ii. Statement of PW Ghulam Qadir Siyal recorded by Judicial Magistrate, Sakran. (Exhibit-12/A)
- iii. Statement of PW Muhammad Raheem Siyal recorded by Judicial Magistrate, Sakran. (Exhibit-13/A)
- iv. Memo of Inspection of Dead-body. (Exhibit-14/A)
- v. Inquest Report of deceased Muhammad Saleh. (Exhibit-14/B)
- vi. Memo of Venue of Incident. (Exhibit-14/C)
- vii. Memo of Last Wearing Clothes of Deceased. (Exhibit-14/D)
- viii. Memo of Arrest of Accused. (Exhibit-14/E)
- ix. Memo of Recovery of Iron-rod. (Exhibit-14/F)
- x. Memo of Recovery of Baton (lathi/wooden rod) from accused Nizamuddin. (Exhibit-14/G)
- xi. Memo of Recovery of Baton (lathi/wooden rod) from accused Babu. (Exhibit-14/H)
- xii. Memo of Arrest of accused Abdul Sattar and Saeed Khan and Recovery of Star Motorcycle and Batons (lathi/wooden rods) on their pointation. (Exhibit-14/I)
- xiii. Police Letter. (Exhibit-15/A)
- xiv. Post-mortem Report. (Exhibit-15/B)
- xv. Referral Letter issued by Dr Ahsan Ali. (Exhibit-15/C)
- xvi. Three OPD Slips. (Exhibit-15/D to Exhibit-15/F)
- xvii. Three Sketches of Place of Incident. (Exhibit-17/A to Exhibit-17/C)
- xviii. Letter issued by Mukhtiarkar of Taluka Kazi Ahmed for inspection of Place of Incident. (Exhibit-17/D)
- xix. Letter issued by Police to Medical officer for conducting post-mortem of the deceased. (Exhibit-18/A)
- xx. Report of Chemical Examiner regarding blood stained rod. (Exhibit-18/B)

6. At the end of the trial, learned trial judge recorded the statements of accused (present appellants) under Section 342 CrPC, who denied all the allegations levelled against them by the prosecution in the edit statements so recorded.

7. After evaluating the oral and documentary evidence produced before it, the learned trial Court, through the aforesaid separate judgments, came to conclusion that both the appellants are guilty hence through impugned judgments, appellant/accused Gada Hussain son of Bakhsh Shah was convicted and sentenced to death for the offence punishable under Section 302 (b) for causing death to deceased Muhammad Saleh while appellant/accused Nizamuddin @ Nazar son of Amir Bux Mallah was convicted and sentenced for life imprisonment for the offence punishable under Section 302 (b) PPC, and also to pay compensation of Rs.100,000/- to the legal heirs of deceased Muhammad Saleh, in case of failure to pay the compensation, the accused/appellant shall undergo simple imprisonment for six months more.

8. We have heard the arguments advanced and have gone through the relevant record.

9. Mr. Maddad Ali Shah advocate for appellant Gada Hussain (Criminal Appeal No.D-212/2012) contends that the motive is not against the appellant and the same was not proved; there was no independent witness of the incident; the other members of complainant party did not try to intervene and save the deceased in spite of the fact

that the accused persons were not armed with firearm weapons. According to him, the incident was an un-witnessed incident and the eyewitnesses shown in the prosecution case are false ones and they deposed lies before the Court. He submits that the iron rod was sent for chemical examination after a considerable delay, as such the report of Chemical Examiner cannot be relied upon. According to him, the allegations against the appellants and acquitted accused are almost similar; therefore, appellant should be acquitted by extending similar treatment. He relies upon the following reported cases.

- i. Habib v. The State; 2014 PCrLJ 1067
- ii. Muhammad Asif v. The State; 2017 SCMR 486
- iii. Ansar Ali and another v. The State; 2010 SCMR 1821
- iv. Allah Bachaya and another v. The State; PLD 2008 Supreme Court 349
- v. Manzoor Hussain and another v. The State; 1999 YLR 496
- vi. Pathan v. The State; 2015 SCMR 315
- vii. Sajid Ali Shah v. The State; 2010 PCrLJ 211
- viii. Nadim alias Nanha alias Billa Sher v. The State; 2010 SCMR 949
- ix. Ali Nawaz v. The State; 2010 PCrLJ 1345
- x. Kamran and others v. The State; SBLR 2014 SC 177
- xi. Muhammad Shah v. The State; 2010 SCMR 1009

10. Ms. Ambreen Siyal, learned counsel for appellant Nizamuddin (Criminal Jail Appeal No.D-106/2014), after adopting the arguments advanced by Mr. Madad Ali Shah, submits that her client Nizamuddin is innocent and the case was not proved against him. According to her, the case against the appellant Nizamuddin is not distinguishing from those accused persons who have been acquitted by the trial Court.

11. Mr. Ahsan Gul Dahri, advocate for applicant in Criminal Revision No.D-75/2014 supports the impugned judgment passed against accused Gada Hussain but his contention is that the quantum of sentence for accused Nizamuddin is lesser and considering the part played by him, the capital punishment should be awarded to him. According to him, the deceased received two injuries on his head and the second injury was caused by accused Nizamuddin.

12. Mr. Shahzad Saleem Nahyoon supports the impugned judgment and he prayed for maintaining the sentences pronounced by the learned trial Court.

13. We have gone through the oral as well as documentary evidence produced before the trial Court. In the instant case, the motive for causing murder of deceased Muhammad Saleh is specifically alleged and confined against the appellant/accused Gada Hussain Shah *only*. As per prosecution evidence, the injuries sustained by the deceased on his head were proved to be fatal for his life. It has come on the record

through plenty of evidence that the first injury at his head was caused by appellant/accused Gada Hussain Shah with an iron rod and the said rod was recovered on pointation of appellant Gada Husain. The act of specific attribution of *motive* and *fatal* blow to the appellant Gada Hussain Shah by the complainant, the real son of the deceased, is *normally* to be accepted because the *blood-relation* may exaggerate but shall not let the real culprit go *free*. The reference may be made to the case of Zahoor Ahmed v. State 2007 SCMR 1519. As far as contention of the learned counsel for the appellant is concerned regarding delay in sending the said iron-rod is concerned, we are of the view that after recovery the said iron rod was sealed on the spot and it was transmitted to Chemical Examiner in the sealed condition, as such it will not improve the case of the appellant Gada Hussain particularly when the *ocular* account strongly connects the appellant and such *recovery* strengthens the ocular account. We are of the view that the entire prosecution case cannot be falsified solely on the ground of delay in sending the iron rod to the Chemical Examiner which *otherwise* is a duty of the investigating agency.

14. Mr Madad Ali Shah learned counsel for the appellant Gada Hussain also emphasised upon non-availability of eyewitnesses at the scene of incident. According to him, the alleged incident is an un-witnessed incident, and the contention of the prosecution witnesses regarding their availability at the scene and time of incident is not correct. Although the learned Consul for the appellant tries to make it a



great point but in fact he could not establish from the available record that the prosecution witnesses were not available at the relevant time and place of the incident. The complainant's presence with the deceased is quite natural and witnesses were attracted on cries of complainant party therefore, such *attraction* was also quite logical. The shifting of the deceased in injured condition to hospital by the witnesses also strengthened their claim of their *availability* at such place. It appears from the evidence that the incident was taken place in a spur of moment and the first blow was proved to be fatal for the deceased as such question of saving the life of deceased by the prosecution witnesses does not arise particularly when the prosecution claimed that appearance of witnesses other than complainant resulted in decamping of the accused persons from scene.

15. We have gone through the medical evidence and found that the same is in the harmony of the ocular account of the incident. The fatal injury to the deceased was caused on his head and as per prosecution evidence, the first blow with iron rod was caused by appellant Gada Hussain. Regarding causing injury to the deceased by appellant Gada Hussain, the complainant and other eye witnesses depositions are in consonant to each other. However, as per deposition of Medical Officer of RHC Kazi Ahmed (Dr. Capt Sikandar Ali), he found following injuries on external examination of the deceased:

- i. A lacerated wound measuring 2.5 cm X 1 cm scalp deep on anterior part of right parietal region of head with underlying sector of right parietal bone.

- ii. A lacerated wound with diffuse swelling measuring 2.5 cm X 1 cm scalp deep on posterior part of left parietal region of head with underlying fracture of left parietal bone.

16. It has come on the record that after falling to ground, the accused persons had caused further blows with batons (lathies). It has also come on the record that only the appellant Gada Husain was armed with iron rod. Although, the two injuries mentioned above are caused at different regions of head but they are similar in nature, meaning thereby that the tool of injury is also same or similar. We are of the view that the first injury was definitely caused by the appellant Gada Hussain while the second injury may be caused after falling of the deceased on the ground for which no specific allegation is levelled against the other nominated co-accused persons but from the nature of injury, a strong presumption may be drawn that the same is also caused by an iron rod. Be as it may, since the prosecution strongly stuck with their claim of *fatal* injury to have been caused by the appellant Gada Hussain hence benefit of *second* injury cannot be claimed by the appellant Gada Hussain when trial Court while properly appreciating evidence did acquit other accused. It is worth noting that only one iron-rod was found blood stained and Chemical Examiner verified that it was stained with human blood. Such *iron rod* was recovered at the pointation of the appellant Gada Hussain which is *admissible* hence strengthened the case of prosecution with regard to charge against appellant Gada Hussain. Although, PWs Ghulam Qadir and Muhammad Raheem have stated that

the appellant Nizamuddin was armed with a lathi (covered with iron) but the same was neither produced by the prosecution during trial nor the same was recovered during investigation. Besides, the complainant has not stated that the appellant Nizamuddin was armed with a lathi (covered with iron or iron plate) and the same was used by him for causing injury to the head of the deceased. In fact, the complainant has stated that when the deceased fell down after receiving fatal blow by appellant Gada Hussain, the other accused also caused lathi blows to him. The statement of the complainant is in harmony with the documentary evidence produced before the court. We are of the view that the allegation levelled by the aforesaid witnesses is actually exaggeration and overstatement and the same cannot be relied upon in absence of any corroboration. As no corroborative piece of evidence in support of the testimony of PWs Ghulam Qadir and Muhammad Raheem is available; therefore, the allegations levelled against appellant/accused Nizamuddin is similar to those accused who have been acquitted by the trial Court. In such a situation, we are of the view that appellant/accused Nizamuddin is also entitled for the same treatment.

17. Now come to the conviction and sentence awarded to appellant/accused Gada Hussain, whom the learned trial judge has awarded death sentence for causing murder of the deceased. The learned counsel for the appellant/accused Gada Hussain emphasised that the allegations against the appellant as well as acquitted accused are similar; therefore, he should be acquitted. In this respect, he relied upon certain

case laws but the fact is that present case is distinguishing to those cases, which were relied by the learned counsel for the appellant Gada Hussain. Here, it may be referred that to earn an acquittal on the basis of acquittal of co-accused, it is always necessary to establish that cases of both accused are not divisible. However, if the cases are divisible and case of convict is corroborated by other pieces of evidences then a referral to acquittal of co-accused would be of no importance. Reference may be made to the case of *Sughra Begum v. Qaiser Pervez* 2015 SCMR 1142 wherein such *principle* is appraised as:

23. After the acquittal of Muhammad Ilyass co-accused, to whom same and similar role was attributed like the appellant and because some of the crime empties did not match with the pistol attributed to the appellant but he was given benefit of doubt along with Babu Muhammad Javed, the latter being a moving spirit behind the whole tragedy then how, in the absence of strong corroboratory evidence, the appellant could be convicted on the same qualify of evidence, which was disbelieved qua the co-accused. In this regard this court in the case of *Ghulam Sikander v. Mamraz Khan (PLD 1985 SC 11)*, has laid down a guiding principle to the effect that when case of the convict is not distinguishable from that of the acquitted accused and the evidence is indivisible in nature then in the absence of strong corroboratory evidence, coming from independent source, the same cannot be made or conviction qua the convict. This rule of law has been followed since long without any exception.

In the instant case, the case against appellant Gada Hussain is strongly corroborated through other *independent* corroborative pieces of evidences like *motive*, *recovery*, as well *chemical report*. It has come on record that the first fatal blow was caused by the appellant/accused Gada Hussain. Although this fact has not come in the charge that in the

incident, the iron rod was used by the appellant/accused Gada Hussein and there was general allegation in the charge but ample evidence that has come on record points at the appellant/accused Gada Hussein as the author of the crime. In the statement under Section 342 CrPC, a question was put to the appellant Gada Hussain, which indicates that the omission of certain particulars of 'charge' has neither misled the accused in his defence nor it has occasioned to failure of justice. We are of the considered view that the defect pointed out by the learned counsel for the appellant/accused is not fatal for the entire trial.

**18.** As far as non-proving of the 'motive' is concerned, in this respect, we would like to say that the fact describing the motive has come into the evidence and the complainant in his deposition has elaborated the same. The motive of the incident is not directly against the deceased or complainant but the same is against the cousin of complainant. The complainant during his deposition has stated that appellant/accused Gada Hussain abused his father by disclosing that his cousin Allah Bux has abused him; therefore, he would not be spared. During cross-examination, the complainant admits that accused Gada Hussain had issued threats for dire consequences but no complaint was made. However, it is a fact that neither Allah Bux was examined nor any other evidence was brought on record by the prosecution to fortify the deposition of complainant regarding 'motive'. Nevertheless, solely weakness of motive is not sufficient to declare that the appellant/accused Gada Hussain is innocent especially when considerable evidence has

come on the record. The learned defence counsel excessively focused on weakness of motive as well as non-proving the motive; but it is by now well settled that absence or weakness of motive would not render case of the prosecution false or fabricated. In this respect, reliance may be made to the cases of **Haroon Rasheed v. The State (2005 SCMR 1568)**, **Muhammad Riaz v. The State (2006 SCMR 954)**, **Zulfiqar Ali v. The State (2008 SCMR 796)** and **Mumriz v. The State (2011 SCMR 1153)**.

19. It is an admitted position that the alleged motive is not directly against the deceased or complainant. The motive is against the cousin of the complainant and this aspect should be considered at the time of sentencing. We are of the view that when the motive is not directly against the deceased or complainant, the same may be considered as mitigating circumstances at the time of pronouncing sentence as held by the Apex Court in a case reported as **Allah Wasayo and another v. The State (2017 SCMR 1797)**. It is also a fact that the motive was brought on record by the complainant only and no other witness has said anything about the motive, which is also a mitigating circumstance for sentence. In this respect, reliance may be taken from the case of **Arshad Beg v. The State (2017 SCMR 1727)**.

20. In view of the above discussion, we came to the conclusion that when there is a remote motive and the same was not corroborated by other pieces of evidence, it will not be appropriate to pronounce death

sentence to the appellant/accused Gada Hussain, as such his sentence is modified from death to rigorous imprisonment for life, as such **Criminal Appeal D-212/2012 (Gada Hussain v. The State)** is disposed of in above terms. However, as the case against appellant/accused Nizamuddin could not be established beyond reasonable doubt; therefore, he is acquitted from charge and **Criminal Jail Appeal No.D-106/2012 (Nizamuddin v. The State)** is allowed while **Cr. Rev. Application No. D-75 of 2014 (Mumtaz Ali Siyal v. Nizamuddin alias Nazro and another)** is hereby dismissed.

**JUDGE**

**JUDGE**