

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

Criminal Jail Appeals No.S-130 and 131 of 2019

Appellant: Through Mr. Muhammad Afzal Jagirani,
Advocate.

State: Through Mr. Ali Anwar Kandhro, Additional
Prosecutor General, Sindh.

Date of hearing: 10.12.2020

Date of Judgment: 10.12.2020.

ORDER

NAIMATULLAH PHULPOTO, J.- This Criminal Jail Appeal is directed against the Judgment dated 29.11.2019, passed by learned Additional Sessions Judge-IV, Dadu in Sessions Case No.180 of 2019, whereby the learned trial Court acquitted the appellant for offence under section 302 P.P.C on the basis of compromise, but convicted him for offence under section 311 P.P.C and sentenced the appellant for ten (10) years as Tazir. The appellant was extended benefit of section 382-B Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the F.I.R. are that one Imtiaz Ali lodged his F.I.R. at Police Station Sita Road, it was recorded vide Crime No. 22 of 2019, under sections 302, 504 P.P.C on 10.05.2019 at 2000 hours, alleging therein that Ms Naila, daughter of Rasheed Ahmed Solangi, aged about 17/18 years (now deceased) was daughter of his sister, she was unmarried and was living with her father Rasheed Ahmed Solangi (present appellant). Mst. Zahida, sister of the complainant told complainant that Rasheed Ahmed had expressed suspicious upon his daughter that she had developed illicit relations with someone; it is further stated that father of deceased asked her, to mend her character. It is alleged that on 07.05.2019, complainant went to the house of his brother-in-law, where Ashiq Ali, cousin of the complainant

was also available. After taking meals, they went to sleep, in the house of the sister. Complainant, his brother-in-law Rasheed Ahmed, sister Zahida, cousin Ashique Ali and deceased Ms Naila were sleeping on separate cots. It is alleged that Ms Naila went towards the bathroom, she did not return back for some time, thereafter father of the deceased called her; it was about 10:00 p.m. In the meanwhile, it is stated that appellant, the father of deceased Ms Naila, took out his pistol from his fold and fired upon his daughter, which hit her on her right side temple and she fell down and succumbed to the injury at spot. The appellant armed with pistol succeeded in running out the house. Complainant and other P.Ws remained over the dead body of Ms Naila till morning and then gave information of the incident to Sita Road Police Station. The dead body was shifted to the hospital by the police, after completion of the necessary formalities. After conducting the postmortem examination, funeral and burial ceremonies were conducted. Thereafter, complainant went to the Police Station and lodged F.I.R. against Rasheed Ahmed, who is the father of the deceased.

3. The motive alleged in the F.I.R. was that father / appellant suspected his daughter deceased Ms Naila, on illicit relations with someone; F.I.R. was lodged on 10.05.2019 at 2000 hours, it was recorded by S.H.O. P.S. Sita Road vide Crime No.22 of 2019 for offence under section 302, 504 P.P.C. After usual investigation challan was submitted against the appellant under section 302, 504 P.P.C; learned Sessions Judge Dadu framed the charge against appellant-accused Rasheed Ahmed Solangi at Ex.3 for offence under section 302, 34 P.P.C, accused pleaded not guilty and claimed to be tried.

4. During trial compromise application was filed before the trial Court on 20.08.2019. Notice was issued to the D.D.P.P and trial Court called for the report about the legal heirs of the deceased in order to ascertain

genuineness of compromise. After completion of the usual formalities, trial Court heard the compromise application vide order dated 30.09.2019, postponed the hearing of the compromise application and directed the prosecution to adduce evidence to prove Fasad-fil-Arz. Thereafter D.D.P.P. submitted an application under section 227 Cr.P.C for amendment of the charge on 30.09.2019, notice was issued to the accused. Such application was allowed and amended charge was framed at Ex.15. Appellant was charged for offences under sections 302, 311 P.P.C. Accused pleaded not guilty and claimed to be tried, evidence of Imtiaz Ali, P.W.1 was recorded at Ex.17, in which he deposed that deceased Ms Naila was the daughter of his sister, about 6/7 months back he went to the house of his sister, where he stayed; it was about 11:00 or 12:00 midnight time, he heard fire reports and found that Ms Naila had sustained firearm injury; accused Rasheed Ahmed was not present in the house. He has further deposed that injured girl passed away; he went to the Police Station for lodging such report against unknown persons but police obtained his signature on plain paper. He produced F.I.R. at Ex.17-A. Complainant was declared hostile by learned D.D.P.P. and he was cross examined, but nothing favourable to state came on record. Mst. Zahida (P.W-2) has deposed that accused is her husband, deceased Naila was her daughter; present incident took place six months back; on the day of the incident, she alongwith her children was present in the house, her husband had gone to Karachi. However, she has stated that her brother was present in her house; they heard firing and saw that her daughter Ms Naila was injured. It was night time and it was darkness, so she could not see any person while firing upon Ms Naila. She was also declared hostile and was cross examined by the D.D.P.P. In the cross examination Mst. Zahida has replied that compromise application has been filed, however, she denied the suggestion that she has resiled from her statement in order to save her husband. Naveed Hussain, P.W-3 at

Ex.19, has acted as mashir in this case. He has deposed that at 10:00 11:00 p.m. on the night of the incident, he came to know about this incident and went to the place of incident, where police obtained his signatures on 2/3 plain papers, he was also declared hostile and was cross examined by the D.D.P.P.; he denied the suggestion that pistol was recovered from the possession of the accused in his presence.

5. Investigation of this case had been conducted by ASI Niaz Hussain (P.W-4), he deposed that on 08.05.2019, he was present at Police Station Sita Road; it was 01:00 a.m. he was informed that appellant Rasheed Ahmed had fought with his wife and during fight his daughter Naila intervened and she sustained firearm injury and succumbed to that injury; ASI left police Station alongwith his staff, proceeded to the place of wardat and found dead body of Ms Naila lying in the house of the appellant; he prepared inquest report in presence of the mashirs and obtained their signatures. The Investigating Officer dispatched the dead body to the hospital for conducting postmortem examination report. Investigating Officer arrested appellant-accused Rasheed Ahmed on 11.05.2019 from Tigadi near village Gulzar Thebo at 1845 hours in presence of the same mashirs and prepared such mashirnama. The Investigating Officer recorded 161 Cr.P.C. statements of P.Ws Mst. Zahida and Ashique Ali on 12.05.2019; the I.O sent the last worn clothes of deceased and blood stained earth for chemical analysis and report. On 14.05.2019, he interrogated the appellant, who prepared to produce crime weapon/pistol used by him in commission of the offence and it was recovered on the pointation of the accused. Thereafter, pistol was also dispatched to the ballistic expert for report, photocopy of such report has been produced as Ex.20/E. After completion of the investigation, the investigating officer submitted challan against the accused; he was cross examined by the defence counsel. In cross examination, I.O has replied that recovered weapon was not in working condition, he has also admitted that some

words are written on the barrel of the pistol, which were not mentioned by him in the mashirnama of recovery. It was the entire prosecution evidence, which was brought on record.

6. Thereafter, statement of the accused was recorded under section 342 Cr.P.C, in which accused claimed false implication in this case and denied the prosecution allegations.

7. Learned advocate for the appellant mainly argued that prosecution has failed to prove that it was the case of fasad-fil-arz. He has further submitted that appellant has already been acquitted in the main crime under section 302 P.P.C. It is also argued that mashir of the recovery of the pistol has also not supported the case of prosecution; that Investigating Officer failed to mention the description of the pistol in his mashirnama; that prosecution failed to produce the evidence with regard to the safe custody and safe transmission of the pistol to the ballistic expert. In support of his contention, he has relied upon the case reported as 2014 SCMR 1155 (*Iqrar Hussain and others v/s. The State and another*).

8. Learned Additional Prosecutor General did not support the impugned judgment, in view of dictum laid down by Hon'ble Supreme Court in the case of *Iqrar Hussain* (supra).

9. I have carefully heard learned counsel for the parties and perused the entire evidence. It is the matter on record that appellant has been acquitted for offence under section 302 P.P.C by the trial Court vide Judgment dated 29.11.2019, but he has been convicted for the offence under section 311 P.P.C. In the evidence furnished by the eye-witnesses namely Mst. Zahida and Ashique Ali, ingredients of section 311 P.P.C are not satisfied. Complainant Imtiaz Ali in his evidence at Ex.17 has deposed that on the night of the incident, he was sleeping in the house of his sister,

at 11:00 p.m. heard gunshot reports and found Ms Naila lying dead. He further deposed that accused Rasheed Ahmed was not present in the house, on the night of the incident; he went to the police station for lodging the report, but police obtained his signatures without recording it correctly. He was declared hostile. Mst. Zahida, P.W-2 has been examined by the prosecution, as mother of the deceased and wife of the appellant, she has deposed that on the night of the incident, she was sleeping in the house alongwith her brother Imtiaz Ali and deceased daughter Ms Naila, it was night time, she heard gun short reports and found Ms Naila lying injured, as night was dark, she could not see any of the culprits. Mother of the deceased was also declared as hostile. Prosecution examined mashir Naveed Husain at Ex.19, he had acted as mashir of place of incident, mashir of the arrest of the accused as well as recovery of the pistol on pointation of accused, but he was declared as hostile. In the cross examination to the learned advocate for the accused, it was replied by him that all the mashirs were prepared at Police Station, second mashir was not examined by the prosecution. The Investigation Officer has deposed that on 08.05.2019, he was posted as ASI at Police Station Sita Road and was present at the police station, at about 0100 hours, he received information that accused Rasheed Ahmed has fought with his wife and during scuffle, Ms Naila, daughter of the accused, intervened and she sustained firearm injury and passed away. As regards to the motive, Investigating officer has failed to collect independent evidence, on the other hand he has given entire different story from the eye-witnesses in this case. Eye-witnesses have been declared hostile. Trial Court convicted the appellant under section 311 P.P.C. vide Judgment dated 29.11.2019, the relevant part of the said judgment is reproduced as under:

“Resultantly, after hearing the arguments and keeping into consideration the overall aspects, particularly, that the offence is Gender Based Violence prevalent in the rural society where the lives of innocent womenfolk is at the stalk of the male dominant society in the pretext of honour, though

the compromise is accepted for offence under section 302 P.P.C, but instead of acquitting him, the case of accused falls within the definition of Fasad-fil-Arz, hence convicted him under section 311, P.P.C and sentenced for (10) ten years as Ta'zir. Accused Rasheed Ahmed Solangi is produced from District Jail Dadu, he is sent back to District Jail, Dadu, alongwith conviction warrants to serve out the sentence awarded to him according to law. The benefit of section 382-B Cr.P.C is extended to the accused."

10. I have gone through the evidence with the assistance of learned counsel for the parties. I have come to the conclusion that prosecution has utterly failed to establish its case against appellant so far as section 311 P.P.C is concerned. Learned Additional Prosecutor General has also not supported the case of prosecution. After having held the above view, now the question arises as to whether the trial Court was justified in law in convicting and sentencing the accused under section 311 P.P.C. after genuine compromise was affected between the parties. In the case of Khan Muhammad v/s. The State (2005 SCMR 599) it is held that section 311 P.P.C. will be attracted in cases punishable with Qisas and not to the cases punishable under Tazir. The relevant portion is reproduced as under:

"9. *It goes without saying that Islamic system of life is more liberal than any other religion, the object of which is to promote harmony and brotherhood amongst the inhabitants of welfare State, therefore, due to this reason despite of the fact that to prove the offence of the Qatl-e-Amd, liable to death by Qisas, the evidence of the witnesses, fulfilling the test of "Tazkiya-tush-Shahood" is required, but to achieve the object of the Qur'an and Sunnah, the sentence of death, liable to Qisas, has been made compoundable even if the offence has not been compounded by all the legal heirs or otherwise, subject to the provisions of sections 309, 310, 311, P.P.C. but as far as the offence of Qatl-e-Amd, liable to death by Ta'zir, is concerned, it has been made compoundable by enacting section 345(2), Cr.P.C. which says that if all the legal heirs have compounded the offence, the Court is empowered to accord permission to ensure that the parties may burry their hatchets once for all, because the idea behind it is that if any of the legal heirs of the deceased has not agreed to compromise the offence, he would not be entitled for Diyat under section 310, P.P.C. nor on acceptance of such compromise, the Court would be empowered to punish such offender under Ta'zir whereas in the case of "Qisas, notwithstanding the fact that all the legal heirs of the deceased or some of them have compounded*

the offence but the Court is empowered to award such punishment to such an offender under section 311, P.P.C.

10. *Thus, keeping in view the above discussion, the offence wherein sentence has been awarded under Ta' zir under section 302(b), P.P.C. has not been made compoundable unless all the legal heirs of the deceased agree for the same, therefore, we are of the opinion that there is no confusion in the law and the judgment relied upon by the learned counsel for the petitioner in the case of Muhammad Aslam (ibid) has not advanced his case in any manner. ”*

In the view of facts and circumstances and evidence furnished at trial, once the genuine compromise was affected between the parties and the legal heirs of the deceased were compensated and when no clear case of the offence under section 311 P.P.C. is made out, then by acceptance of the compromise, appellant was entitled to the acquittal on that ground alone, the same principle has been followed in the case of Iqrar Hussain (supra).

11. The appellant has also been convicted for the offence under section 23(1)(a) of Sindh Arms Act, 2013 and sentenced to five years, for which separate appeal has been filed As the facts and circumstances of the case are same and appreciation of the evidence is same, I have decided to dispose of the said appeal alongwith this appeal. It is the case of the prosecution that during interrogation appellant prepared to produce the pistol used by him in the commission of the offence in present of the mashir namely Naveed Hussain, who has been examined before this Court; he has categorically stated that police had not recovered the pistol from the possession of the accused in his presence and he was declared hostile, second mashir was not examined by the prosecution. So far as the evidence of the Investigating Officer with regard to the recovery of the pistol is concerned, the Investigating Officer in his evidence has failed to mention that from which place and at what time accused produced the weapon used by him in the commission of the offence; the Investigating Officer in his evidence has replied that he had failed to mention the number/words, which were written on the barrel of the pistol in his

mashirnama; such evidence is fatal to the prosecution case. It is the matter of record that pistol was used in the commission of the murder of Ms Naila and it was sent to the ballistic expert for the report and positive report has been tendered for evidence by the I.O, but it is surprising to observe that prosecution failed to produce the evidence with regard to the safe custody of the weapon at police station and safe transmission to the ballistic expert. In these circumstances, positive report of the ballistic expert would not be helpful to the prosecution case.

12. For the above stated reasons, I have no hesitation to hold that prosecution has failed to prove its case against the appellant. Consequently, impugned judgments are set aside and the appellant is acquitted of the charge in Crime No.22 of 2019 for offence under section 311 P.P.C and in Crime No.26 of 2019 for offence under section 25 of the Sindh Arms Act, 2013, registered at Police Station Sita Road. The appellant shall be released forthwith in case he is not required in some other case.

These are the reasons of short order dated 10.12.2020.

J U D G E

Manzoor