

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Jail Appeal No. D – 132 of 2019

Confirmation Case No. D – 07 of 2019

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Zulifqar Ali Sangi

Date of hearing: **26.02.2020**

Date of announcement: **05.03.2020**

Mr. Javed Miandad Advocate for appellant.

Mr. Zulifqar Ali Jatoi, Additional P.G.

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J U D G M E N T

NAIMATULLAH PHULPOTO, J. The present appeal is directed against the Judgment dated 04.07.2019 passed by learned Additional Sessions Judge Mirwah in Sessions case No. 241/2013 (State v. Niaz Muhammad) by which appellant was convicted under Section 302(b) PPC and sentenced to death as Tazir and he was directed to pay fine of Rs.100,000/- (One lac). In case of failure to pay fine amount, he was directed to suffer S.I for six months more. He was also convicted for offence Under Section 404 PPC and sentenced for the period of three years and also directed to pay fine of Rs. 25,000/-. In case of failure to pay fine amount, he was directed to suffer S.I for three months. Appellant Niaz Muhammad was also directed to pay compensation of Rs. 10,00,000/- (Rupees ten lacs) to be paid to the legal heirs of deceased Waheed Ali in terms of Section 544-A Cr.C. In case appellant/accused fails to pay compensation, the same shall be recovered as land revenue arrears as provided under Section 544-A Cr.P.C.

2. Brief facts rise to present appeal, as reflected in the judgment of the Trial Court are reproduced as under:-

“ The brief facts of the prosecution case as per FIR are that on 9.1.2013 at 3.00 pm in a way leading towards village Muhari in the land of Balam Khan Rajpar accused Niaz Muhammad along with one un-identified person in furtherance of their common object knowingly and intentionally committed Qatl-i-Amd of deceased Waheed Ali, son of complainant by causing him knife injuries and dishonestly taken away his motorcycle. Thereafter, complainant appeared at PS and got registered present F.IR.”

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3. After usual investigation challan was submitted against the accused for offences under Sections 302, 404, 34 PPC.

4. Trial Court framed charge against appellant at Niaz Muhammad Exh.2 under the above referred sections. Accused pleaded not guilty and claimed to be tried.

5. In order to substantiate the charge, prosecution had examined nine (09) P.Ws, thereafter, prosecution side was closed.

6. Trial Court recorded statements of accused U/S 342 Cr.P.C at Exh. 14 in which accused claimed false implication in this case and denied the prosecution allegations. Accused did not lead evidence in his defense and declined to give statement on oath in disproof of prosecution allegations.

7. Trial Court after hearing learned counsel for the parties and assessment of the evidence, vide judgment dated 04.07.2019, convicted and sentenced the appellant, as stated above, hence this appeal. By this single judgment we intend to decide appeal filed by the appellant as well as

confirmation Reference as both arise out of the same judgment and requires same appreciation of evidence.

8. The facts of this case as well as evidence produced before trial court find an elaborate mention in the judgment passed by trial Court and therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repeatation.

9. Mr. Javed Miandad Chandio learned advocate for appellant after arguing the appeal at some length did not press the same on merits and stated that death sentence may be converted to the imprisonment for life on the ground that prosecution has failed to prove motive at trial and relied upon the case of Nadeem Ramzan vs. The State 2018 SCMR 149..

10. Mr. Zulifqar Ali Jatoi Additional P.G argued that prosecution has succeeded to prove its case, ocular evidence was corroborated by the medical evidence. However, learned Additional P.G conceded to the contention of learned advocate for appellant/accused that motive has not been proved at trial and recorded no objection in case death sentence is converted to the imprisonment for life.

11. We have carefully heard learned advocate for the appellant and learned Additional P.G and perused the evidence minutely.

12. It is primary duty of the prosecution to prove its case against the accused. For our satisfaction, we have perused the entire prosecution evidence. As regards to the un-natural death of deceased, we agree with the findings of the trial Court that deceased died his unnatural death as described by the Medical Officer.

Complainant Manik (PW-1) has deposed that deceased was his son. On 09.01.2013 he along with his son left house on motorcycle and reached at stop where they took tea. Complainant has further deposed that his deceased son was using his motorcycle as taxi and in presence of complainant, accused/appellant Niaz Muhammad along with unidentified person hired motorcycle of the deceased and drove away on motorcycle. The motorcycle was being driven by the deceased. Accused Niaz Muhammad and one unidentified person was sitting on rear seat of motorcycle . After some time the son of complainant namely Hub Ali and nephew Zahid Ali came there and complainant along with them went to village Balam Khan Rajper for the business chaff of oil seed. They were visiting the agricultural land, where they heard sound of motorcycle and heard cries of his son Waheed Ali. Complainant along with above named witnesses went running there and saw one unidentified person armed with mouser while accused Niaz Muhammad was sitting at the chest of the son of the complainant and was causing him knife blow at his neck. Incident was witnessed by the complainant and his witnesses. They went near to the son of complainant and complainant along with P.Ws saw that his son passed away in their presence. Complainant immediately contacted the SHO concerned on his cellular phone and narrated him the incident. After 20 minutes police came at the place of incident and shifted the dead body of his deceased son to the hospital for post mortem examination. After completion of the post mortem examination dead body was handed over to the complainant. On the third day of incident he lodged FIR of the incident. Complainant was cross examined by the defense counsel in which he denied the suggestion that he was deposing falsely.

Hub Ali (P.W 2) was also eye witness of the incident. He also narrated the same facts and stated that incident was witnessed by him and he had seen that Niaz Muhammad causing knife blows to the deceased but due to

the far away he could not rescue his brother. He was also cross examined by the defense counsel but nothing favourable to the accused came on record.

Case was investigated by SIP Ghulam Ali. He had inspected place of wardat, recorded 161 Cr.P.C statements of P.Ws. He arrested accused in presence of mashirs and recovered knife used by the accused in the commission of murder of Waheed Ali and also recovered motorcycle in presence mashirs and prepared such mashirnama.

13. From the close scrutiny of prosecution evidence we are clear in our mind that in the case in hand, we find that in absence of proof of assertive motive, the cause of occurrence had remained shrouded in mystery. In the F.I.R complainant has mentioned that appellant after committing the murder of deceased drove away on his motorcycle. In the evidence before the trial Court complainant regarding motive deposed that :-

“ At about 3.00 pm when we were visiting the agricultural land, where we heard the sound of motorcycle and thereafter we also heard a cry of my son Waheed Ali and we came out and saw that one unidentified accused armed with mouser, while accused Niaz Muhammad was on the chest of my son Waheed Ali and Niaz Muhammad was given knife blows at his neck. I had seen the incident at the distance of about one acre. We immediately reached near my son and found that his neck was slaughtered and blood was oozing while both the accused persons run away by taking the motorcycle of my son and in our presence my son passed away.”

14. Prosecution has also examined another eye witness namely PW-2 Hub Ali who has also deposed about motive that on 09.01.2013 in their presence accused Niaz Muhammad and one unidentified person hired motorcycle of his brother as taxi and in their presence they proceeded towards

their way while this PW along with his father and cousin made to sit at hotel for taking tea. Then at 11.30 a.m this PW along with his cousin and father proceeded towards Kot Laloo to visit oil seeds crop of Wadero Balam Khan Rajper, then at about 2.30 pm they heard sound of motorcycle and heard cry of Waheed Ali . They came out and saw one unidentified person with mouser was standing near his brother Waheed Ali while accused Niaz was on the chest of his brother Waheed Ali. Niaz Muhammad was causing knife blows to Waheed Ali on his neck and committed his murder. Due to fear they remained silent. The accused persons after committing his murder dragged his body and thrown in the oil seed crop and went on the motorcycle of deceased. SIP Ghulam Ali Investigation Officer has also been examined by the prosecution. During investigation, Investigation Officer totally failed to interrogate/investigate the appellant/accused about the motive in the commission of offence. Learned advocate for the appellant as well as Additional P.G argued that motive is unclear from the record. From the above evidence, we have also come to the conclusion that real cause of occurrence had remained shrouded in mystery and this factor has put us to the caution in the matter of appellant's sentence of death as held in the case of Nadeem Ramzan vs. The State (2018 SCMR 149). Relevant para No.4 of the Judgment of Hon'ble Supreme Court of Pakistan is reproduced as under.

“We have specifically attended to the sentence of death passed against the appellant and have noticed in that context that the motive set up by the prosecution had not been established by it. While discussing the motive part of the case the High Court had observed that both the eye-witnesses had stated about the alleged motive and they had not been cross-examined by the defence on that aspect of the case and, thus, the alleged motive stood proved. This approach adopted by the High Court has been found by us to be fallacious inasmuch as it had been clarified by this Court in the case of S. Mahmood Alam Shah v. The State (PLD 1987 SC 250) that the principle that a fact would be deemed to be proved if the

witness stating such fact had not been cross-examined regarding the same was a principle applicable to civil cases and not to criminal cases. It was held that a criminal case is to be decided on the basis of totality of impressions gathered from the circumstances of the case and not on the narrow ground of cross-examination or otherwise of a witness on a particular fact stated by him. A similar view had already been expressed by this Court in the case of *State v. Rab Nawaz and another* (PLD 1974 SC 87) wherein it had been observed that a criminal case is to be decided on the basis of totality of circumstances and not on the basis of a single element. We have noticed that even the investigating officer of this case had failed to collect any material in support of the asserted motive. The lady who had statedly fallen mentally ill because of application of Taveez on her by Mst. Kausar Bibi deceased had not even been examined by the investigating agency nor any investigation had been conducted in that regard. The motive asserted by the prosecution had, thus, remained far from being proved. During the investigation a dagger had allegedly been recovered from the custody of the appellant but it is admitted at all hands that the recovered dagger was not stained with blood and, hence, the same did not stand connected with the alleged murder. It has been held by this Court in many cases 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 a sentence of death passed against a convict on a capital charge and a reference in this respect may be made to the cases of *Ahmad Nawaz v. The State* (2011 SCMR 593), *Ifikhar Mehmood and another v. Qaiser Ifikhar and others* (2011 SCMR 1165), *Muhammad Mumtaz 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) and *Qaddan and others v. The State* (2017 SCMR 148). In the case in hand we find that in the absence of proof of the asserted motive the real cause of occurrence had remained shrouded in mystery and this factor has

put us to caution in the matter of the appellant's sentence of death”.

15. In our considered view, ocular evidence was corroborated by the medical evidence. The occurrence had taken place in broad day light and FIR in respect of the same had been lodged wherein appellant was nominated as sole perpetrator of the alleged murder. Delay in lodging of the FIR has been fully explained. The consistent ocular account furnished by above named eye witnesses had received full support from medical evidence in as much the date and time of occurrence, the weapon used and locale of the injuries stated by the eye witnesses had also been confirmed by the medical evidence. We have come to the conclusion regarding guilt of the abovenamed appellant having been established to the hilt and upon our own independent evaluation of the evidence we have not been able to take a view of the matter different taken by the trial Court. Most important circumstance in the case is that motorcycle of the deceased was recovered from the possession of accused Niaz Muhammad on 15.01.2013 in presence of the private mashirs. Motive as set up by the prosecution in the FIR has also not been established at trial. Law is settled by now that if prosecution asserts the motive but fails to prove the same, then such failure on the part of prosecution may let against the sentence of death passed by the trial Court and reference in this respect may be made to the recent judgment of Hon'ble Supreme Court in the case of Mst. Nazia Anwar v. The State and others (2018 SCMR 911). Relevant paragraph is reproduced as under:

“4. I have particularly attended to the sentence of death passed against the appellant and have noticed in that context that the motive set up by the prosecution had remained far from being established. According to the FIR as well as the statement of the complainant the motive was based upon borrowing of a sum of Rs. 5,000/- by the appellant from the deceased and on the issue of

repayment of that loan a heated exchange had taken place between the appellant and the deceased. Mst. Sadiqa Bibi complainant (PW2) was the only witness produced by the prosecution regarding the alleged motive but in her deposition made before the trial court the complainant had admitted that the appellant and the deceased were on very good and friendly terms, no date or time of borrowing of the relevant amount by the appellant from the deceased had been specified by the complainant, the complainant was not present when the money had been borrowed by the appellant from the deceased, no date, time or place of the altercation taking place between the appellant and the deceased over repayment of the borrowed amount had been specified by the complainant and admittedly the complainant was not present when the said altercation had taken place. In these circumstances it is quite obvious to me that the 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 a sentence of death passed against a convict on the charge of murder and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz 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) and Qaddan and others v. The State (2017 SCMR 148). After going through the entire record of the case from cover to cover and after attending to different aspects of this case I have found that although it is proved beyond doubt that the appellant was responsible for the murder of the deceased yet the story of the prosecution has many inherent obscurities ingrained therein. It is intriguing as to why the appellant would bring her four months old baby-boy to the spot and put the baby-boy on the floor and then start belabouring the deceased with a dagger in order to kill her. I have, thus,

entertained no manner of doubt that the real cause of occurrence was something different which had been completely suppressed by both the parties to the case and that real cause of occurrence had remained shrouded in mystery. Such circumstances of this case have put me to caution in the matter of the appellant's sentence and in the peculiar circumstances of the case I have decided to withhold the sentence of death passed against the appellant.”

14. In the view of above discussion, this **Criminal Jail Appeal No. D-132 of 2019** is **dismissed to the extent of Appellants' conviction** for offence under Section 302(b), PPC, but **the same is partly allowed to the extent of death sentence**, which is **reduced** to the **imprisonment for life**. However, sentence of fine imposed by the trial Court was erroneous and the same is not sustainable under the law. Appellant is ordered to pay compensation of Rs.10,00,000/- (Rupees ten lac) to be paid to the legal heirs of the deceased in terms of Section 544-A Cr.P.C, as directed by the trial Court while other sentences awarded to the appellant by the trial Court, shall remain intact. The benefit of Section 382-B Cr.P.C shall be extended to the appellant. **Confirmation Reference No.D-07 of 2019** made by the trial Court for **confirmation of death sentence** is **answered** in the **NEGATIVE** and death sentence is **NOT CONFIRMED**.

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