

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

Criminal Appeal No.D-80 of 2011  
Criminal Reference No.D-16 of 2011

Present:

Mr. Justice Muhammad Iqbal Kalhoro,  
Mr. Justice Faheem Ahmed Siddiqui,

Appellant : Sarfraz Uner, through Mr. Asif Ali Abdul Razak Soomro, Advocate.

Respondent: The State through Mr. Sardar Ali Shah, Deputy Prosecutor General.

Mr. Ghulam Dastagir A. Shahani, advocate for complainant.

Date of Hearing : 08.02.2018.

Date of Judgment : \_\_\_\_.02.2018.

J U D G M E N T.

MUHAMMAD IQBAL KALHORO, J.- Appellant faced trial in Sessions Case No.266 of 2006 re-State v. Sarfraz Uner & others (Crime No.49/2006 of Police Station Sijawal, u/s 302, 109, PPC) and was found guilty. As a result he was convicted and sentenced to death, subject to the confirmation by this Court vide impugned judgment dated 15<sup>th</sup> August, 2011 passed by learned Sessions Judge, Kamber-Shahdadkot at Kamber.

2. Concisely the facts of the prosecution case as gleaned from the FIR are that on 16.09.2006 complainant Bahadur lodged FIR at PS Sijawal, stating therein that he had purchased 21-00 acres land from Jan Muhammad and Ali Sher Uner about 23/24 years back, the consideration amount was paid to them in installments, but they did not mutate the record. He had made such complaints to the nekwards upon which grandson of Ali Sher Uner namely Sarfraz used to say that it is their land and refused mutation of record in favour of complainant. On the day of incident, he along with his son Sardar Bux, nephew Ali Bux came to village Kot Lal Bux Mahessar. After finishing work, they met

one Ghulam Nabi and while returning back to their village, when at about 6.30 p.m. reached the land of Dr. Muhammad Ali Mahessar, they saw accused Sarfraz Uner armed with a pistol, who callout them and stated that they had pressurized them for mutation of record, therefore, he would kill son of complainant. Saying so, he fired at Sardar Bux which hit him and he fell down. On the cries of complainant party and fire shot reports, the people standing in the lands came running over there. Then accused fled away along with his pistol towards southern side. Thereafter, complainant party saw that Sardar Bux had died, there were firearm injuries on his chest and stomach and he was bleeding. The complainant removed the dead body to Taluka Hospital, Mirokhan, where leaving the above PWs over the dead body appear at PS and lodged the FIR alleging that on the point of mutation of record of the land, accused Sarfraz has committed murder of Sardar Bux at the abetment of Ali Sher Uner.

3. After collection of evidence during investigation, the I.O. submitted challan for trial, during which a formal charge against the accused was framed but he did not plead his guilt and claimed trial.

4. At the trial, the prosecution examined in all 11 witnesses, namely, complainant Bahadur (Exh.5), PWs Ali Bux and Ghulam Nabi (Exs. 6 & 7), Dr. Abdul Sattar (Ex.8), mashir Illahi Bux (Ex.9), corpse-bearer PC Qadir Bux (10), tapedar Abdul Wahab Hakro (Ex.11), ASI Muhammad Akram Channa (Ex.12), SIO Safdar Ali Brohi (Ex.13), mashir HC Muhammad Saleh (Ex.14) and SIP Ghulam Abbas Chandio (Ex.15). They during their evidence produced the relevant documents viz., FIR, Lash Chakas Form, postmortem report, mashirnama of dead body, inquest report, mashirnama of vardat, letter of police and Civil Judge & JM, Kamber, receipt of dead body, sketch of wardat in triplicate, mashirnama of arrest and recovery of pistol and bullets and mashirnama of arrest of accused Ali Sher. After the evidence, the appellant was examined under section 342, Cr.P.C, wherein he denied the allegations and professed his innocence. He, however, declined to produce any defence witness or to examine himself on oath in terms of section 340(2), Cr.P.C. The trial ended in conviction and sentence of the appellant, as stated hereinabove, which has been impugned by filing instant appeal.

6. Mr. Asif Ali Abdul Razak Soomro, learned Counsel for appellant at the very outset has submitted that he does not dispute the conviction of the appellant on merits of the case; however, since there are mitigating circumstances, he would request for conversion of the death sentence awarded to the appellant into the imprisonment for life. Supporting the same plea, he has submitted that there is a delay of two hours in lodgment of FIR, which has not been explained by the prosecution; that although it is alleged that from the appellant the crime weapon was recovered so also the crime empties from the spot, but the same were not sent to the Forensic Science Laboratory for report, and thus there is nothing on record to show that the alleged crime weapon was in fact used in the crime; that in the case of recovery of said crime weapon filed under Section 13(d) Arms Ordinance bearing Crime No.51/2006, PS Sijawal, the appellant was acquitted vide judgment dated 13.3.2008; that although the prosecution has alleged motive in the case but it has miserably failed to establish the same, and the real motive is shrouded in a mystery; that there is contradiction in the medical and ocular evidence, the prosecution witnesses have said that appellant fired at the deceased from the distance of 7/8 paces, whereas the postmortem of the deceased shows that on injury No.1 charring was present, which would mean that the deceased was fired at from a very close range. The learned defence Counsel in support of his arguments has relied upon the cases of *Abdul Nabi v. The State* (2017 SCMR 335), *Muhammad Ismail v. The State* (2017 SCMR 713), *Qurban Hussain v. The State* (2017 SCMR 880), *Zahoor Ahmad v. The State* (2017 SCMR 1662), *Mazhar Abbas alias Baddi v. The State* (2017 SCMR 1884), *Amanat Ali v. The State* (2017 SCMR 1976) and *Amjad Shah v. The State* (PLD 2017 SC 152).

7. On the other hand, Mr. Ghulam Dastagir A. Shahani, learned Counsel for the complainant and Mr. Sardar Ali Shah, learned Deputy Prosecutor General have opposed request of the appellant's Counsel and have argued that there are no contradictions in the evidence of prosecution witnesses; that the appellant has been assigned a specific role of causing murder of the deceased; that unimpeachable evidence describing his specific role has come on record against the appellant and the normal penalty provided for the offence under Section 302 PPC is death and only in presence of

extenuating circumstances a deviation from the normal penalty can be made. Learned Counsel for the complainant has further added that mere failure to prove motive by the prosecution would not be taken as a mitigating circumstance justifying taking a lenient view against the appellant. He in support of his arguments has relied upon the cases of *Muhammad Ashraf v. The State* (1971 SCMR 530), *Nawaz Ali v. The State* (2001 SCMR 726), *Nazir Ahmed v. The State* (2009 SCMR 523) and *Anwar Shamim v. The State* (2010 SCMR 1791).

8. We have considered submissions of the parties and have perused the material including the case law cited at bar. The prosecution has examined in all 11 witnesses. The medicolegal officer, namely, Dr. Abdul Sattar (Ex.8) in his evidence has supported the unnatural death of the deceased caused by firearm injuries and has given in detail the description of such injuries in his evidence, which has not been disputed by the defence. Besides the medicolegal officer, the prosecution has examined three eyewitnesses i.e. the complainant, namely, Bahadur at Ex.5, PW Ali Bux at Ex.6 and PW Ghulam Nabi at Ex.7, who have supported each other insofar as role of the appellant causing firearm injuries to the deceased is concerned. Although they have been subjected to a lengthy cross-examination by the learned defence Counsel, but no any material contradiction has come on record to injure veracity of their evidence. Their evidence is consistent and confidence-inspiring on salient features of the case and in absence of any material to the contrary we have no reason to disbelieve the intrinsic value of their evidence. It is, therefore, manifest that declaration of guilt of the appellant arrived at by the learned trial Court does not suffer from any illegality to justify interference by this Court. However, we have noted that the complainant in the FIR has alleged that the incident took place as a result of a transaction in respect of 21 acres of agricultural land, which he had purchased from Jan Muhammad and Ali Sher Unar, the amount of which he had paid to them in instalments but they did not get mutation recorded in his favour and although he had made such complaints to the local nekwards, but to no avail and on this score appellant Sarfraz, who is the grandson of one of the seller, namely, Ali Sher, used to threaten them and say that no mutation of the same land would be recorded in their favour. In the evidence, the complainant has reiterated the said facts so also the other witnesses, but no material has

been placed on record to establish any such transaction between the parties which may be considered a cause of incitement to the appellant to commit the present offence. It is thus obvious that although the motive has been alleged by the prosecution but it has not been established by it and the same is still shrouded in a mystery. More-so, the alleged motive seems squarely against the complainant and not against his son, the deceased, because it was he who had purchased the land and was demanding mutation of the said land in his name. In such circumstances sparing of the original purchaser, who was demanding transfer of "khata" in his favour and killing his son in his presence does not appeal to the mind and would lead to an inference that motive as alleged is not the actual cause of the incident. Additionally, it is noteworthy that the appellant was arrested on 22.09.2006 and from him the alleged crime weapon viz. 9mm pistol was recovered. The record also shows that from the place of incident three empties bullets of 9mm were also recovered on the date of incident viz. 16.9.2006, at 2230 hours. But strangely neither the said crime empties nor the crime weapon were sent to FSL for report and, therefore, there is no corroborative evidence in the shape of crime weapon allegedly used by the appellant in the commission of offence. The appellant is in jail since the date of his arrest i.e. 22.09.2006. The statement of the appellant recorded on 23.8.2011 shows his age as 25 years, which would mean that at the time of commission of the offence viz. 16.9.2006 he was hardly 19/20 years old. His being young at the time of committing offence is a relevant circumstance, which can be taken into account along with above discussed facts and circumstances to decide the quantum of punishment awarded to him. So the material in hand reflects that the prosecution has failed to prove the alleged motive and there is no corroborative piece of evidence in shape of the crime weapon as there is no FSL report to the effect that the weapon recovered from the appellant was used in the commission of offence. The empties recovered from the spot were not sent to FSL for report either, for which the prosecution has not forwarded any explanation, besides the appellant is young in age. This being the position, we are of the view that the request of the appellant's Counsel for conversion of death sentence to the imprisonment for life is not unjustified. We have taken guidance from the case-law relied upon by the defence Counsel

and are of the firm view that above factors can be considered as mitigating circumstances to convert the death penalty of the appellant into imprisonment for life.

9. For forgoing discussion, this appeal is dismissed. However, the sentence of death awarded to the appellant vide impugned judgment dated 15.8.2010 is modified and converted into imprisonment for life under Section 302(b) PPC as tazir. The benefit of section 382-B Cr.P.C is extended to the appellant. The appellant, however, shall pay compensation of Rs.300,000/- to the legal heirs of the deceased as provided under Section 544-A, Cr.P.C, in default of which he shall remain in prison for six months more. The appeal stands disposed of in the above manner.

10. In view of above, Criminal Reference No.D16/2011 for confirmation of death sentence of the appellant is replied in negative and is accordingly disposed of.

JUDGE

JUDGE