

Final is in the USB of Honourable Mr. Justice Muhammad Iqbal Kalhoro
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.D-08 of 2014.

Confirmation Case No.02 of 2014

Present:-

Mr. Justice Muhammad Iqbal Kalhoro.

Mr. Justice Khadim Hussain M. Shaikh.

Date of hearing: 30.10.2017

Date of decision: 30.10.2017

Appellant: Awais Haleem through Mr. Ghulamullah Chang, Advocate.

Appellant: Anwar Khan through Mrs. Razia Ali Zaman Khan Patoli,
Advocate.

Complainant: Nadir Khan through Mr. Ishrat Ali Lohar, Advocate.

The State: Through Syed Meeral Shah A.P.G.

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MUHAMMAD IQBAL KALHORO,J:-The appellants have impugned the judgment dated 09.01.2014 passed by IInd Additional Sessions Judge, Hyderabad whereby appellant Awais Haleem was convicted under section 302(b) r/w section 34 PPC and sentenced to death as Ta'zir, whereas, appellant Anwar Khan was sentenced to suffer imprisonment for life. They were also directed to pay compensation of Rs.40,00,000/- each to the legal heirs of deceased and in case of failure to suffer S.I for six months more.

2. The brief facts of the prosecution case are that on 04.05.2009 at 0300 hours, complainant Nadir Khan lodged an FIR stating therein that on 03.05.2009 at 2230 hours he came out of the house on hearing commotion and saw that accused Awais Haleem, Muhammad Umer, Anwar Khan and Nadeem alias Niddo were maltreating his younger brother Shakir Khan and Babar Khan. Rana Nadeem held his brother Shakir Khan from his back and accused Awais Haleem caused a blow of sharp knife on his chest, whereas accused Muhammad Umer inflicted an iron-pipe blow on his head and accused Anwar Khan caused him a wooden-stick blow. Resultantly, Shakir Khan got injured and fell down. He was taken to hospital by him and P.Ws Babar Khan and Bahadur Yar Jung but on the way he succumbed to the injuries and died.

3. After registration of F.I.R., the police started investigation and arrested appellant Muhammad Awais Haleem on 19.06.2009. After completing due formalities, the police submitted the challan against him showing appellant Anwar Khan and Muhammad Umer Khan as absconders, who subsequently joined the trial. Finally, the trial against the appellants commenced, during which a formal charge was framed against them and co-accused Muhammad Umer at Ex.3, who pleaded not guilty and opted to contest the charge. Subsequently, co-accused Muhammad Umer subsequently absconded, as such, an amended charge against the appellants was framed as Ex.9.

4. In the trial, the prosecution has examined Complainant Nadir Khan as Ex.12, P.W-2 Babar Khan as Ex.13, P.W-3 Bahadur Khan alias Bahaduryar Jan as Ex.14, P.W-4 Dr. Syed Muhammad Khalid as Ex.16, P.W-5 Muhammad Anwer as Ex.17, P.W-6 Jumma Khan as Ex.18, P.W-7 Muhammad Aijaz as Ex.19 and P.W-8 SIP Nisar Ahmed as Ex.20. They have produced all the necessary documents viz. F.I.R., mashirnamas of arrest of accused, mashirnama of dead body, medical record, mashirnama of place of incident, mashirnamas of recoveries, etc. Whereafter prosecution closed its side vide Ex.21.

5. Statements of the appellants were recorded under section 342 Cr.P.C in which they have denied the allegations and have professed innocence. They have also examined themselves on oath U/s 340(2) Cr.P.C and further examined 09 witnesses in their defense. The learned trial Court after concluding the evidence and hearing the parties convicted the appellants in the terms as stated above.

6. Mr. Ghulamullah Chang learned Counsel appearing for appellant Awais Haleem has contended that the appellant is innocent and has been falsely implicated by the complainant; that there is a delay in the registration of the F.I.R. which has not been explained by the complainant reasonably; that information of the incident was communicated to the police by some unknown person through 15 Madadgar message which shows that neither the complainant nor this witnesses were present at the time of alleged incident; that although P.W-2 Babar Khan has claimed that he was injured in the incident but there is no medical record of his being injured, therefore, his presence at the spot is not without doubt; that the ocular evidence is in conflict with the medical evidence which puts the entire prosecution case under the shadow of doubt; that the crime weapon i.e. knife was produced by the complainant himself and it was not recovered from the accused, therefore, such recovery is of no use to the prosecution and cannot be used against the appellant; that the appellant

has been implicated due to enmity between the parties which is even admitted in the F.I.R.; that all the witness have revealed a different story of the incident in their respective evidence and have contradicted each other on material facts of the case; that the place of incident is unknown as no blood stained earth was taken by the Investigating Officer from the alleged place of incident although its memo points to availability of blood there; that place of incident is alleged to be a thickly populated area but no independent witness has been cited; that conduct of the witnesses is unnatural as neither they put up any resistance nor tried to save the deceased; Learned Counsel in support of his arguments has relied upon the case laws reported as (1) 2013 SCMR 383 (2) 2011 SCMR 941, (3) 2017 SCMR 486, (4) 2017 SCMR 596, (5) 2011 SCMR 1524, and (6) 2016 SCMR 1241.

7. Mrs. Razia Ali Zaman Khan Patoli learned Counsel appearing for appellant Anwar Khan has argued that he has been implicated falsely on account of the previous enmity; that the role attributed to him is that he had caused a lathi blow to the deceased but the medical evidence does not show any such injury on the person of the deceased. Further explaining said point, she has contended that in the F.I.R. the main role is attributed to appellant Awais Haleem, whereas, co-accused Muhammad Umar Khan and appellant Anwar Khan are alleged to have caused blows to the deceased with their respective weapons i.e iron bar and lathi, but, in the postmortem report only one injury i.e a lacerated wound on left cheek is available which opined to have been caused with a hard and blunt weapon. The prosecution has not led any evidence that out of the said two accused who caused such a blow to the deceased. The present appellant is shown to be armed with the stick (lathi) but it was not recovered from him. On the point of common intention, she has argued that from the record, it can be easily gathered that the prosecution has not been able to establish sharing of common intention by the appellant Anwar Khan with the main accused, his son, who is shown to have inflicted a single blow with knife to the deceased without repeating it. Even from the evidence the incident appears to have evolved then and there without any preplanning by the accused, therefore, she agreed, that there is no evidence pointing to the appellant sharing common intention with the main accused to commit murder of the deceased. Learned Counsel in support of her contentions has relied upon the cases reported as (1) 2010 SCMR 374, (2) 2008 P.Cr.L.J 230, (3) 2016 SCMR 1441, (4) 2017 SCMR 400, (5) 2017 SCMR 596, (6) 2011 P.Cr.L.J 1441, and (7) 2007 SCMR 203.

8. On the other hand, Mr. Ishrat Ali Lohar learned Counsel appearing for the complainant has supported the impugned judgment. His case is that the

complainant and the other witnesses being residents of said area are natural witnesses, who have fully supported the prosecution case qua role of the appellants, and no material contradiction has been obtained by the defense despite subjecting them to a lengthy cross examination. He has further argued that the incident is not denied even by the appellants but their plea is that during the fight deceased had fallen on some cutter or some iron-bar or “shuttering” material littered at the place of incident. According to him, when a specific plea is taken by the party, the burden is shifted to the said party to prove the same. But, in this case although the appellants have taken the plea of deceased falling on the ground and sustaining fatal injury from some cutter etc but they have not been able to prove the same. He has further contended that if the defense evidence is put in juxtaposition with the evidence of the prosecution witnesses, it would be established that it was the appellants who committed murder of the deceased. In support of his arguments, learned Counsel has relied upon the case laws reported as (1) 2008 SCMR 917, and (2) 2008 SCMR 1228.

9. Learned Additional Prosecutor General Sindh has supported the impugned judgment.

10. We have considered the submissions of the parties and have perused the material available on record. The prosecution in all has examined eight (08) witnesses. P.W-1 Nadir Khan (Ex.12) is the complainant and has described the incident as seen by him. P.w-2 Babar Khan (Ex.13) is not only brother of the deceased but he is also an eye witness of the incident. His evidence shows that he had come at the place of incident with the deceased on a motorcycle after closing their mobile shop. He has described the incident in which he himself was beaten by the accused and has materially supported the case as narrated in the F.I.R. P.W-3 namely Bahadur Khan (Ex.14) is not only the eye witness of the incident but he is also the mashir of inspection of dead body and mashir of place of incident. He has also supported the prosecution case qua the role of each appellant in his evidence. P.W-4 Dr. Muhammad Khalid (Ex.16) is the medico legal officer; he has conducted the postmortem of the deceased. Per his evidence, there were two injuries on the person of the deceased and the injury No.1 was caused by a sharp cutting substance which led to hemorrhage resulting in instantaneous death of the deceased. P.W-5 HC Muhammad Anwer (Ex.17) is the mashir of arrest of appellant Awais Haleem. P.W-6 HC Jumma Khan (Ex.18) is the person who received information from Madadgar 15 about the incident and death of deceased as a result of which he alongwith which SIP Aijaz went to hospital and witnessed completion of necessary formalities over there. In his evidence he has described the said facts. P.W-7 SIP Muhammad Aijaz (Ex.19) was the incharge at Police Station Fort. On the day of incident on

receiving information through Madadgar 15 he alongwith PC Jumma Khan visited the hospital and found the deceased lying on the stretcher there. He completed due formalities over there besides issuing a letter for postmortem examination of the dead body. P.W-8 SIP Nisar Ahmed (Ex.20) is the Investigating Officer. His evidence shows that on 04.05.2009 at about 09:00 a.m. he had inspected the place of incident in presence of mashirs and had prepared such memo. And on 08.05.2009 the complainant handed him over the crime weapons i.e. blood stained knife and iron pipe which he secured under the relevant memo.

11. The evidence of three eye witnesses shows that they have deposed that appellant Awais Haleem caused a knife blow to the deceased on his chest as a result of which he died. Their evidence is supported by medical evidence, which indicates the local of injury on the chest of the deceased and the fact that it was caused by a sharp cutting weapon. Their evidence is inspiring confidence, and no material contradictions is available to give benefit thereof to the said appellant Awais Haleem. The presence of the complainant and other witnesses at the spot is natural. The complainant and prosecution witness Babar Khan are the brothers of the deceased, whereas, P.W-3 Bahadur Khan is their uncle whose house is situated in the same street. Accused party is also closely related to the complainant party and their house is also situated in the same street.

The motive appears to be an old dispute between the parties over a house which was under the occupation of the accused.)

12. Learned Counsel for the said appellant has vehemently argued that there are several discrepancies in the case of the prosecution which have rendered it doubtful. He referred to the delay in registration of the F.I.R and argued that it is not explained therefore the case is doubtful. The F.I.R. shows that the incident took place on 03.05.2009 at 2230 hours, whereas, the report of which was registered on 04.05.2009 at 0300 hours after about 4½ hours. The evidence of the witnesses would show that initially they took the deceased to the hospital, and meanwhile the information of the incident was communicated to the police, who resultantly arrived at the hospital, where all the formalities including the postmortem of the deceased were carried out. The postmortem was completed at 2-15 a.m. then the dead body was handed over to the complainant. His therefore coming at Police Station at 0300 hours to lodge the F.I.R. does not appear to be unjustified as a result of some unexplained reason. Learned Counsel for the appellant Awais Haleem in his arguments has also specifically referred to the cross examination of P.W-2 Babar Khan who in reply to a

question has revealed that “before reaching of brother Nadir Khan (complainant), the accused had done their job, therefore, he could not intervene to rescue us”. It was his contention that this revelation denotes that before the arrival of the complainant, the accused had already committed the offence and he had not witnessed the incident. We, however, are not persuaded by such argument of learned Counsel. In our view such disclosure would mean that before his said brother (complainant) could reach out to accused and them physically to intervene and save the deceased, the accused completed the crime. It would not connote that the complainant had not seen the incident, the whole evidence and its impart have to be read together to draw its meaning and implication. We are minded that above said revelation would not be read in isolation of the entire trend and tenor of the evidence of the witnesses, and would not mean that the complainant has not seen the incident.

13. Learned Counsel for appellant Awais Haleem also contended in his arguments that the conduct of the witnesses is unnatural, the witnesses did not try to save the deceased and / or offer any resistance to the accused party. It may be mentioned that the incident of inflicting injury by a knife to the deceased occurred within a short while leaving no opportunity for the complainant to intervene beforehand. P.W Babar, who was with the deceased could not offer much resistance to save his brother's life, as not only he was empty handed but himself was beaten by the accused in the course of said quarrel. And after the deceased had sustained the injury, it was material for complainant and other witnesses to take him to the hospital to save his life instead of engaging in the dispute with the accused further. Their prioritizing the life of their brother and taking him to the hospital was the most natural act expected of human conduct in such a situation.

14. It shall be noted that the appellants have not denied the incident, or the presence of complainant and witnesses, or their presence and the quarrel between them. In their statements under section 342, and 340(2), Cr.P.C. and their witnesses examined by them in defense have confirmed the incident on the relevant date between the parties. However, their plea is that the appellant Awais Haleem did not cause the fatal injury to the deceased but he sustained such injury by falling on some cutter or some iron-bar etc. lying on the ground. Strangely, they are not sure about the exact thing on which the deceased fell and sustained injury. At one place they have suggested that deceased was hit by some cutter, when he fell down on the ground, at another place cutter has been replaced by an iron-bar, yet at another place it is suggested that it was “CRASH”, iron, glasses, etc. But one thing is common in this articulation that the deceased sustained injury in the incident. When a specific plea about the

incident has been taken by the appellants, in law, they have to prove the same but they have miserably failed to prove the same. However, if their account of the incident is seen in juxtaposition to the prosecution case, it would lead to an irresistible conclusion about the appellants' involvement in the incident. It is worth noting that they also could not substantiate such a defense during investigation of the case nor any material i.e cutter or iron-rod etc was produced by them either in the investigation or at the time when their defense evidence was being recorded.

15. Regardless of the above, we have noted certain discrepancies in the prosecution case which could be considered as mitigating circumstances against appellant Awais Haleem. The incident does not appear to be premeditated or preplanned. Appellant Awais Haleem caused only a single knife-injury to the deceased without repeating it. The crime weapon i.e the knife was not recovered from the accused but it was produced by the complainant. The same was not sent for chemical examination and report. Although it is alleged in the F.I.R. and in the evidence that the parties were already on dispute over the occupation of a house but the actual motive which led to the incident has not been revealed by the prosecution. It is not clear that at the time of this particular incident what exactly prompted the appellant Awais Haleem to cause murder of the deceased. The exact motive of the incident appears to be shrouded in mystery. Appellant Awais Haleem is not shown to be of advanced age in his 342 Cr.P.C statement.

16. Although the presence of appellant Anwar Khan, who is father of main accused Awais Haleem is alleged in the F.I.R. and all the witnesses have supported the same, but the prosecution has not been able to prove that he was sharing common intention with the main accused. He is alleged to be armed with stick / lathi, but during investigation no such a weapon was recovered from him. He is alleged to have caused a lathi blow to the deceased, but so also co-accused Muhammad Umer is allegedly causing him a blow with iron-bar but the postmortem report of the deceased shows only one injury caused to him by a hard and blunt substance and, therefore, it is not clear whether the said injury was caused by the present appellant or by co-accused Muhammad Umer (absconding). Moreover, although record reflects that there was a dispute on a house between the parties and on the day of incident they had had many squabbles with each other, but the prosecution has not alleged any premeditation or preplanning on the part of the accused to commit the offence. It is also a matter of record that main accused inflicted only a single blow with a knife to the deceased and did not repeat it. In the facts and circumstances, we are of the view that the sharing of common intention by

appellant Anwer Khan with the main accused Awais Haleem is not without doubt.

17. Considering all the above facts and circumstances, we are of the view that the death penalty to appellant Awais Haleem would not be justified. Therefore, we disposed of this appeal in the terms whereby the appellant Anwar Khan is acquitted of the charge. He shall be released forthwith if not required in any other custody case. Whereas, the death penalty awarded to appellant Awais Haleem through impugned judgment is converted into Imprisonment for Life under section 302 (b) PPC. The appellant namely Awais Haleem shall pay Rs.2,00,000/- (Rupees two hundred thousand only) as compensation to the legal heirs of the deceased as provided u/s 544-A Cr.P.C and in case of default, he shall suffer S.I six (06) months more. He is extended benefit of section 382-B Cr.P.C.

18. Resultantly, reference No.02 / 2014 for confirmation of death sentence of appellant Awais Haleem is replied in negative and is accordingly disposed of. These are the reasons of our short order dated 30.10.2017.

JUDGE

JUDGE

Ali Haider