

Reduction: death to life

Rape: No eye witness or other evidence 258

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Cv. J. A. 284 & 277 of 16 also Conf. Case 5/16

Sham @ Babbar Kanther vs The State

SINDH HIGH COURT

Composition of Bench.

Single/D.B.

Mr. J. Muhammed Karim Khan Asghar

Mr. J. Zulfiqar Ali Sangi

Dates of hearing: 16-10-19

Decided on (i) 22-10-19

(a) Judgment approved for reporting.

Yes
No



CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

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- NOTE:—(i) This slip is only to be used when some action is to be taken.
- (ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.
- (iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.
- (iv) Those directions which are not to be used should be deleted.

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IN THE HONOURABLE HIGH COURT OF SINDH
AT KARACHI.

U/A Appeal No. 277 of 2016

Session Case No: 456/2013

Mossa s/o Muhammad Khan
presently confined in
Central Prison, Karachi — Appellant.

versus

The State — Respondant.

APPEAL UNDER SECTION 410

CRIMINAL PROCEDURE CODE

Filed Through Jail.

B No: 16708

27-07-2016

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal NO. — / 2016

Shau alias Bablo

S/o

MOOSA

Presently Confined
in Central Prison,
Karachi.

Appellant/accused.

VERSUS

The State

Respondent

Session Case NO. 456/2013

FIR NO: 209/2012

U/s : 302/324/34 P.P.C

P.S : Orangi Town
Karachi (West)

Submitted by Jail

B NO: _____

Dated : _____

On 21/02/2012 two unknown persons on an unnumbered motor cycle came and for unknown reasons fired with fire arms upon my son Iqbal Shah sitting there. The

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FROM THE COURT OF II-ADDITL DISTRICT & SESSION JUDGE KARACHI WEST
No: II/ADJ/W/97/2016. Karachi, 26th July 2016.

608
CRL
02/8/16

To,
The Hon'ble
Registrar, High Court of Sindh
Karachi

SUBJECT:- REFERENCE U/S. 374 CR.P.C FOR CONFIRMATION OF DEATH SENTENCE
AWARDED IN SESSIONS CASE NO.456/2013 (THE STATE V/S MOOSA AND
ANOTHER, FIR NO.209/2012, U/S. 302/324/34 PPC, P.S. ORANGI TOWN

i have the honour to submit that vide judgment dated 22nd July 2016
passed by the undersigned in the above noted Sessions Case, whereby accused
Moosa s/o Muhammad Khan convicted u/s.302 (b) PPC and awarded death
sentence besides to pay compensation to the legal heirs of deceased, therefore,
the subject judgment alongwith R&Ps of S.C No. 456/2013 are submitted
herewith under section 374 Cr.P.C for confirmation of death sentence.

(MRS. SAMINA GHOURI)

IIIND ADDL DISTRICT SESSIONS JUDGE KARACHI WEST

Enclosed:

R&Ps of SC No.456/2013 (2-parts)

Paging index Part I

1.Diary sheets A to ZF and (01 to 214)

2.Paging index Part-II

Page No. 01 to 412

3.Case Law of complainant page No.01 to 383

Case Law of accused page No. 01 to 320

4. Police File Page No 01 to 108

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.277 of 2016
Criminal Jail Appeal No.294 of 2016
Confirmation Case No.05 of 2016

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi.

Appellants: Moosa and Shan alias Bablo through Mr. Abdul Razzak, Advocate.

For Complainant: Mr. Muhammad Akram, Advocate.

For State: Mr. Muhammad Iqbal Awan, Deputy Prosecutor General.

Date of hearing: 16.10.2019

Date of announcement: 22.10.2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellants Moosa S/o. Muhammad Khan and Shan alias Bablo S/o. Moosa have preferred these jail appeals against the impugned judgment dated 22.07.2016 passed by the learned IInd Additional District & Sessions Judge Karachi West in Sessions Case No.456 of 2013, F.I.R. No.209/2012 u/s. 302/324/34 PPC registered at P.S. Orangi Town Karachi (West) whereby the appellant Moosa S/o. Muhammad Khan has been convicted and sentenced to death under Section 302(b) PPC subject to confirmation by this court with fine of Rs.1,00,000/- (Rupees one lac only) to be paid as compensation to the legal heirs of the deceased. In case of non-payment of fine he was ordered to undergo S.I. for six months more. The appellant Shan alias Bablo S/o. Moosa was convicted and sentenced to rigorous life imprisonment with fine of Rs.50,000/- to be paid as compensation to the legal heirs of the deceased.

2. The brief facts of the prosecution case as per FIR are that with Reference to Roznamcha report No.33 dated 06.09.2012, S.I. Noor Ahmed after proceedings under section 174 Cr.P.C. of deceased Iqbal Shah S/o. Suchal Shah (the deceased) at Abbasi Shaheed Hospital, returned to P.S.

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The detail of statement u/s. 154 Cr.P.C. of deceased's father are as follows:-

"I, Suchal Shah S/o. Muhammad Shah, aged 55 years, resident of House No.240, situated at Noorani Park sector 7/A, Balouch Goth Orangi Town, Karachi are along with my family members residing at aforesaid address. On 06.9.2012 at 7:45 pm at night my son Iqbal Shah was sitting in front of our house while I left my house to go to the shop of Babo Pathal for receiving sale proceed of milk where from back side children came and told me that a fire arm bullet had hit Iqbal Shah. On this information, I instantly returned back and saw my son Iqbal Shah lying in a pool of blood in dead condition. Upon inquiry, I came to know that near 8.00 pm (night) two unknown persons on an unnumbered motorcycle came and due to unknown reasons fired with fire arms upon my son Iqbal Shah sitting there, due to which two bullets hit my son and he died/expired on the spot. From their firing two persons namely Muhammad Ali S/o. Mumtaz Ali and Lutuf S/o. Ismail have received injuries too. My claim is against two unknown persons for committing murder of my son Iqbal Shah by fire arm shots due to unknown reasons and caused injury to above injured persons".

3. Investigating Officer ASI Gulzar Ahmed submitted challan against both accused namely Moosa S/o. Muhammad Khan and Shah alias Bablo S/o. Moosa u/s. 512 Cr.P.C. before the Court of learned Judicial Magistrate Karachi West, who while observing offence u/s. 302/324/34 PPC ordered NBWs against accused persons. When investigation was in progress both accused had obtained interim pre-arrest bails in order to join the investigation which were subsequently dismissed vide order dated 16.7.2013.

4. The charge was framed against the accused persons in which they pleaded not guilty and claimed their trial.

5. In order to prove its case the prosecution examined 08 PW's and exhibited various documents and other items in support of its case. The appellants/accused recorded their statements under section 342 Cr.PC whereby they both admitted their presence at the scene of the offense but

claimed not to have shot at the deceased or anybody else but rather took the deceased to hospital in their car. They did not give evidence under oath or call any witness in support of their defense case.

6. Learned IInd Additional District & Sessions Judge Karachi West after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 22.07.2016, convicted and sentenced the appellants as stated above, hence these appeals have been separately filed by the appellants against their conviction.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. After the reading out of the evidence and the impugned judgment learned counsel for the appellants initially tried to argue the appellants' case however in the face of the overwhelming evidence against the appellants on record he decided not to press the appeals on merits but instead prayed for reduction of the sentence from the death penalty to one of life imprisonment in respect of appellant Moosa based on the following mitigating circumstances (a) that the prosecution had neither alleged nor proven any motive as to why the appellants should murder the deceased and (b) the very slightest of doubt in the prosecution case although not sufficient a doubt to lead to the acquittal of the appellants was enough to impose the alternate sentence of life imprisonment instead of death which was present in this case. In support of his contentions for a reduction in sentence from death to that of life imprisonment for appellant Moosa he placed reliance on **Muhammad Anwar V State** (2017 SCMR 630) and **Ghulam Mohyuddin V State** (2014 SCMR 1034).

9. Learned DPG and the complainant both contended that based on the evidence on record the prosecution had proved its case against both the appellants beyond a reasonable doubt and as such the impugned judgment did not require interference. When, however, the DPG was asked by the court whether the mitigating circumstances raised by the appellant justified a reduction in sentence he candidly conceded that as a

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matter of law they did justify a reduction from the death penalty to that of life imprisonment which was also the position taken by the complainant.

10. Having gone through the evidence on record we have no doubt that the prosecution has been able to prove its case against both the appellants beyond a reasonable doubt for the offenses for which they have been charged. In that the appellants have admitted their presence at the scene; that the eye witnesses who saw Moosa shoot the deceased along with Shan who was on the motor bike and helped Moosa to escape are reliable and confidence inspiring and are corroborated by the medical evidence and the recovery of the empties at the crime scene. The only issue before us is whether sufficient mitigating circumstances have been shown to justify the reduction in sentence from that of the death penalty to imprisonment for life as prayed by the appellant Moosa.

11. We are of the view that the prosecution has not been to prove any motive for the killing of the deceased. Generally it has been accepted by the superior courts that if the prosecution fails to prove the motive for the murder the courts are justified in imposing the alternate sentence of life imprisonment as opposed to the death penalty. Reliance in this respect is placed on the case of **Amjad Shah V State** (PLD SC 2017 P.152) where it was held as under at P.156 Para 9;

"Notwithstanding that the participation of the appellant in the commission of offence is duly established, his intention, guilty mind or motive to commit the same remains shrouded in mystery and is therefore, unproven. In such like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict. Reference is made to Zeeshan Afzal v. The State (2013 SCMR 1602)." (bold added)

12. In our view taking into account the fact that no motive has been proved against the appellant and that there might be some doubts in the prosecution case albeit insufficient to lead to an acquittal such as the slight delay in recording of some of the S.161 statements and whilst exercising judicial caution by taking guidance from the Supreme Court authority of

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Ghulam Mohyuddin (supra) where it was stressed as under whilst dealing with sentencing in a murder case in the following terms;

*"A single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment. No clear guideline, in this regard can be laid down because facts and circumstances of one case differ from the other, however, it becomes the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case. **If the Judge/Judges entertain some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows. So it is better to respect the human life, as far as possible, rather to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed.** (Bold added)*

13. We hereby uphold the convictions in the impugned judgment but reduce the sentence of the appellant Moosa from that of the death penalty to life imprisonment as such the confirmation reference is answered in the negative in respect of appellant Moosa and maintain the sentence of life imprisonment imposed on appellant Shan. Apart from the above variation in sentence all other fines and penalties imposed against the appellants in the impugned judgment shall remain in tact and both the appellants shall have the benefit of S.382 (B) Cr.PC.

14. The appeals stand disposed of in the above terms.