

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.41 of 2019.
Conf. Case No.09 of 2018.

Present:

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

Appellant: Akhtar Pervaiz @ Babu through
Mr. Habib-ur-Rehman, Advocate.

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

Date of hearing: 17.10.2019 and 18.10.2019.

Date of Announcement: 24.10.2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Appellant Akhtar Pervaiz @ Babu S/o. Muhammad Ashraf has preferred this appeal against the impugned judgment dated 17.10.2018 passed by the Additional District & Sessions Judge-8 Karachi West in Sessions Case No.1412 of 2014, F.I.R. No.89/2014 u/s. 302/324 PPC registered at P.S. Orangi Town Karachi (West) whereby the appellant Akhtar Pervaiz @ Babu has been convicted and sentenced to death under Section 302(b) PPC subject to confirmation by this court. The appellant was also awarded S.I. for 07 years under section 324 PPC with fine of Rs.5,00,000/- (Rupees five lac only) under section 544-A Cr.P.C to be paid 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.

2. The brief facts of the prosecution case as per FIR lodged by Jameel Ahmed (brother of deceased) are that on 30.04.2014 he along with his brothers namely Shakeel Ahmed (the deceased) and Ameer Ahmed were residing in Shakeel Pan Wali Street, Sector 13/G, Orangi Town, where they had also established lathe machine. Three (3) years ago they were living in House No.310 as a tenant where they had a dispute with one Ashraf over water but they shifted to another house. Today, at about 1030 hours while he along with his brother Ameer Ahmed were working inside lathe machine factory and his brother Shakeel Ahmed was sitting on the front portion of the factory he heard firing and when they both came out of the factory they saw that Babu was holding pistol in his hand, while his

brother Shakeel Ahmed was lying on the ground having injury on his head. Meanwhile Babu also tried to fire on Jameel but the bullet did not fire from the pistol. Babu then ran away while his brother Shakeel Ahmed died on the spot. Thereafter, the dead body was taken to Abbasi Shaheed Hospital and FIR was lodged against Babu. During investigation, the accused Babu was apprehended in FIR No.89/2014 U/s. 23(1)(a) Sindh Arms Act 2013 and was found in possession of one pistol. He also made a judicial confession before the Magistrate and subsequently his case was challoned and forwarded to the Court of Additional District & Sessions Judge-8 Karachi West for trial.

3. The charge was framed against the accused to which he pleaded not guilty and claimed his trial.

4. In order to prove its case the prosecution examined 08 PW's who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The appellant/accused recorded his statement under section 342 Cr.PC and gave evidence on oath U/s. 340(2) Cr.P.C. whereby he claimed his false implication in the case. He did not call any defense witnesses in support of his defense case.

5. Learned Additional District & Sessions Judge-8 Karachi West after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 17.10.2018, convicted and sentenced the appellant as stated above, hence this appeal has been filed by the appellant against his convictions and sentences.

6. 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.

7. After the reading out of the evidence and the impugned judgment learned counsel for the appellant initially tried to argue the appellant's case however in the face of the overwhelming evidence against the appellant on record he decided not to press the appeal on merits but instead prayed for reduction of the sentence awarded u/s 302 (b) PPC from the death penalty to one of life imprisonment in respect of the appellant based on the following mitigating circumstances (a) that the

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appellant had been acquitted in the associated case under the Arms Ordinance (b) that no eye witness actually saw the appellant shoot the deceased and (c) 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 for the offense under S.302 (b) PPC from death to that of life imprisonment for the appellant he placed reliance on **Ghulam Mohyuddin V State** (2014 SCMR 1034).

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

9. Having gone through the evidence on record we have no doubt that the prosecution has been able to prove its case against the appellant beyond a reasonable doubt for the offenses for which he has been charged. In that the appellant's presence at the scene is not in doubt; that the eye witnesses who came out of the factory when they heard the shot saw the appellant whom they knew standing over their brother with a pistol who was laying in a pool of blood and we consider these eye witnesses to be trust worthy, reliable and confidence inspiring who were not shaken during their cross examination and are corroborated by the medical evidence, the judicial confession of the appellant which we find to have been voluntarily made and truthful being fully in line with the prosecution case and all necessary rules and procedures were followed whilst recording the judicial confession (despite being later retracted by the appellant) and the recovery of the empty at the crime scene and the murder weapon from the appellant with a positive FSL. The only issue before us therefore 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 for the offense under S.302 (b) PPC.

10. In our view taking into account the fact that the appellant was acquitted in the Arms Ordinance case, that no eye witness actually saw the appellant shoot the deceased and the murder was not a particularly brutal one and the complainant present in court has also no objection to the reduction in sentence and whilst exercising judicial caution by taking guidance from the Supreme Court authority of **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)

11. We hereby uphold the convictions in the impugned judgment but reduce the sentence of the appellant from that of the death penalty to life imprisonment as such the confirmation reference is answered in the negative in respect of appellant Akhtar Pervaiz @ Babu. Apart from the above variation in sentence for the offense under S.302 (b) PPC all other convictions, sentences for other offences under S.324 PPC and fines and penalties imposed against the appellant in the impugned judgment shall remain in tact. The sentences in the impugned judgment shall run concurrently and the appellant shall have the benefit of S.382 (B) Cr.PC.

12. The appeal stands disposed of in the above terms.