

Murder & Revolt Pump

Seema acquitted

Asif Muneer did not press on merits - death sentence reduced to life

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IN THE HIGH COURT OF SINDH AT KARACHI

Spl. Criminal Anti-Terrorism Jail Appeal No.190 of 2016

Spl. Criminal Anti-Terrorism Jail Appeal No.194 of 2016

Confirmation Case No.08 of 2017

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellants:

1. Ms. Seema W/o. Muhammad Malook presently confined in Central Prison, Karachi through Mr. Khawaja Naveed Ahmed and Irfan Bhutta, Advocates.
2. Asif Muneer S/o. Munir Ahmed, presently confined in Central Prison, Karachi through Mr. Nasrullah Korai, Advocate.

Respondent:

The State through Muhammad Iqbal Awan, Deputy Prosecutor General Sindh.

Date of hearing:

02.04.2019.

Date of Judgment:

12.04.2019.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Mst. Seema W/o. Muhammad Malook and Asif Muneer S/o. Muneer Ahmed were tried by learned Judge Anti-Terrorism Court No.II, Karachi in Special Case No.245 of 2013 arising out of Crimes No.18/2013 U/s. 353/324/302/109/34 PPC read with section 7 of Anti-Terrorism Act, 1997 and Crime No.20/2013 U/s. 13-D Arms Ordinance registered at Police Station, F.B. Area, Karachi. After a full dressed trial vide judgment dated 23.05.2016, the appellant Mst. Seema W/o. Muhammad Malook was convicted and sentenced to suffer R.I. for life u/s 7(a) of ATA, 1997 with fine of Rs.1,00,000/- (Rupees one lac only) as compensation to be paid to the legal heirs of deceased Samiullah and appellant Asif Muneer S/o. Muneer Ahmed was awarded death penalty u/s. 7(a) of ATA, 1997 subject to confirmation by this court. Appellant Asif Muneer was also convicted and sentenced to suffer R.I. for 07 years u/s. 13-(d) of Arms Ordinance (the impugned judgment).

2. The brief facts according to the F.I.R. filed by the complainant Asadullah Khan are that on 12.03.2013 his brother Samiullah aged about 33 years was going in his Car No.AHH-434 "HONDA" City Black Colour along with his friends Rafiq S/o. Muhammad Hanif, Atiq Ahmed S/o. Furqan from his House No.93, Nusrat Bhutto Colony, nearby Usmania Jamia Masjid Trust, Karachi when they reached at Rashid Minhas Road near Caltex Petrol Pump, he was told by Atiq Ahmed (friend of his brother) on telephone that he has taken his brother to Abbasi Shaheed Hospital. On this information the complainant reached Abbasi Shaheed Hospital and he found that his brother succumbed to his injuries. Rafiq friend of his brother told him that they were going in his car at about 5.30 p.m. when they reached Rashid Minhas road, near Caltex petrol pump, two young motor bike riders came on 125 motorbike in front of the car and got down and started indiscriminate firing upon Samiullah who received bullet injuries. A police constable came from the petrol pump and tried to stop the two accused but they both started firing at him and police constable retaliated upon which the culprits fell down. Meanwhile a police mobile also reached there and arrested the two injured accused, who had TT pistols in their hands. The injured Samiullah was taken to Abbasi Shaheed Hospital but he succumbed to his injuries on the way. He had learnt the names of the injured accused through police. The accused who succumbed to his injuries on the spot is Adnan alias Raheel S/o. Sadiq and the injured accused is Asif Muneer S/o. Muneer Ahmed, who were on motorbike and he suspects beside them there were two more persons involved.

3. After usual investigation, challan was submitted against the accused persons before the trial court. The absconding accused persons namely Sijawal S/o. Abdul Razaq and Noman alias Nomi S/o. Muhammad Umer alias Baqar were declared as proclaimed offenders on 01.11.2013. The trial court framed the charge against the accused persons on 20.11.2013 to which they pleaded not guilty and claimed trial of the case.

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4. At trial the prosecution examined 18 witnesses and exhibited numerous documents and other items in order to prove its case. Thereafter the prosecution closed its side. Statements of three accused Hamza, Seema and Asif Muneer were recorded U/s. 342 Cr.P.C. on 22.03.2016 and accused Seema and Asif Muneer also gave evidence under oath. The accused persons claimed false implication in the present cases but did not call any witnesses in support of their defense. As mentioned above after assessing the evidence on record the trial court acquitted accused Hamza and convicted and sentenced the appellants Seema and Asif Muneer as mentioned earlier in this judgment. Hence the appellants Seema and Asif Muneer have filed these appeals against their conviction.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 23.05.2016 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. After the reading out of the evidence and the impugned judgment learned counsel for the appellant Asif Muneer at the very outset did not press his appeal on merits but instead prayed for reduction of the sentence from the death penalty to one of life imprisonment based on the following mitigating circumstances (a) that it has not been proved whether the appellant or his deceased co-accused Adnan alias Raheel fired the fatal shot which killed Samiullah and (b) the prosecution had not proved any motive as to why appellant Asif Muneer should kill Samiullah and (c) that the allegation against Asif Muneer was general in nature. In support of his contention for a reduction in sentence from death to that of life imprisonment he placed reliance on **Atta-ur-Rehman v. The State** (2018 SCMR 372), **Ahmad Nawaz and another v. The State** (2011 SCMR 593), **Ahsan Bangash alias Junaid v. The State** (2017 P. Cr.LJ 509), **Jan Mohammad alias Janoo v. The State** (2016 YLR 2359), **Bashir Ahmed v. The State** (2016 P. Cr. LJ 1682) and **Abdur Rauf and 3 others v. The State** (2014 YLR 933).

7. Learned DGP contended that based on the evidence on record the prosecution had proved its case against the appellant Asif Muneer beyond a reasonable doubt and as such the impugned judgment did not require interference. When, however, he was asked 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.

8. We have carefully considered the plea of mitigation for the reduction of sentence by the appellant from the death penalty to life imprisonment based on the relevant law and the particular facts and circumstances of this case

9. 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)*

10. It has also been held by the superior judiciary that where it has not been conclusively proved as to which accused fired the fatal shot which killed the deceased then this amounted to a mitigating circumstance which may justify the court in imposing the alternate sentence of life imprisonment as opposed to the death penalty. Reliance in this respect is placed on the case of **Atta-Ur-Rehman** (Supra) where it was held at P375 Para 4 as under;

"It is, thus, not clear as to which one of the accused persons, including the present appellants, was actually responsible for causing the fatal injuries to the deceased. In such circumstances generally a sentence of death is withheld when it is not clear as to whether a particular culprit was actually responsible for causing a death or not. For all these reasons we have decided to exercise caution and to err, if at all, on the side of precaution."

11. Having gone through the evidence on record we have no doubt that the prosecution has been able to prove its case against the appellant Asif Muneer beyond a reasonable doubt for the offenses for which he has been charged. 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.

12. In our view taking into account the fact that no motive has been proved against the appellant and it has not been conclusively determined whether it was the appellant or his now deceased co-accused who fired the fatal shot which killed the deceased and in taking guidance from the above mentioned supreme court authorities and the additional supreme court authority of **Ghual Mohy-Ud-Din V State** (2014 SCMR 1034) where it was stressed as under whilst dealing with sentencing in a murder case in the following terms;

"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".

13. We hereby reduce the sentence of the appellant Asif Muneer from that of the death penalty to life imprisonment. Apart from the above variation all other sentences imposed against the appellant Asif Muneer in the impugned judgment shall remain in tact.

14. Turning to the case of appellant Seema who was convicted and sentenced to life imprisonment by the impugned judgment. The case against her is entirely different to that of appellant Asif Muneer. The case of the prosecution in essence is that the accused Seema who arranges travel tickets and visa's for customers orchestrated the murder of the

deceased Samiullah by Raheel (now deceased) and Asif Muneer by guiding Raheel to the location of Samiullah through being in mobile telephone contact with each of them around the time of the incident whereby Raheel and Asif Muneer murdered deceased Samiullah by way of a planned and intended target killing.

15. Learned counsel for appellant Seema contended that she was entirely innocent and that the prosecution had not been able to prove beyond a reasonable doubt her involvement in the murder of Samiullah by Raheel and Asif Muneer. In particular he stressed that her mobile phone had not been recovered from her; that the CDR records of her phone to that of Raheel and Samiullah did not show that she was involved in their murder; that the prosecution had not proved that she had any motive to kill Samiullah; that the prosecution had not shown that she had any criminal intent to kill Samiullah and that she was entitled to be acquitted of the charge by giving her the benefit of the doubt. In support of his contentions he placed reliance on **Allah Wadhayo and another v. The State** (2001 SCMR 25), **Tariq Pervez v. The State** (1995 SCMR 1345), **Anwar-ul-Haq v. S.H.O., Police Station Nishatabad, Faisalabad and another** (2002 SCMR 31) and **Imtiaz Ahmad v. The State** (2001 SCMR 1334).

16. On the other hand learned DPG has contended that the evidence on record clearly shows that the accused Seema had orchestrated the target killing of Samiullah by Raheel and Asif Muneer. In particular he referred to the CDR records of Seema which showed that on the day of the incident she made 18 calls to Raheel and Samiullah whereby she arranged for Samiullah to go to the petrol pump at a given time and wait there to receive a visa for his friend Ataq who was in his car and for Raheel and Asif Muneer to go to the petrol pump at that time so that they could target kill Samiullah. The prosecution stressed that her motive for doing this was that Samiullah had assisted her parents in ruining her marriage to Raheel and as such the accused Seema had rightly been convicted and sentenced by the impugned judgment which does not require interference with and as such her appeal should be dismissed.

17. We have carefully considered the arguments of the learned counsel for appellant Seema and the learned DPG, gone through the entire evidence and impugned judgment with their able assistance and considered the relevant law.

18. In essence the case against appellant Seema is that she planned and had common intention along with deceased Raheel and Asif Muneer to murder Samiullah.

19. On considering the evidence against accused Seema it is of extreme significance that the 3rd IO in this case PW 16 Syed Mohsin Raza admitted during cross examination that;

"It is correct to suggest that beside CDR I have not produced any evidence against accused Seema".(bold added)

20. Putting aside the question of whether Seema's mobile phone was sealed on the spot and kept in safe custody at the time of her arrest until the time of the trial the question arises as to what does this CDR data actually tell us about Seema's involvement in Samiullah's murder. In this respect the relevant part of the 3rd IO in this case PW 16 Syed Mohsin Raza's evidence in chief in so far as it relates to Seema's mobile phone CDR is set out as under,

"Since the CDR obtained by I.O. Mehmood Khan Rajput was of such form the words being were cut it was vertical for and I had taken the CDR important form so that the words should not be cut and one can read it. I produced the CDR of the phone No. of accused Adnan alias Raheel having No.0345-2093462 of 41 pages as Ex. P/57. I had also taken CDR of the phone number of Seema having No.0301-2951351 of 111 page as Ex. P/58. I had also taken CDR of the number of accused Hamza having No.0300-2281091 of 34 pages as Ex. P/59. I had studied the CDRs and put the marking Seema had been contacting on yesterday on the day of incident with the deceased Samiullah and the accused Adnan alias Raheel. She had contacted more than 18 times to accused as well as Samiullah. Seema had also contacted with Aamna. Seema is middle person between the travel agent and the people who wants to go abroad as labour. I had not received custody of accused Seema in jail. She was given the direction to Adnan and information about the Samiullah to the murderers. The number of accused Raheel was 0345-2093462. According to

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CDR of Seema had contacted Adnan alias Raheel many times. Seema instead of going to airport had gone to Asadullah. The complainant had given the papers telling him to give the papers to Samiullah. Asadullah had contacted Samiullah who got annoyed at Asadullah as to why he had taken papers from Seema". (bold added)

21. The CDR tell us that on the day of the incident Seema was in contact with Adnan alias Raheel (one of the target killers) and Samiullah on at least 18 separate occasions despite Seema in her evidence under oath denying this. In our view Seema has not been truthful in this aspect of her evidence. Never the less the onus still lies on the prosecution to prove its case against Seema beyond a reasonable doubt. Namely that she planned and had common intention along with deceased Raheel and Asif Muneer to murder Samiullah.

22. In our view, the CDR conclusively proves that accused Seema was in constant contact via mobile phone with target killer Raheel and the deceased Samiullah around the time of the incident. The question is how does this prove Seema's guilt? The evidence shows that she was in the business of arranging travel tickets and visa's; that Atiq who was traveling in the car with Samiullah and others was expecting to receive a visa from her so that he could proceed on his international travel that day from the airport; that there was some confusion as to whether Seema should have handed over the visa to Asadullah to give to Atiq at his shop or to Atiq at the airport and as a result of this confusion a number of phone calls were made between the concerned parties which must have included Samiullah and Seema whose car Atiq was in in order to resolve the situation. Thus, Seema's calls to Samiullah on the evidence on record can be readily explained on the day of the incident. With regard to Raheel he was her relative as was Samiullah so she had every reason to talk to him. It may be that Seema and Raheel had a motive to murder Samiullah for helping her parents to ruin their marriage but the prosecution still needs to prove through cogent and reliable evidence Seema's involvement in the offense as charged.

23. So although we are of the view that the prosecution has been able to prove that a large number of calls were being made on the date of the

incident by Seema to both Raheel and Samiullah the prosecution has not been able to prove what these calls were about. In our view, the only reasonable inference based from the facts and circumstances of the case that these calls were made by Seema to guide Raheel to where Samiullah was so that Raheel and Asif Muneer could murder him in accordance with their plan **cannot** be drawn from the particular facts and circumstances of the case as it is equally true that Seema may have been contacting Samiullah in connection with the confusion concerning Atiq receiving his visa before departing that day and speaking to Raheel on family issues.

24. In our view, without a tape recording of the conversations of the calls mentioned in the CDR between Seema, Raheel and Samiullah on the day of the incident showing that Seema was guiding Raheel to Samiullah's location so that Raheel and Asif Muneer could murder Samiullah pursuant to their plan and common intention the prosecution will be **unable** to prove its case against Seema beyond a reasonable doubt for the offense for which she is charged no matter how strong their suspicions, presumptions and surmises may be. It has not even been proved that the SIM was in the name of Seema. In this respect reliance is placed on the case of **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274), where it was held as under at P.286 Para 22:-

"The cell phone call data collected is of no help to the prosecution for the reasons that numerous calls have been made indicating continuous interaction between the two cell phones, contrary to the evidence given by Muhammad Wali (PW-3), who has stated at the trial that the unknown caller made calls on his cell phone four times. No competent witness was produced at the trial, who provided the call data, record Ex P.1 to 5. No voice record transcript has been brought on record. Similarly from which area the caller made the calls, is also not shown in it. Above all, the most crucial and conclusive proof that the cell phone was owned by the accused and SIM allotted was in his name is also missing. In this view of the matter, this piece of evidence is absolutely inconclusive and of no benefit to the prosecution nor it connects the accused with the crime in any manner."(bold added)

25. As was further held in the aforesaid case at P.290 Para 32 as under:-

"It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one".

26. Thus, based on the above assessment of evidence in respect of appellant Seema and by extending the benefit of the doubt to her we hereby set aside the impugned judgment in so far as it relates to her and acquit her from the charge and order that she be released from custody unless she is required in any further custody case.

27. In summary, in so far as the appeal of appellant Asif Muneer is concerned this is dismissed except that the sentence is varied from the death penalty to that of imprisonment for life, he shall be entitled to the benefit of section 382(B) Cr.PC and the confirmation reference is answered in the negative. In respect of the appeal of appellant Seema this is allowed.

28. The appeals are disposed of in the above terms with the confirmation reference against appellant Asif Muneer being answered in the negative.