

**IN THE HIGH COURT OF SINDH, KARACHI**

*Present:*

*Mr. Justice Naimatullah Phulpoto,  
Mr. Justice Mohammad Karim Khan Agha*

**Criminal Jail Appeal No.340 of 2017  
Confirmation Case No.06 of 2017**

Appellant	Sharafat Ali through Mr. Abdul Razzak, Advocate
Complainant	Through Mr. Rehan Qureshi, Advocate
Respondent	The State through Mr. Farman Ali Kanasro, Addl. Prosecutor General
Date of hearing	26.04.2019
Date of Judgment	10.05.2019

**JUDGMENT**

**MOHAMMAD KARIM KHAN AGHA, J:-** The appellant (Sharafat Ali) in the instant appeal has assailed the judgment dated 31.03.2017 passed by Learned Xth Additional Sessions Judge (West) Karachi in a Sessions Case bearing No.163 of 2010 whereby the appellant was convicted for commission of offence punishable under Section 302(b) PPC and awarded death sentence subject to confirmation by this court. He was also directed to pay a fine of Rs.200,000/- and in default of payment he had to undergo simple imprisonment for six months more (the impugned judgment).

2. The brief facts of the case are that on 22.01.2010 brother of complainant Liaqut, his mother, father and Abdul Hameed and accused Sharafat Ali being brother of complainant were present in the house No.2028 Block A, Abidabad Baldia Town, Karachi. It was about 7-00 pm when accused Sharafat Ali asked his mother that there is influence of witches over her therefore, he is ready to remove the same, and on this his father Abdul Hameed asked the accused Sharafat Ali not to do such improper behavior with his mother, then accused Sharafat Ali took out churri and tried to attack upon his brother Liaqat Ali. The father of complainant namely Abdul Hameed intervened and accused Sharafat Ali then caused churri blows to his father Abdul Hameed which hit him on his head and shoulder and left him bleeding. Thereafter, Mohammad

Ashique uncle of the complainant and other mohalla people brought his father Abdul Hameed to the Abbasi Shaheed hospital at Karachi where he expired. The complainant then lodged FIR at PS Mochko on 23.01.2010 at 0215 hours to the above effect under section 302 PPC.

3. After completion of investigation, investigating officer submitted challan against the accused before concerned Sessions court, Karachi under section 302 (b) PPC. The charge was framed against the accused to which he pleaded not guilty and claimed trial of the case.

4. The prosecution in order to prove its case examined 07 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. He declined to record his statement on oath and did not call any witness in support of his defense. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as set out earlier in this judgment. Hence, the appellant has filed this appeal against conviction.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 31.03.2017 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, the impugned judgment and arguing at some length learned counsel for the appellant did not press his appeal on merits but instead prayed for reduction of the sentence from the death penalty to that of an appropriate sentence of imprisonment based on the particular facts and circumstances of the case of 14 years RI along with an appropriate amount of compensation to the legal heirs as according to him his case fell within S.302 © PPC and not S.302 (b) PPC. In this respect he contended that there was no premeditation in causing the death of his father; that he had no intention of killing his father who got in between him and his brother in order to prevent an altercation which they were having on account of his brother's annoyance about his changing of the T.V channels and thus he unintentionally killed his father and as such his case fell within S.302 (c) PPC not S.302 (b) PPC and thus his sentence be reduced to that applicable for an offense under S.302 (c) PPC. In

support of his contention he placed reliance on the case of **Zeeshan@ Shani V The State** (PLD 2017 SC 165).

7. Learned APG 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, he was asked by the court whether the case fell within S.302 © PPC as opposed to S.302 (b) PPC he rejected this contention of the appellant. According to him, it was a clear case of premeditated murder and the offense had been committed under S.302 (b) PPC and not under S.302 (c) and thus the appellant had been rightly convicted and sentenced to death under S.302 (b) PPC. In terms of sentence reduction however he conceded that the facts and circumstances surrounding the case justified the reduction of the death sentence to that of life imprisonment mainly on the grounds that the motive appeared to be indirect and that this was the desire of the legal heirs. Learned counsel for the complainant adopted the arguments of learned APG.

8. We have carefully gone through the evidence on record and in our view based on the eye witness evidence, other corroborative ocular evidence, medical evidence, chemical report and recoveries we are fully satisfied that the prosecution has proved its case against the accused beyond a reasonable doubt and as such neither the impugned judgment nor conviction requires any interference.

9. The only remaining issue at hand is whether a reduction in sentence is justified from death to any other alternate sentence.

10. The obvious question arises as to what is the distinction in law between S.302 (b) PPC and S.302 (c) PPC and as such it would be of assistance to consider S.302 PPC which provides as under:

*"S.302. Punishment of qatl-i-amd - Whoever commits qatl-i-amd shall, subject to the provisions of this Chapter be -*

*(a) punished with death as qisas;*

*(b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of forms specified in section 304 is not available; or*

5



*(c) punished with imprisonment of either description for a term which may extend to twenty-five years where according to the injunctions of Islam the punishment of qisas is not applicable;*

*Provided that nothing in this clause shall apply to the offence of qatl-i-amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be". (bold added)*

11. The case of **Ali Muhammed V Ali Muhammed** (PLD 1996 SC 274) set out the distinction between S.302 (b) and (c) PPC in the following terms at P.290 at Para 29:

*"29.....Section 302 of the P.P.C. therefore, itself contemplates plainly clearly a category of cases which are within the definition of Qatl-i-Amd but for which the punishment can, under the Islamic Law, be one other than death or life imprisonment. As to what are the cases falling under clause (c) of section 302, the law-maker has left it to the Courts to decide on a case to case basis. But keeping in mind the majority view in Gul Hassan case PLD 1989 SC 633, there should be no doubt that the cases covered by the Exceptions to the old section 300, P.P.C. read with the old section 304 thereof, are cases which were intended to be dealt with under clause (c) of the new section 302 of the P.P.C." (bold added)*

12. This view of the Supreme Court was approved and adopted in the later case of **Zahid Rehman V State** (PLD 2015 SC 77)

13. The next issue therefore is what are the Exceptions to the old section 300, P.P.C. read with the old section 304 which are set out as under for ease of reference:

*"Exception 4:" Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner;*

*"304. Punishment for culpable homicide not amounting to murder: Whoever commits culpable homicide not amounting to murder, shall be punished with imprisonment for life or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, if the act by which the death is caused is done with the intention, of causing death, or of causing such bodily injury as is likely to cause death;*

*or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the*

4

*act is done with the knowledge that it is likely to cause death, but without any intention to cause death or to cause such bodily injury as is likely to cause death."*(bold added)

14. It appears from the above that S.302 © is most likely to apply in situations:

- (a) where without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender's having taken undue advantage or acted in a cruel or unusual manner a person is murdered or
- (b) where there is a lack of intention to cause death which say results by accident.

15. In this respect learned counsel for the appellant has relied on the case of **Zeeshan alias Shani** (Supra) whereby the appellant's conviction under S.302 (b) PPC was altered to one under S.302 (c) PPC. In that case it was found that the appellant did not premeditate the killing as the complainant had arrived unannounced at the appellant's house and thus if he had not gone there no argument would have occurred and that the appellant struck the deceased with only a **single blow** with a simple **stick and not a weapon** with the result that the deceased died a few days later.

16. In the case at hand the appellant was the instigator of the argument by changing the T.V channels and then appears to have argued with both his brother who objected to the change in T.V channels, then abused his mother and thereafter pulled a churri/dagger which he struck his father **three times** with while protecting his son. In our view this case is distinguishable from the case of **Zeeshan alias Shani** (Supra). This is because the appellant caused the argument and then attacked his father with a churri/dagger who was shielding his brother (if there had been no premeditation to kill his father the appellant could have simply punched his father or pushed him out of the way), it also appears that he collected this churri from a different part of the house (PW 6 Naimat Jan who was his mother) **then hit his father not once with the churri but three times including once on the head being a vital part of his body**. This conduct in our view despite the argument between the two brothers makes the attack on his father pre meditated. He also had the intention to kill his father in order to get at his brother who his father was shielding or as we

5

have mentioned otherwise he would simply have pushed/knocked his father out of the way in order to reach his brother who he was arguing with over the change of TV channel. Instead however **he gave his father 3 separate churri blows including one to the head which is a vital part of the body.** If he had no intention of killing his father then even if he had resorted to the use of a churri which is a **lethal weapon** when he had struck him once which injured him then as his son in our view he would have dropped the churri and come to the aid of his father by even taking him to hospital if necessary. Instead, however, of adopting this approach **he hit his father two more times with the lethal churri** before running out of the house and escaping without making any attempt to come to the aid of his father. In our view the appellant deliberately and intentionally killed his father because he was shielding the brother who he was arguing with otherwise once he had hit his father with the 3 churri blows he would also have made sure he killed his brother. In short his premeditated intention to kill shifted from his brother to his father once his father tried to intervene and safeguard his other son.

17. Even in the recent unreported Supreme court case of **Mansoor Khan alias Danish V The State** in Criminal Appeal No.11K of 2018 dated 25.02.2019 where the conviction was altered from being under S.302 (b) to S.302 (c) PPC the facts of that case were different and distinguishable from the instant case where the accused after being slapped (a far more serious provocation than changing the T.V channel) by his friend shot and killed him and thus in that case the accused was provoked whilst in the instant case it was the accused who did the provoking. Furthermore, in **Mansoor Khan's case (Supra) only one shot was fired as opposed to the instant case where 3 churri blows were inflicted on the deceased including one blow to his head.**

18. Based on the above discussion we find this to be a case falling under S.302 (b) PPC and NOT S.302 (c) PPC.

19. We are fortified in our findings by the unreported Judgment of a Division Bench of the Peshawar High Court dated 26.01.2016 in Cr.A No.135-M/2015 in the case of **Mian Gul Rahim V State** whereby a criminal revision application was allowed whereby the trial court's

conviction under S.302 © PPC was **enhanced** to a conviction under S.302

(b) PPC on relative lesser grounds than the instant case in the following terms at Para 11:

*"11. Now adverting to the stance of the learned counsel for the complainant and the learned A.A.G that the trial Court has awarded lesser punishment to the appellant/convict despite the fact that no mitigating circumstances prevail in the present case. The learned trial Judge has held that the murder was the result of sudden fight over a hand-cart dispute, no previous enmity was their inter se the parties and the appellant/convict gave a single stab to the deceased. The above facts were taken as a mitigating circumstances by the learned trial Court and the appellant was convicted under section 302(c) PPC by awarding him punishment of fourteen years rigorous imprisonment. No doubt, mitigating circumstances mentioned by the learned trial Court can be considered for avoiding the capital punishment of death sentence but not in the case of awarding punishment under section 302(c) PPC keeping in view the attending facts and circumstances of the present case. Record shows that the present case is that of a single accused who has been charged for inflicting knife blow to the deceased which proved fatal and caused the death of the deceased. It is also noticeable that the occurrence originated from a petty matter and there is no evidence of premeditation on the part of the appellant/convict, therefore, the Court in such like circumstances should not lose sight of the principle of proportionality and should avoid the award of capital punishment to an accused. But in the present case the learned trial Court has penalized the appellant/convict under Section 302(c) PPC which is not fair just keeping in view the mode and manner in which the appellant/convict inflicted knife injury to the deceased. Since, proof of the sort specified in Section 304 PPC is not available in the present case and the mitigating circumstances are available for avoiding death sentence to the appellant/convict as discussed above, therefore, in estimation of this Court Section 302 (b) PPC would be the right section under which the appellant/convict should be convicted by enhancing his sentence to imprisonment for life as 'tazir'.(bold added)*

20. Having found it to be a case which falls under the purview of S.302 (b) PPC the last issue to consider is whether the offense justifies the death penalty or a reduction in sentence to imprisonment for life.



21. We are of the view that a part from the father shielding his other son the appellant at best had an indirect motive to kill his father since initially the primary motive was to kill his brother which later shifted to his father once his father got in the way. It is well settled that if the prosecution fails to prove its motive or if the motive is indirect then this is regarded as a mitigating factor and usually the death penalty is reduced to that of imprisonment for life. In this respect reliance is placed on **Ali Bux V State** (2018 SCMR 354). Based on the particular facts and circumstances of the case we also find that it was not a particularly brutal murder and that the appellant spared both his brother and mother who he was arguing with/abusing and that based on such facts and circumstances surrounding the case it is better to preserve life rather than to end the same especially when the family has already lost the life of one of its members when the alternate sentence of life imprisonment is available. In this respect reliance is placed on **Ghual Mohy-Ud-Din V State** (2014 SCMR 1034). We also observe that the learned APG also conceded that this was a fit case to reduce the sentence from that of death to life imprisonment and that the legal heirs are also in favour of this reduction in sentence to life imprisonment.

22. Thus, taking into account the above discussed mitigating circumstances we are of the view that the appellant has made out a case for the reduction in his sentence from that of death to imprisonment for life. As such, the appellant's sentence is converted from the death sentence to imprisonment for life and the confirmation reference is answered in the negative. The appellant shall be given the benefit of S.382-B Cr.PC and apart from the above variation the other elements of the sentence contained in the impugned judgment shall remain in tact.

23. The appeal is disposed of in the above terms with the confirmation reference being answered in the negative.