

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Criminal Jail Appeal No D-77 of 2019  
Cr. Conf. Case No D-44 of 2019

Present

Mr. Justice Muhammad Saleem Jessar.  
Mr. Justice Shamsuddin Abbasi.

Pauper Appellant : Khadim Hussain Khoso, through Mr. Ahsan Ahmed Qureshi, Advocate.

The State : through Mr. Ali Anwar Kandho, Additional Prosecutor General.

Date of Hearing : 06.04.2022.

Date of Judgment : 06.04.2022.

JUDGMENT.

MUHAMMAD SALEEM JESSAR, J.- Appellant faced trial in Sessions Case No.241 of 2008 re-State v. Khadim Hussain & others (Crime No.10/2008 of Police Station Nabi Shah Wagan, u/s 302, 34, PPC) and was found guilty. As a result, he was convicted and sentenced to death, subject to the confirmation by this Court vide impugned judgment dated 13<sup>th</sup> November, 2019 passed by learned 1<sup>st</sup> Additional Sessions Judge/Model Criminal Trial Court, Shikarpur.

2. Concisely the facts of the prosecution case as gleaned from the FIR are that on 05.05.2008 complainant Mohammad Raheem Khoso lodged FIR at PS Nabi Shah Wagan, stating therein that on 04.05.2008, he, his brothers Mirzan, Manthar, his maternal cousin Allah Warayo, nephew Ghulam Sarwar, aged about 16/17 years, were available in the house of complainant. At about 12.00 noontime, accused Khadim Hussain son of Piyaro Khoso, armed with gun and two unidentified bare-faced accused, both armed with T.T. Pistols, intruded into the house. Accused Khadim Hussain pointing his gun towards Ghulam Sarwar

asked him that his elders were not settling the matrimonial dispute with them, so they would kill him, then accused Khadim Hussain fired shot of his gun straight upon Ghulam Sarwar with intention to kill him, which hit him and he raising cry fell down, whereafter the accused person ran away. Complainant and PWs after seeing the injuries of Ghulam Sarwar and seeing him in serious condition took him to hospital for providing medical treatment, but Ghulam Sarwar succumbed to injuries on the way to hospital. Police got conducted postmortem of the dead body and handed over it to the complainant, who after its burial went to police station and lodged FIR.

3. The appellant/accused was arrested after more than one decade of the FIR and sent up to face trial, during which a formal charge was framed, to which he pleaded 'not guilty' and claimed trial.

4. At the trial, the prosecution examined in all 11 witnesses, namely, PW-1 Dr. Shayam Lal (Exh.11), PW-2 ASI(R) Ghazi Khan (Ex.14), PW-3 First IO/Inspector Zahid Hussain Soomro (Ex.19), PW-4 complainant Mohammad Raheem (Ex.24), PW-5 eyewitness Manthar Ali (Ex.25), PW-6 mashir Feroz (Ex.26), and PW-7 second IO/SIP Ahmed Ali. They during their evidence produced the relevant documents viz., lash chakas form, postmortem report, mashirnama of inspecting dead body, danistnama, receipt of handing over dead body, FIR, mashirnama of visiting place of incident, letter to Mukhiarkar for deputing tapedar to visit place of incident, chemical examiner's report etc. After the evidence, the appellant was examined under section 342, Cr.P.C, wherein he denied the allegations and professed his innocence. He, however, declined to produce any defence witness or to examine himself on oath in terms of section 340(2), Cr.P.C. The trial ended in conviction and sentence of the appellant, as stated hereinabove, which has been impugned by filing instant appeal.

6. Mr. Ahsan Ahmed Qureshi, learned Counsel for appellant, at the very outset has submitted that he does not dispute the conviction of the appellant on merits of the case; however, since there are mitigating circumstances, he would request for conversion of the death sentence awarded to the appellant into the imprisonment for life. Supporting the same plea, he has submitted that there is a delay of 24 hours in lodgment of FIR, which has not been explained by the

prosecution; that the crime weapon was not recovered from the appellant; that the motive set up in the FIR viz., dispute over matrimonial affairs was common; that Tapedar, who prepared sketch of place of incident and the corpse-bearer were not examined at trial; that there is contradiction in the medical and ocular evidence, the prosecution witnesses have said that appellant fired one shot at the deceased, whereas as per postmortem of the deceased there were two injuries on the person of deceased. The learned defence Counsel in support of his arguments has relied upon the cases of *Abdul Nabi v. The State* (2017 SCMR 335), *Muhammad Ismail v. The State* (2017 SCMR 713), *Qurban Hussain v. The State* (2017 SCMR 880), *Zahoor Ahmad v. The State* (2017 SCMR 1662), *Mazhar Abbas alias Baddi v. The State* (2017 SCMR 1884), *Amanat Ali v. The State* (2017 SCMR 1976) and *Amjad Shah v. The State* (PLD 2017 SC 152).

7. On the other hand, learned Additional Prosecutor General opposed the appeal and has argued that there are no contradictions in the evidence of prosecution witnesses; that the appellant has been assigned a specific role of causing murder of the deceased; that unimpeachable evidence describing his specific role has come on record against the appellant and the normal penalty provided for the offence under Section 302 PPC is death and only in presence of extenuating circumstances a deviation from the normal penalty can be made. He, however, gave his no objection if the sentence of death awarded to the appellant is converted into imprisonment for life as Ta'zir.

8. We have considered submissions of the parties and have perused the material brought on record. The prosecution has examined in all 7 witnesses. The medicolegal officer, namely, Dr. Shayam Lal (Ex.11) in his evidence has supported the unnatural death of the deceased caused by firearm injuries and has given in detail the description of such injuries in his evidence. Besides the medicolegal officer, the prosecution has examined two eyewitnesses i.e. the complainant, namely, Mohammad Raheem at Ex.24 and PW Manthar Ali at Ex.25, who have supported each other insofar as role of the appellant causing firearm injuries to the deceased is concerned. Although they have been subjected to cross-examination by the learned defence Counsel, but no any material contradiction has come on record

to injure veracity of their evidence. Their evidence is consistent and confidence-inspiring on salient features of the case and in absence of any material to the contrary we have no reason to disbelieve the intrinsic value of their evidence. It is, therefore, manifest that declaration of guilt of the appellant arrived at by the learned trial Court does not suffer from any illegality to justify interference by this Court. However, we have noted that the complainant in the FIR has alleged that the incident took place as a result of dispute over matrimonial affairs. In the evidence, the complainant has reiterated the said dispute so also the other eyewitness, but the said dispute is not shown to be against the deceased alone. Per FIR, the complainant and other PWs were also allegedly available at the spot, but except the deceased no hurt was caused by the accused to any one else. It is thus obvious that although the motive has been alleged by the prosecution but the same is still shrouded in a mystery. In such circumstances, sparing others and killing the deceased only does not appeal to the mind and would lead to an inference that motive as alleged is not the actual cause of the incident. Additionally, two eyewitnesses of the alleged incident, namely, Mirzan and Allah Warayo were not examined by the prosecution at trial and were given up. The alleged crime weapon was not recovered from the appellant. The appellant is in jail since the date of his arrest i.e. May, 2019. The statement of the appellant recorded on 12.11.2019 shows his age as 40 years, which would mean that at the time of commission of the offence viz. 04.5.2008 he was hardly 30/31 years old. He being young at the time of committing offence is a relevant circumstance, which can be taken into account along with above discussed facts and circumstances to decide the quantum of punishment awarded to him. This being the position, we are of the view that the request of the appellant's Counsel for conversion of death sentence to the imprisonment for life is not unjustified. We have taken guidance from the case-law relied upon by the defence Counsel and are of the firm view that above factors can be considered as mitigating circumstances to convert the death penalty of the appellant into imprisonment for life.

9. For forgoing discussion, this appeal is dismissed. However, the sentence of death awarded to the appellant vide impugned judgment dated 13.11.2019 is modified and converted into imprisonment for life under Section 302(b) PPC as tazir. The benefit of section 382-B, Cr.P.C

is extended to the appellant. The appellant, however, shall pay compensation of Rs.200,000/- to the legal heirs of the deceased as provided under Section 544-A, Cr.P.C. in default of which he shall remain in prison for six months more. The appeal stands disposed of in the above manner.

10. In view of above, Criminal Reference vide Conf. Case No.D-44/2019 for confirmation of death sentence of the appellant is replied in negative and is accordingly disposed of.

  
JUDGE

  
JUDGE

Qazi Tahir PA