

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

Criminal Appeal No.D-04 of 2020

Crl. Conf. Case No.D-03 of 2020

Present:

Mr. Justice Amjad Ali Sahito

Mr. Justice Jan Ali Junejo

Appellant : Hussain Ali s/o Hakim Ali by caste Maitlo
Through Mr. Athar Abbas Solangi, Advocate

Complainant : Hout Khan s/o Hussain Bux by caste Maitlo
Through Mr. Habibullah G.Ghour, Advocate

The State : Through Mr. Ali Anwar Kandhro, Addl.P.G

(Crl. Acquittal Appeal No.D-05 of 2020)

Complainant/Appellant: Hout Khan s/o Hussain Bux by caste Maitlo
Through Mr. Habibullah G.Ghour, Advocate

Respondent No.1: Mazhar Ali @ Ali Akbar s/o Ali Hakim alias
Hakim Ali, by caste Maitlo,
Through Mr. Athar Abbas Solangi, Advocate

The State : Through Mr. Ali Anwar Kandhro, Addl.P.G

Date of hearing : 22-04-2025

Date of decision : 08-05-2025

JUDGMENT

Jan Ali Junejo, J :- This single judgment shall decide the fate of the captioned appeal(s), in that the criminal appeal is preferred by appellant Hussain Ali s/o Hakim Ali Maitlo, impugning the judgment dated 14.01.2020, passed by learned 3rd Additional Sessions Judge/MCTC, Larkana, in Sessions Case No.518/2015 (Re.St.Vs.Hussain Ali & others), vide FIR Crime No.66/2007, registered for offences punishable under Sections 302, 114, 148, 149, 337-H(ii) PPC at Police Station, Hyderi, whereby he, for having committed the murder of complainant's uncle Liaquat Ali, was

sentenced to death under Section 302(b) PPC, with compensation equal to Diyat amount, to be paid to the legal heirs of the deceased, and in default thereof, the same shall be recovered as arrears of land revenue. In addition to this, a reference for confirmation of death sentence to said appellant has also been referred to this Court. Besides, the Crl.Acquittal Appeal has been filed by complainant Hout Khan against the acquittal of respondent No.1 Mazhar Ali alias Ali Akbar son of Ali Hakim @ Hakim Ali Maitlo.

2. The gist of the FIR is that on 12-08-2007, at around 2130 hours, complainant Hout Khan together with his uncle Liaquat Ali, friends Imdad Ali and Sajjad Ali when were returning towards their village from Larkana on a Car, they were waylaid by accused persons namely Barkat Ali, Hussain Ali armed with pistols, Irshad Ali, Mukhtiar Ali having repeaters and Mazhar Ali empty handed, who were boarded on two motorcycles. On the instigation of accused Mazhar Ali, co-accused Barkat Ali and present appellant Hussain Ali fired at Liaquat Ali, causing him injuries on left of his neck and later all the accused escaped towards Gajjanpur Chowk by making aerial firing. Subsequently, injured Liaquat Ali was swiftly shifted to hospital where he died at 10.00 p.m.

3. At trial, the prosecution to prove its' case, examined in all eleven witnesses i.e PW/Inspector/I.O Ansar Ali Mithani at Exh.8, he produced inquest report at Exh.8/A, memo of inspection of dead body a Exh.8/B, memo of place of incident at Exh.8/C, memo of arrest and recovery from co-accused Barkat Ali at Exh.8/D, memo of arrest of accused Mazhar Ali @ Ali Akbar and Irshad Ali at Exh.8/E, memo of arrest of co-accused Barkat Ali at Exh.8/F. PW/Corpse bearer HC Sadoro Khan at Exh.9, he produced receipt of delivery of dead body to the complainant at Exh.9/A. PW/Complainant Hout Khan at Exh.27, he saw FIR of the present case as already produced at Exh.20/A. PW/eye-witness Sajjad Ali at Exh.28. PW/Author of FIR/SIP Barkat Ali at Exh.29. PW/Mashir Nazir Hussain at Exh.30. PW/Dr. Muhammad

Saleem Shaikh at Exh.32, he produced postmortem report at Exh.32/A. PW/Tapedar Rustam Ali at Exh.33, he produced sketch of vardat and letter addressed to Mukhtiarkar at Exh.33/A and B. PW/Inspector Toufique Ahmed at Exh.34, he produced memo of arrest and recovery from accused Hussain Ali at Exh.34/A. PW/First Mashir Muhbat Ali at Exh.35, he produced roznamcha entry at Exh.35/A and PW/Recovery Mashir Abid Hussain at Exh.36. Thereafter, learned prosecutor closed its' side.

4. The appellant Hussain Ali and respondent No.1 Mazhar Ali @ Ali Akbar in their statements recorded in terms of Section 342 Cr.P.C, denied the prosecution's allegations by claiming their innocence and lastly prayed for justice. However, none of them examined themselves on oath in disproof of the charge, nor led any evidence in their defence.

5. The learned trial Court after hearing counsel for the parties and appraisal of the evidence, convicted and sentenced appellant Hussain Ali with death penalty and recorded acquittal of Mazhar Ali @ Ali Akbar, vide impugned judgment, which the present appellant Hussain Ali has impugned before this Court by preferring the instant criminal appeal.

6. Learned counsel for appellant Hussain Ali submits that the judgment is against the law and facts of the case; that F.I.R is delayed for one and half hours, for which no plausible explanation has been furnished by the complainant, whereas the distance between P.S and place of incident is about one kilometer, which can easily be covered within minutes; that all the witnesses cited in the case being friends to the complainant are chance witnesses; that the recovery of the crime weapon has been foisted against the appellant just to strength the murder case; that the medical evidence conflicts with the ocular account; that unnatural conduct of the witnesses appears in the evidence is that as they being two in numbers even did not attempt to save the deceased; that no independent witness has been cited by the prosecution. The

learned counsel further submitted that two fire shots are alleged to have been received by the deceased on his neck with a distance of 02 c.m, which normally is quite incredible that two shots by two accused standing at different angles could be received by the victim at the same point of neck. Summing up his contentions, the learned Advocate submitted that the present appellant was arrayed as an accused in this case on account of earlier hostility, as is discernible from the narration given in the FIR itself. He thus concluded that the case of prosecution was not free from doubt and the present appellant deserves to be acquitted in the circumstances of the case. He thus prayed for allowing of criminal appeal filed by appellant Hussain Ali and dismissal of Crl.Acquittal Appeal filed by complainant against the acquittal of respondent No.1 Mazhar Ali.

7. While rebutting the above contentions, learned counsel for the complainant and learned Addl.P.G argued that present appellant Hussain Ali is named in the FIR with specific role of firing at the deceased which proved fatal and that recovery of crime weapon from him has also justified his involvement in this case; the ocular account is in consonance with medical as well as circumstantial evidence; that the delay in FIR has properly been explained and that no any single infirmity or contradiction has been highlighted by learned defence counsel to show false implication of the appellant in the crime, in such situation, the learned trial Court has rightly awarded the death penalty to the appellant Hussain Ali, which needs no interference by this Court, therefore, the criminal appeal filed by him is liable to its dismissal and Mazhar Ali (respondent No.1 in Crl.Acquittal Appeal), may be convicted of the charged offence, considering the same set of evidence against him.

8. We have heard the learned counsel for the respective parties and have gone through the material available on record with their able assistance.

9. The meticulous analysis of the record reveals that the prosecution has solely believed the ocular account adduced in shape of evidence of PW/Complainant Hout Khan and PW/Eye-witness Sajjad Ali. Both of them deposed that on the fateful day i.e 12.08.2007, they alongwith uncle Liaquat Ali (deceased), and Imdad Ali were returning to their village on a Car driven by the deceased, who stopped the Car to pass urine at Lashkar road near Darul Aman, where appellant Hussain Ali and co-accused Barkat Ali fired pistol shots at him on instigation of accused Mazhar Ali, and then all the accused fled away making aerial firing. Liaquat Ali was immediately shifted to Hospital where he died at 10.00 p.m. Leaving witnesses over his dead body, the complainant went to police station and lodged the FIR (Exh.20/A). In the instant case, except for deceased Liaquat Ali, not a single person has sustained even a single scratch.

10. In cross examination, the complainant deposed that *“on the day of incident, I, Imdad and Sajjad were available at fish farm where my uncle/deceased Liaquat Ali had come and then we proceeded towards Larkana at about 07.30 p.m/08.00 p.m and we had come to Larkana for the purpose of effecting recovery of money in respect of fish farm. The accused were at distance of 5/6 paces from deceased, from which distance they made fires upon deceased. It is incorrect that I am not eye witness in this case”*.

11. PW/eye-witness Sajjad Ali in his cross examination deposed that *“I was sitting in the Car in the side wherefrom accused had made their entry. I myself had seen this incident. We had taken the deceased to hospital after ten minutes of this incident. As soon as we arrived the hospital, the injured suffered death within few minutes”*.

12. The prosecution examined PW/Nazir Hussain, the mashir of this case. He endorsed the version of I.O, who produced inquest report at Exh.8/A, memo of inspection of dead body at Exh.8/B, memo of place of incident, recovery of two empties and blood

stained soil as Exh.8/C. In cross-examination, he deposed that ***“Police collected blood which was available near driver side door of the car at the place of incidence. The recovered empty bullets were checked by I.O under whose dictation WHC prepared mashirnama. I do not remember name of WHC. It is correct that in front of me the investigation officer did not ask any local person to become mashir in this case.*”**

13. The prosecution also examined PW/Muhbat Ali, the recovery mashir in this case. He supported the recovery of an unlicensed pistol with magazine containing three bullets, from appellant Hussain Ali, under such memo, prepared in his presence, which is produced at Exh.34/A. In his cross examination, he deposed that *“we did not seal the recovered pistol”*.

14. PW Rustam Ali/Tapedar produced certain documents as Ex.33/A and 33/B. PW SIP Barkat Ali happens to be the author of FIR while Inspector Ansar Ali Mithani has acted as investigation officer in this case, who repeated almost same narratives as disclosed by the prosecution witnesses. However, the I.O confirms that he recorded 161 Cr.PC statements of witnesses and prepared the documents of the case already produced by PW/Mashir Nazir Hussain. In cross-examination, he denied suggestion that he had not inspected place of incident.

15. In the instant matter, eye-witnesses of the incident have endorsed the prosecution story which also finds support from the medical evidence concerning the cause of death and time of incident and weapon used in the commission of offence. It is established from the evidence of PW/Dr.Muhammad Saleem Shaikh who deposed that he served with Dr. Ghulam Muhammad Memon who issued postmortem report of deceased and he is well conversant with his signature. He further stated that the dead body brought by HC Sadoro Khan, was identified by Nazir Hussain and Muhammad Ismail (cousin and brother of deceased). As per postmortem, on external examination, the deceased had sustained

two injuries (entry and exit) on left side of his neck, which were ante-mortem in nature and individually and collectively were sufficient to cause death in ordinary course of nature. The time between injury and death was 10 to 30 minutes and between death and postmortem was one hour and 45 minutes. He produced such postmortem report at Exh.23/A.

16. The medical evidence also finds support from the ocular account which is further strengthened by the circumstantial account, produced in shape of recovery of two empty bullets from the scene of occurrence and that of recovery of crime weapon from present appellant Hussain Ali. Besides, the blood stained soil was also collected by the police. The prosecution witnesses are at line in respect of the present appellant on the vital points in their depositions and they could not be shaken during cross examination. The presence of appellant at the venue of occurrence has been established during the evidence of the complainant and eye-witnesses and no any material infirmity has been noticed in their evidence.

17. In this case, the complainant and eye-witnesses in their evidence have provided a clear, consistent, and detailed account of the incident, including its' date, time, and location, leaving no space for ambiguity. Their disclosure of the events has been presented in a straightforward and convincing manner. The record also establishes that the parties are well acquainted inter-se, which has discarded any possibility of mistaken identity of the present appellant. It is a well-settled principle of law that when the witnesses are natural and narrate the account of the incident in a manner inspiring confidence, their testimony cannot be disregarded lightly. The burden then shifts upon the accused to establish that such witnesses are not truthful but are interested. In this case, the present appellant has failed to discharge such burden. In cases entailing the capital punishment, the mere claim of a dispute or enmity is not sufficient to discredit, otherwise are

reliable witnesses. The accused must bring forth the credible account to substantiate that such a dispute existed and that it was of such magnitude that it could plausibly explain a false implication by the witnesses, even at the cost of shielding the actual perpetrator. It is noteworthy that the deceased was real uncle of the complainant. In such a well acquaintance of the complainant with the accused, the possibility of substituting an innocent person with real offender becomes highly unconvincing. The appellant has not produced any substance to establish the existence of earlier grudge/enmity which could have been reasoned for false implication.

18. Regret to say that the Investigating Officer (I.O.) neither disclosed about sending the empties secured from the vardat and the crime weapon from the appellant, to the Forensic Lab. and also the blood stained soil to the Chemical Laboratory, nor such Forensic as well as Chemical report(s) have been brought on record by the prosecution. In this context, the legitimacy of matching the empties with weapon's recovery becomes highly questionable. In that situation, such recovery does not constitute a direct evidence but merely serves as a corroborative element, which may justifiably be considered as a mitigating factor in the case, to support the reduction of the sentence.

19. Moreover, the law of land normally provides a sentence for an offence of Qatl-i-amd (murder) is death which is to be awarded as a matter of course except where the Court finds some mitigating circumstances, which may warrant the imposition of a lesser sentence. On deeper analysis of evidence, we have found that the motive set up by the prosecution was quite vague and admittedly no independent witness was brought by the prosecution. The investigation with regard to controversy between the parties is totally silent, as no any documentary proof has been produced by the appellant either during course of investigation or even at close of trial which may justify the motive behind the incident. When the

motive is not proved, the Honourable Apex Court in number of cases has reduced the sentence from death to imprisonment for life. The reliance in this regard is placed on the case of ***Khalid v. The State through P.G Sindh (2024 SCMR-1474)***, wherein the Honourable Supreme Court of Pakistan has held that;

“---S. 302 (b)---Qatl-i-amd--- Reappraisal of evidence---Sentence, reduction in---Mitigating circumstances---Motive nor proved---In the instant, though the motive of the occurrence was alleged to be the previous enmity due to land dispute as well as matrimonial relations but the prosecution had failed to prove the same--Failure to prove motive alleged by the prosecution can be considered as a mitigating circumstance for reducing the quantum of sentence awarded to an accused---Petition was converted into an appeal and was partly allowed, and conviction awarded to petitioner/appellant under Section 302(b) P.P.C. was maintained, however his sentence of death was converted into imprisonment for life on the basis of the mitigating circumstances.

Similar view is also taken in cases of Ahmed Nawaz v. The State (2011 SCMR-593), Muhammad Mumtaz v. The State and another (2012 SCMR-267), Muhammad Imran @ Asif v. The State (2013 SCMR-782), Naveed alias Needu and others v. The State and others (2014 SCMR-1664), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR-2035) and Qaddan and others v. The State (2017 SCMR-148), and Haq Nawaz v. The State (2018 SCMR-21).

20. In another case of ***Muhammad Nadeem Ramzan v. The State (2018 SCMR-149)***, the Honourable Supreme Court of Pakistan has held as under;

“The motive asserted by the prosecution had, thus, remained far from being proved”

21. The above circumstances observed that punishment provided under Section 302(b) PPC as Tazir is either death or imprisonment for life, both sentences are available under this head but the circumstances are not spelt out in section 302(b) PPC, in which case either of the two punishment can be awarded. We are fortified

on this point with the case of ***Muhammad Sharif v. The State (PLD 2009 Supreme Court-709)*** whereby the Honourable Supreme Court has elaborated the similar question as under;

“It has been seen and observed from the perusal of the various proceeding in relation to section 302 PPC in particular its clause (b), that there is a choice and discretion with the Court to inflict punishment with death or imprisonment for life as tazir having regard to the facts and circumstances of the case”.

22. Consequent upon above discussion, the Criminal Appeal No.D-04 of 2020 preferred by appellant Hussain Ali Maitlo being meritless is **dismissed**, the conviction awarded to him for offence under section 302 (b) PPC is maintained but on account of mitigating circumstances involved in the present case, the sentence to death on the charge of murder of deceased Liaquat Ali is reduced/converted to imprisonment for life. He is also directed to pay compensation equal to Diyat amount to the legal heirs of the deceased, and in default thereof, the same to be recovered as arrears of land revenue. The benefit of Section 382-B Cr.PC is also extended in favour of appellant Hussain Ali Maitlo.

23. As a result of above findings, the reference bearing Crl.Conf. Case No.D-03 of 2020 submitted by the learned trial Court for confirmation of death sentence to the appellant Hussain Ali is answered in **NEGATIVE.**

24. The Crl.Acquittal Appeal No.D-05 of 2020 filed by the complainant against the acquittal of respondent No.1 Mazhar Ali alias Ali Akbar Maitlo, being devoid of the merits, is dismissed accordingly.

JUDGE

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