

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.483 of 2018
Confirmation Case No.02 of 2018

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio.

Appellant: Roshan Shah son of Bachal Shah Syed through
Mr. Zahid Hussain Soomro, Advocate

Respondent: The State through Mr. Siraj Ali K. Chandio,
Addl. Prosecutor General Sindh

Date of hearing: 30.09.2019

Date of announcement : 03.10.2019

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Roshan Shah son of Bachal Shah Syed has preferred this appeal against the impugned judgment dated 25.01.2018 passed by the learned Sessions Judge Thatta in Sessions Case No.262 of 2013 F.I.R. No.55 of 2013 registered at PS Ghorabari, under Section 302 PPC whereby after full-dressed trial, appellant Roshan Shah was awarded death sentence under Section 302(b) PPC subject to confirmation of by this court. Accused Roshah Shah was also ordered to pay fine of Rs.100,000/- (Rupees One Lac) as compensation to the legal heirs of deceased Gulab Shah and in case of default he has to undergo a simple imprisonment for four months more (the impugned judgment).

2. Brief facts of case as per FIR No.55 of 2013 are that on 14.09.2013 at 1630 hours, complainant Syed Nawaz Ali Shah appeared at police station Ghorabari and lodged FIR stating that he works as labourer having disputed terms over matrimonial affairs with Syed Roshan Shah and others, hence they have no visiting terms. On 10.09.2013, his relatives Mehboob Shah s/o Juman Shah r/o Jati and Jurial Shah s/o Qasim Shah r/o Taluka Shah Bunder had come to his house being guests and stayed there. After dinner and chitchatting, they went to sleep while his son

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Gulab Shah had gone to Sim Nali for purchasing some house hold articles. At 11:00 pm at night, they heard cries of Gulab Shah son of complainant outside the house, hence they woke-up and came outside the house and on torch light, they saw and identified accused Roshan Shah s/o. Bachal Shah alias Anwer Shah with hatchet, who within their sight inflicted sharp sided hatchet blow to Gulab Shah, which struck on right side of his head, in between ear and back of neck, who fell down on the ground and raised cries, accused caused second hatchet blow on back of Gulab Shah as well as third hatchet blow on thigh of his left leg. Complainant party raising cries went near accused who seeing them coming near fled away with his hatchet in devi and pan jungle by taking advantage of darkness. The complainant party then saw Gulab Shah on torch light to have expired. The police was called which came there at the scene of offence, completed necessary formalities of dead body and then shifted it to Rural Health Center Var, where autopsy was conducted and police after completing other formalities, handed over dead body of Gulab Shah to complainant; who took it to his original village Taluka Shah Bunder and buried it there in the graveyard, received condolence of people and then came to police station Ghorabari and lodged FIR that accused Roshan Shah by giving sharp sided hatchet blows to his son Gulab Shah murdered him.

3. After usual investigation charge was framed against the accused on 02.12.2013 to which he pleaded not guilty and claimed for trial.

4. In order to prove its case the prosecution examined 05 PW's who exhibited various documents in support of the prosecution case. The accused person recorded his statement under S.342 Cr.PC whereby he claimed his false implication in the case. However, he did not examine himself on oath nor led any evidence in his defence.

5. Learned Sessions Judge, Thatta after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 25.01.2018, convicted and sentenced the appellant Roshan Shah as stated above hence he has filed this appeal against his conviction.

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6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 25.01.2018 passed by the trial court and, therefore, the same may not be 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 from the death penalty to one of life imprisonment based on the following mitigating circumstances (a) that the prosecution had neither alleged nor proven any motive as to why appellant should murder the deceased Gulab Shah and (b) that the appellant was of a young age and was previously of good character (c) that the appellant had acted out of frustration on account of a matrimonial dispute and (d) the very slightest of doubt in the prosecution case although not sufficient a doubt to lead to his acquittal 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 from death to that of life imprisonment he placed reliance on **Muhammad Anwar V State** (2017 SCMR 630) and **Ghulam Mohyuddin V State** (2014 SCMR 1034).

8. Learned DPG who was also representing the complainant 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 mitigating circumstances raised by the appellant justified a reduction in sentence he candidly conceded that as a matter of law they did justify a reduction from the death penalty to that of life imprisonment except in respect of the motive which according to him had been proven.

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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 offense for which he has been charged. In that the complainant is a reliable eye witness who is corroborated by another eye witness along with the medical evidence and that the recovery of the murder weapon was made on the pointation of the appellant. 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.

10. We are of the view that the prosecution has not been able to fully prove its motive. 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)*

11. In our view taking into account the fact that no motive has been proved against the appellant and there may be some doubts in the prosecution case albeit insufficient to lead to an acquittal such as the non recovery of the torch and one eye witness not giving evidence in 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;

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"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".

12. We hereby uphold the conviction in the impugned judgment but reduce the sentence of the appellant Roshan Shah from that of the death penalty to life imprisonment and as such the confirmation reference is answered in the negative. Apart from the above variation all other fines, penalties imposed against the appellant Roshan Shah in the impugned judgment shall remain in tact and he shall have the benefit of S.382 (B) Cr.PC.

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

MAK/PS