

Remand - No ^{deputy} advocate during evidence in 92
day for 3 Pw's
IN THE HONOURABLE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD.

Jail Criminal Appeal D-97/19. 92

The State ----- *CONF Case 19/19.* ----- Versus

1. Ghulam Rasool s/o Arab Zardari
2. Khamiso s/o Arab Zardari
3. Mukhtiar s/o Momin Zardari ----- Appellants

Sessions Case No. 892/2014
Crime No. 196/2014
U/S 302(b) & 324 PPC
P.S Sakrand

Remark: No defense counsel present for evidence in chief of
3 Pw's.

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Order Sheet
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Jail Appeal No. D- 97 of 2019

Cor. Case 14/19 -

DATE	ORDER WITH SIGNATURE OF JUDGE
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26.01.2023

Ms. Urooj Aqeel, Advocate for appellant Mukhtiar

Mr. Khan Muhammad Sangi, Advocate for appellant Ghulam Rasool and Khamiso

Mr. Nazar Muhammad Memon, Addl. P.G.

ORDER

MUHAMMAD KARIM KHAN AGHA, J.- Appellants Ghulam Rasool, Khamiso and Mukhtiar were tried in the court of 1st Additional Sessions Judge / Model Criminal Trial Court, Shaheed Benazirabad in S.C. No. 892 of 2014 arising out of FIR No. 196 of 2014 registered at police station Sakrand under Section 302, 324, 114, 337-H(ii) PPC and vide impugned Judgment dated 10.6.2019 they were convicted and sentenced as under:-

" In view of reasons recorded above, in support of findings at point numbers 01 & 02, I am of the humble view that the prosecution has proved its case against accused Ghulam Rasool son of Arab Zardari, Khamiso son of Arab Zardari and Mukhtiar son of Momin Zardari beyond reasonable shadow of doubt and successfully discharged onus to prove its case and it has been proved beyond doubt that accused Ghulam Rasool had fired shot on deceased Zangi Khan which proved to be fatal and thus committed Qatl-e-Amd of Zangi Khan. Therefore, in exercise of powers conferred by section 265-H(ii) Cr.P.C, accused Ghulam Rasool son of Arab Zardari is convicted for committing murder of deceased Zangi Khan and offence punishable under section 302(b) PPC. Therefore, accused Ghulam Rasool son of Arab Zardari is sentenced to death and he shall be hanged by neck till he is dead. The accused/convict Ghulam Rasool son of Arab Zardari shall, in view of section 544-A Cr.P.C and judgment reported as 1995 SCMR 1776, pay compensation to the tune of rupees two hundred thousand only (Rs.200,000/-) to the legal heirs/walis of deceased Zangi Khan, failing which the convict shall undergo further simple imprisonment of six months.

Accused Ghulam Rasool Zardari, per case of prosecution had fired shots on PW Lutuf Ali and deceased Zangi Khan with intent to commit murder. Therefore, in exercise of powers conferred by section 265-H(ii) Cr.P.C, accused Ghulam Rasool son of Arab Zardari is also convicted for committing offence of attempting to commit Qatl-e-Amd of deceased Zangi Khan and PW Lutuf Ali and offence punishable under section 324 PPC. Thus, accused Ghulam Rasool Zardari is sentenced to undergo R.I. for period of five years and pay fine to the tune of rupees fifty thousand only (Rs.50,000/-). In

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case of default in payment of fine, the accused shall undergo S.I. for period of six months more. Perusal of record shows that accused Ghulam Rasool Zardari was arrested in this case on 14.09.2014 and remained in custody in this case till today viz. 10.06.2019. It is therefore, ordered U/s 382-B Cr.P.C. that the above period of detention shall be counted towards substantive sentence of imprisonment awarded to the accused.

In view of reasons recorded above, in support of findings at point numbers 01 & 02, I am of the humble view that the prosecution has proved its case against accused Khamiso son of Arab Zardari beyond reasonable shadow of doubt and successfully discharged onus to prove its case and it has been proved beyond doubt that accused Khamiso son of Arab Zardari had fired shots on PW Lutuf Ali with intent to commit murder and in the same incident deceased Zangi Khan lost his life owing to fatal shot fired by co-accused Ghulam Rasool, therefore, I am of the humble view that the prosecution has proved indictment against accused Khamiso son of Arab Zardari as well. Therefore, in exercise of powers conferred by section 265-H(ii) Cr.P.C, accused Khamiso son of Arab Zardari is convicted for providing aid to co-accused Ghulam Rasool in committing murder of deceased Zangi Khan and offence punishable under section 302(b) PPC. Thus accused Khamiso son of Arab Zardari is sentenced to R.I. for life and in view of section 544-A Cr.P.C and judgment reported as 1995 SCMR 1776, pay compensation to the tune of rupees two hundred thousand only (Rs.200,000/-) to the legal heirs/walis of deceased Zangi Khan, failing which the convict shall undergo further simple imprisonment of six months.

In view of reasons recorded above at Point No.2, I am of the considered view that the prosecution has proved beyond doubt that accused Khamiso son of Arab Zardari had attempted to commit Qatl-e-Amd and fired shots on PW Lutuf Ali with intent to commit murder. Therefore, in exercise of powers conferred by section 265-H(ii) Cr.P.C, accused Khamiso son of Arab Zardari is also convicted for committing offence of attempting to commit Qatl-e-Amd of PW Lutuf Ali and offence punishable under section 324 PPC. Hence accused Khamiso son of Arab Zardari is sentenced to undergo R.I. for period of five years and pay fine to the tune of rupees fifty thousand only (Rs.50,000/-). In case of default in payment of fine, the accused shall undergo S.I. for period of six months more. Perusal of record shows that accused Khamiso Zardari was arrested in this case on 14.09.2014 and remained in custody in this case till today viz. 10.06.2019. It is therefore, ordered U/s 382-B Cr.P.C. that the above period of detention shall be counted towards substantive sentences of imprisonment awarded to accused. Both sentences of imprisonment awarded to the accused shall run concurrently.

In view of reasons recorded above, in support of findings at point numbers 01 & 02, I am of the humble view that the prosecution has proved its case against accused Mukhtiar son of Momin Zardari beyond reasonable shadow of doubt and successfully discharged onus to prove its case and it has been proved beyond doubt that accused Mukhtiar son of Momin Zardari had fired shots on PW Lutuf Ali with intent to commit murder and in the same incident Zangi Khan, father of injured PW Lutuf Ali, lost his life owing to fatal shot fired by co-accused Ghulam Rasool, therefore, I am of the humble view that the prosecution has proved indictment against accused Mukhtiar son of Momin Zardari. Therefore, in exercise of powers conferred by section 265-H(ii) Cr.P.C, accused Mukhtiar son of Momin Zardari is convicted for being present at place of incident, firing shots on injured and providing aid to co-accused Ghulam Rasool in committing murder of deceased Zangi Khan and offence punishable under

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section 302(b) PPC. Thus accused Mukhtiar son of Momin Zardari is sentenced to R.I. for life and in view of section 544-A Cr.P.C and judgment reported as 1995 SCMR 1776, pay compensation to the tune of rupees two hundred thousand only (Rs.200,000/-) to the legal heirs/walis of deceased Zangi Khan, failing which the convict shall undergo further simple imprisonment of six months.

In view of reasons recorded above at Point No.2, I am also of the considered view that the prosecution has proved beyond doubt that accused Mukhtiar son of Momin Zardari had attempted to commit Qatl-e-Amd and fired shots on PW Lutuf Ali with intent to commit murder and PW Lutuf Ali sustained fire arm injury on his leg. Therefore, in exercise of powers conferred by section 265-H(ii) Cr.P.C, accused Mukhtiar son of Momin Zardari is also convicted for committing offence of attempting to commit Qatl-e-Amd of PW Lutuf Ali and offence punishable under section 324 PPC. Hence accused Mukhtiar son of Momin Zardari is sentenced to undergo R.I. for period of five years and pay fine to the tune of rupees fifty thousand only (Rs.50,000/-). In case of default in payment of fine, the accused shall undergo S.I. for period of six months more. Perusal of record shows that accused Mukhtiar Zardari was arrested in this case on 14.09.2014 and remained in custody in this case till today viz. 10.06.2019. It is therefore, ordered U/s 382-B Cr.P.C. that the above period of detention shall be counted towards substantive sentences of imprisonment awarded to accused. Both sentences of imprisonment awarded to the accused shall run concurrently.

2. Brief facts of the case as narrated in FIR No.196 of 2014 of P.S. Sakrand lodged on 07.09.2014 by Mst. Shareefan wife of Zangi Khan Zardari are that complainant has been wife of Zangi Khan son of Allah Warayo Zardari who was having dispute with Ghulam Rasool son of Arab Zardari over piece of land. Ghulam Rasool son of Arab Zardari has been constable in Police Department and issuing threats of murder to Zangi Khan and his sons. On 87.09.2014 at 06:30 p.m. in the evening the complainant along with her husband Zangi Khan, Son Lutuf Ali Zardari and son in law Riaz son of Ghulam Rasool Zardari were available on their land where Ghulam Rasool son of Arab Zardari wearing police uniform and having government K.K. rifle, Khamiso son of Arab Zardari having rifle, Mukhtiar son of Momin Zardari having pistol and an unknown person having pistol who can be identified if seen again arrived. Accused Ghulam Rasool Zardari instigated all the accused to catch hold and commit murder and by saying so Ghulam Rasool Zardari fired shots on Zangi Khan with intent to commit murder. On sustaining firearm shots Zangi Khan fell down. All other accused fired shots on Zangi Khan and Lutuf Ali with intent to commit murder. On sustaining fire arm injuries Lutuf Ali fell down. The complainant and her son in law Riaz beseeched accused who decamped towards their houses by firing aerial shots. After departure of accused the complainant and her son in law saw that Zangi Khan

had sustained fire arm shot injury on chest which exited from back and Zangi Khan was lying dead. Lutuf Ali has sustained fire arm shot injury on left leg from which bleeding occurred and Lutuf Ali was lying unconscious. After arranging transport Lutuf Ali was shifted to hospital for treatment. The complainant also shifted dead body of her deceased husband Zangi Khan to Taluka Hospital Sakrand and thereafter lodged FIR against accused.

3. After usual investigation the matter was challaned and the case was sent up for trial. All the appellants pleaded not guilty to the charge and claimed trial. In order to prove its case prosecution examined seven witnesses and produced various documents and other items. The appellants under Section 342 Cr.P.C. statement denied the allegations leveled against them. None of the appellants gave evidence on oath or called any D.W in support of their defence case.

4. After hearing the parties and appreciating the evidence on record, learned trial court convicted and sentenced the appellants as stated earlier in the order. All the appellants have filed appeals against their convictions.


5. At the very outset, learned counsel for all the appellants stated that it was a case of remand. This is because according to them, Complainant P.W-1 who was also an eye-witness was examined in absence of defence counsel. The same was the position with P.W-2 Lutuf Ali who was another important witness being eye-witness and P.W-4 Shafi Muhammad and as such the appellants had been prejudiced. Learned A.P.G. was also in agreement with this proposition that under the law this was a case for remand due to the above facts mentioned by learned counsel for the appellants.

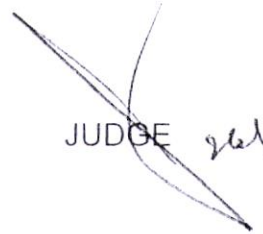
6. We agree with the contentions of learned counsel for the appellants because in a capital case the defence counsel must be present during the examination in chief so that no prejudice is caused to him which would amount to a violation of Article 10-A of the Constitution. For example if the defence counsel had been present he could have objected to certain questions being asked or certain documents being exhibited. In this regard, we rely upon the case reported in 2019 MLD 1713.

7. Accordingly, the impugned Judgment is set-aside and the confirmation reference is answered in the negative. The case is remanded to 1st Additional Sessions Judge / Criminal Model Trial

Court, Shaheed Benazirabad for limited purposes of re-recording the evidence of P.W-1 / Complainant, P.W-2 Lutuf Ali and P.W-4 Shafi Muhammad which includes evidence in chief, cross-examination and re-examination in presence of defence counsel. Thereafter, learned trial court shall re-record Section 342 Cr.P.C. statements of each of the appellants and re-write the Judgment based on the evidence on record. This exercise shall be completed by the concerned trial court within three months from the date of this order. Copy of this order shall be sent to the trial court for compliance along with R&Ps.

8. The above appeal and confirmation reference stands disposed of in the above terms.


JUDGE 26/01/23


JUDGE 26/01/2023

karar_hussain/PS*