

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

Cr. J. Appeal No. D — 119 of 2009.
Confirmation Case No.07 of 2009.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro.

Appellant: Zahoor alias Bholi through Mr. Nandan A. Kella,
Advocate.

The State Through Mr. Shahzado Saleem Nahiyoon, A.P.G.

Date of Hearing: 07.02.2017

Date of Judgment: 21.02.2017.

J U D G M E N T

RASHEED AHMED SOOMRO, J.

Appellant Zahoor alias

Bholi faced trial in F.I.R. bearing No.192 of 2001, registered at Police Station Sanghar, for offence under section 302 PPC. After trial, he was convicted by learned Sessions Judge Sanghar, by Judgment dated 28.07.2009 for offence under section 302 and sentenced to death. Trial court has made Reference to this court for confirmation of death sentence as required under section 374 Cr.P.C. Hence, present appeal is filed by the appellant against the impugned judgment.

2. Brief facts of the prosecution case are that complainant Muhammad Tufail Arain lodged his report on 30.12.2001 alleging therein that Sajjad Ali Arain [now deceased] aged about 14/15 years was his nephew. Two months prior to the registration of the F.I.R, he went out of the house for a work as cleaner at the Van of the Boota Jatt. On the occasion of Eid his nephew Sajjad came to home and informed the complainant that he was

working at the Hotel of Idrees at Shahdadpur Sanghar. It is alleged that on 30.12.2001 complainant was present at home along with his relatives Akhtar s/o Noor Ahmed and Saeed s/o Abdul Rehman, where they were was informed that his nephew has been murdered last night and his dead body was lying near Toori Moori by-pass road. After receipt of such information, complainant along with above named prosecution witnesses went to the pointed place and saw the dead body of his nephew Sajjad Ali, the neck of deceased was cut with sharp cutting weapon. Deceased had also sustained injuries at various parts of the body. Complainant went to the Police Station and lodged F.I.R. in which he suspected accused Boota Khan Jatt as accused for the murder of his nephew Sajjad Ali. F.I.R. was recorded vide crime No.192 of 2001 for offence under section 302 PPC. It appears that during investigation police arrested accused Zahoor alias Bholi on 25.01.2002. Statements of prosecution witnesses under section 161 and 164 Cr.P.C. were also recorded. Appellant / accused was arrested on 25.01.2002 and produced before Civil Judge & Judicial Magistrate Sanghar, for recording his confessional statement and it was recorded. Thereafter, on the conclusion of investigation final report was submitted against him under section 302 PPC.

3. Charge against appellant / accused was framed by trial court as Ex.2 for offence under section 302 PPC. Accused / appellant pleaded not guilty and claimed to be tried. Trial court examined (1) P.W.1 Complainant Muhammad Tufail Arain at Ex.6, (2) P.W.2 Najamul Hassan Rajput Bhatti at Ex.7, (3) P.W.3 Zahoor Ahmed Arain at Ex.8, (4) P.W.4 Mashir Muhammad Saeed at Ex.9 & (5) P.W.5 Dr. Hoto Mal at Ex.11. Thereafter prosecution side was closed.

4. Statement of accused was recorded under section 342 Cr.P.C. at Ex.16 in which accused denied the prosecution allegations and claimed his false implication in this case at the instance of P.C. Noor Ahmed posted at Sanghar. A plea was also raised by the accused that real

culprits were let-off by the police after getting gratification. Accused did not lead any evidence in defence and declined to give evidence on oath.

5. Trial court after hearing the learned counsel for the parties and analyzing prosecution evidence found accused guilty, convicted and sentenced him as stated above.

6. We have carefully heard the learned counsel for the parties and perused the entire evidence.

7. It may be mentioned here that trial court has mentioned the facts in detail so also the evidence in impugned Judgment. We do not think it necessary to repeat the same, to avoid repetition.

8. Unnatural death of deceased is admitted. Now the question arises that who committed murder of deceased Sajjad Ali. Learned advocate for appellant confined his arguments to the issue of the mitigation of the appellant's sentence of death to imprisonment for life. Learned counsel for the appellant argued that incident was unwitnessed and evidence of extra judicial confession of accused was highly unbelievable. It is also contended that the recovery of the dagger was also not witnessed by the persons of the locality. Counsel for the appellant attacked the confessional statement of the appellant at some length. Finally prayed for converting sentence of death to the imprisonment for life. Counsel for the appellant lastly submitted that appellant is in Jail for more than 15 years. In support of his contentions he has relied upon cases of (i) **GHULAM MOHY-UD-DIN alias HAJI BABU and others v. THE STATE** (2014 SCMR 1034 (ii) **KAMRAN AHMED FAROOQUI & another v. THE STATE** (S.B.L.R. 2013 18) & (iii) **QADDAN and others v. THE STATE** (2017 SCMR 148).

9. Mr. Shahzado Saleem Nahiyoon, learned A.P.G. appearing for the State in the peculiar circumstances of the case and the case-law relied upon by the counsel for appellant recorded no objection in case sentence of death passed against the appellant may be reduced to imprisonment for life.

10. We have carefully examined the arguments of learned counsel for the appellant and came to conclusion that this is a case of mitigation of the appellant's sentence of death. It is the matter of record that incident was unwitnessed. According to the prosecution case, appellant compelled the deceased for commission of the sodomy to which deceased resisted and appellant / accused caused him knife blows. Accused was arrested on 25.01.2002 and produced knife from gutter on 27.01.2002. Accused made confession before the Civil Judge & Judicial Magistrate Sanghar, on 29.01.2002. It appears that Judicial Magistrate did not observe precautions before recording confession of accused motive set-up by the prosecution has not been established by the prosecution and all incriminating pieces of evidence have not been put to the accused at the time of recording his statement under section 342 Cr.P.C. It is the matter of record that case / F.I.R. bearing Crime No.192 of 2001 was lodged by the uncle of deceased at Police Station against accused for offence under section 302 PPC. On the basis of the extra judicial confession made by the accused / appellant before prosecution witnesses, accused was arrested on 25.01.2002. After usual investigation final report was submitted against accused. Learned Sessions Judge Sanghar, conducted trial and appellant was convicted under section 302 (b) PPC and sentenced to death by Judgment dated 28.07.2009. A report received from Superintendent Central Prison Hyderabad dated 7.2.2017, reflected that appellant has served sentence excluding remissions up to 7.2.2017, seven years, six months, and nine days but from the perusal of the record it transpired that appellant has been arrested on 25.01.2002. As per case diaries, he is in continuous detention since 25.01.2002, for more than 15 years as per Jail Roll. Learned D.P.G. has recorded no objection in case sentence of death passed against the appellant may be reduced to imprisonment for life.

11. The Honourable Supreme Court in the case of **DILAWAR KHAN vs. THE STATE** reported in 2013 S.C.M.R. 1582, held as under:-

“11. In view of the afore-quoted provisions of law it is crystal clear as the light of the day that life imprisonment mean twenty five years rigorous imprisonment. Even Rule 198(b) of the aforesaid Rules talks of the lifer as a person sentenced to imprisonment for life and such sentence shall mean twenty five years rigorous imprisonment. In the instant case the petitioner is being incarcerated in the death cell for the last 17 years, one month and five days and by efflux of time he has also earned remissions for 18 years, eight months and ten days. Keeping in view the aforesaid extenuating circumstances to the effect that the petitioner did not repeat the fire, chose lower part of the body, petitioner and deceased being closely related to each other, incident took place on some abrupt altercation between them and that incarceration of the petitioner in the death cell for a long period we are of the considered view that the conversion of sentence from death to imprisonment for life would not only be proper rather it would be in the interest of justice.”

12. In the case of ***GHULAM MOHY-UD-DIN vs. THE STATE*** reported in 2014 SCMR page 1034 it has observed as follows:-

“21. A single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment. No clear guideline, in this regard can be laid down because facts and circumstances of one case differ from the other, however, it becomes the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case. If the Judge/Judges entertain some doubt, albeit not sufficient for acquittal, 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.

Albeit, there are multiple factors and redeeming circumstances, which may be quoted, where awarding of death penalty would be unwarranted and instead life imprisonment would be appropriate sentence but we would avoid to lay down specific guidelines because facts and

circumstances of each case differ from the another and also the redeeming features, benefiting an accused person in the matter of reduced sentence would also differ from one another, therefore, we would deal with this mater in any other appropriate case, where, if proper assistance is given and extensive research is made.

In any case, if a single doubt or ground is available, creating reasonable doubt in the mind of Court/Judge to award death penalty or life imprisonment, it would be sufficient circumstances to adopt alternative course by awarding life imprisonment instead of death sentence.”

13. In the case of **KAMRAN AHMED FAROOQUI & another v. THE STATE** (S.B.L.R. 2013 18) it is held as under:-

“7. In this regard it would be noted that although the exact age of the Appellants has not come on the record but per the Prosecution itself they were young boys at the time of incident viz. on 27.09.1997, which means their ages were not more than 18 to 20 years. It would also be seen that neither in the F.I.R. nor in the deposition of the Prosecution witnesses have they alleged that the Appellants belonged to a sectarian organization or that it was a result of their sectarian views that they had murdered the Deceased. IN this view of the matter we are of the opinion that indeed the motive has not been established by the Prosecution at all. Finally it would be seen that the Appellants have remained behind the bars since 12.03.1998 when they were arrested in this case. In these circumstances we are of the opinion that it would be in the interest of justice to convert the death sentence imposed upon the Appellants under Section 302 PPC to that of life imprisonment. Order accordingly. The other sentences imposed by the Learned High Court are upheld. The benefit of remissions, if any, would be available to both the Appellants and their sentences would run concurrently. So also the benefit of Section 382-B Cr.P.C. shall be extended to them.”

14. In the case of **QADDAN and others v. THE STATE** (2017 SCMR 148) it is held as follows:-

“3. We have noticed that before the High Court the only prayer made by the learned counsel for the appellants

was that in view of some peculiar circumstances of this case the sentences of death passed against the appellants may be reduced to imprisonment for life and, thus, we have confined our consideration of this case only to the issue of mitigation of the appellants' sentences of death. In this context it has straightaway been noticed by us that according to the F.I.R. as well as the statements of the eye-witnesses made before the trial court the appellants and the other members of the accused party had come armed and had gone into the house of one Ali Sher Brohi quite peacefully and it was the complainant party which had provoked the accused party at the spot which provocation had led to the present occurrence. It is, thus obvious that but for the intervention and provocation of the complainant party the present occurrence might not have taken place at all. We have further observed that one lady died and three others had received injuries during the occurrence in issue which also indicates that the occurrence in question had developed at the spur of the moment without any premeditation and that different members of the accused party as well as of the complainant party embroiled with each other in a developing occurrence. Apart from that the motive set up by the prosecution had never been put to the present appellants at the time of recording of their statements under section 342, Cr.P.C. The law is settled that a piece of evidence not put to an accused person at the time of recording of his statement under section 342 Cr.P.C. cannot be considered against him."

15. We have considered above mentioned factors available on the record in the light of case law and keeping in view the aforesaid extenuating circumstances and for the above stated reasons, have come to the conclusion that a case for reduction of the appellant's sentence of death to imprisonment for life is made out. This appeal is, therefore, dismissed to the extent of conviction and his sentence of death on the charge under section 302(b) PPC is reduced to imprisonment for life. Trial court was bound while convicting the accused for commission of the death to award compensation under Section 544-A Cr.P.C. to the legal heirs of

the deceased, unless reasons should have been recorded in writing for not granting the compensation. Reliance is placed upon the case of **Talib Hussain & others vs. The State** (1995 SCMR 1776). Appellant/accused Zahoor alias Bholi shall pay the compensation of Rs.300,000/- to be paid to the legal heirs of deceased, in case of default, to suffer S.I. for 06 months more. Benefit of Section 382-B Cr.P.C. shall be extended to the accused. This appeal is disposed of in these terms.

Reference made by the trial court for confirmation of death sentence is answered in negative.

JUDGE

JUDGE

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