

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

1. Criminal Appeal No.D-28 of 2012.
2. Cr. Jail Appeal No.D-29 of 2012  
Confirmation Case No.02 of 2012

*Present:-*

*Mr. Justice Muhammad Iqbal Kalhoro.*

*Mr. Justice Khadim Hussain M. Shaikh.*

Date of hearing: 20.12.2017

Date of decision: 20.12.2017

Appellant: Ghazi Khan  
Through Mr. Aslam Pervez Khan, Advocate.

Appellants: Ghulam Nabi and Ali Gul  
Through Mr. Muhammad Sachal R. Awan, Advocate.

Complainant: Mir Hazar Khan Chandio  
Through Mr. Muhammad Jameel Ahmed, Advocate.

The State: Through Syed Meeral Shah A.P.G.

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**MUHAMMAD IQBAL KALHORO,J:-**The appellants have impugned the judgment dated 31.01.2012, passed by 2<sup>nd</sup> Additional Sessions Judge, Hyderabad whereby they were convicted under section 302(b) r/w section 34 PPC in the terms whereby appellants Ghulam Nabi and Ali Gul were sentenced to death as Ta'zir, whereas, appellants Ghazi Khan and Sachal were sentenced to suffer imprisonment for life, as Ta'zir. They were also directed to pay compensation of Rs.2,00,000/- in terms of section 544-A Cr.P.C to the legal heirs of the deceased and in case of failure to suffer S.I for six months more.

2. The brief facts of the prosecution case are that on 28.03.2003 at 9-00 am, Khalid Bashir, Ghulam Jaffar, Munshi Ali Hassan and Rasheed were present at their Poultry Farm near Shah Latif Colony SITE Hyderabad when accused Sachal, Ghazi Khan, Ali Gul and Ghulam Nabi duly armed with pistols arrived there. Accused Sachal Chandio and Ghazi Khan Chandio called out that Rasheed was their enemy and one Mullan Chandio, who was in jail, had also required them to execute him, therefore, he should be murdered. On their abetment, accused Ali Gul and Ghulam Nabi made firing from their pistols at Rasheed. Thereafter all the accused fled from the spot while making aerial

firing. Injured Rasheed was taken to hospital, but he could not survive. Resultantly, the F.I.R. was lodged.

3. After registration of the F.I.R., the police started investigation and after completing due formalities, challan against the accused was submitted. Finally, the trial against the accused commenced, during which a formal charge was framed against them at Ex.5, who pleaded not guilty and opted to contest the charge.

4. In the trial, the prosecution has examined PW-1 Complainant Mir Hazar Khan at Ex.11, P.W-2 Ali Hassan (eye witness) at Ex.12, P.W-3 Ghulam Jaffar (eye witness) at Ex.13, P.W-4 Mashir Muhammad Hashim at Ex.14, P.W-5 Mashir PC Abdul Hameed at Ex.15, P.W-6 Medical Officer Dr. Abdul Haleem Thebo at Ex.16, P.W-7 P.W Khalid Bashir (eye witness) at Ex.19, P.W-8 SIP Dos Muhammad Abro at Ex.22, P.W-9 SIP Tahir Shaikh at Ex.29 and P.W-10 ASI Altaf Hussain Shaikh at Ex.32. They have produced all the necessary documents viz. F.I.R., statements under sections 164, Cr.P.C, memo and sketch of place of incident, inquest report, memos of inspection of dead body, seizure of blood stained cloths, letter, post mortem examination report, etc. Learned DDPP vide his statement at Ex.38 got exhibited the report of chemical examiner as Ex.38-A.

5. Statements of the appellants were recorded under section 342 Cr.P.C in which they have denied the allegations and have professed innocence. However, neither they have examined themselves on oath nor led any evidence in their defense. The learned trial Court after concluding the evidence and hearing the parties convicted the appellants in the terms as stated above. Being aggrieved by the same, the appellants have preferred instant appeal. It is pertinent to mention here that the appeal of appellant Sachal due to his death on 21.05.2015 has already been abated vide order dated 08.05.2017.

6. Mr. Muhammad Sachal R. Awan learned Counsel appearing for appellants Ghulam Nabi and Ali Gul after arguing the case at some length submits that he would not press this appeal on merits, if the death penalty of the said appellants is converted into imprisonment for life as, according to him, there are mitigating circumstances in the case and that the death penalty awarded by the learned trial court is not justified. Learned Counsel in support of his contentions has relied upon the case laws reported in 2014 SCMR 1464, 2017 SCMR 986.

7. Mr. Aslam Pervez Khan learned counsel appearing for appellant Ghazi Khan contends that only his presence is shown in the F.I.R. without any active

role and although the appellant is alleged to have made firing in the air but the prosecution has failed to prove said allegations against him as from the spot only five empties were recovered which are attributed to the main accused namely Ghulam Nabi and Ali Gul.

8. Conversely, Mr. Muhammad Jameel Ahmed learned Counsel appearing for the complainant has supported the impugned judgment and has submitted that the prosecution has been able to prove the case against the appellants beyond any reasonable doubt and there are no mitigating circumstances to convert death penalty of the appellants into imprisonment for life. Learned Counsel in support of his contentions has relied upon the case laws reported in PLD 1990 Supreme Court 1176, 2015 SCMR 258, 2016 SCMR 958 and PLD 2008 Supreme Court 503..

9. Learned Additional Prosecutor General Sindh, however, has submitted that he has no objection against the acquittal of appellant Ghazi Khan because prosecution has not been able to prove the case against him beyond a reasonable doubt and in respect of appellants Ghulam Nabi and Ali Gul his opinion is that there are mitigating circumstances, therefore, he has no objection if death penalty of the said appellants is converted into imprisonment for life.

10. We have considered submissions of the parties and have perused the material available on record. The prosecution in all has examined ten (10) witnesses. P.W-1 Mir Hazar Khan (Ex.11) is the complainant. P.W-2 Ali Hassan (Ex.12), P.W-3 Ghulam Jaffar and P.W-7 Khalid Bashir (Ex.19) are the eye witnesses of the incident, who have supported each other on relevant facts of the case. The remaining witnesses, who are mashirs, and official witnesses have also corroborated the prosecution case and have produced relevant documents.

11. A perusal of the evidence of above witnesses shows that the prosecution has been able to prove the case against appellants Ghulam Nabi and Ali Gul. They are attributed a specific role of firing at the deceased, which has been supported by the medical evidence which indicates that deceased Rasheed Chandio received 4 firearm injuries on different parts of his body with exit wounds. The evidence of witnesses is further corroborated by the production of crime weapon by appellants Ghulam Nabi and Ali Gul at the time of their surrender to the police on 29.03.2003. Therefore, it is established that the prosecution has succeeded in proving the case against the appellants Ghulam Nabi and Ali Gul. However, the case against the appellant Ghazi Khan is not free from doubt. Appellant Ghazi Khan is shown present at the spot at the time

of incident and making aerial firing. It is clear that he has not been assigned any role of making firing at the deceased. And his role of making aerial firing is not established from any corroboratory evidence. The memo of place of incident shows that only 5 empties were recovered from the spot, and the same numbers of fire shots are attributed to appellants Ghulam Nabi and Ali Gul. It is also important to note that during investigation no crime weapon was recovered from the appellant Ghazi Khan, therefore, his sharing common intention with the appellants Ghulam Nabi and Ali Gul at the time of commission of offence is not free from doubt. Therefore we are of the view that the learned Additional Prosecutor General Sindh has rightly conceded to his case and recorded no objection to his acquittal.

12. Although we have noted above that the prosecution has been able to prove its case against appellants Ghulam Nabi and Ali Gul, but nonetheless there are certain circumstances in the prosecution case, which extenuate the crime committed by the said appellants. For instance, the motive is shrouded in mystery. While it has been alleged that the accused committed the offence at the instance of one Piyaro alias Mulla Chandio, who at the time of incident was confined in jail, but no evidence establishing the said fact has been brought on record by the prosecution. Even said Piyaro alias Mulla has not been made accused by the prosecution. There is a delay of 14 hours in registration of the F.I.R., and in order to explain such delay, it has been stated that complainant was in Karachi where he was informed about the incident and only after his return from Karachi, the F.I.R. was lodged. But it has not been explained why the P.Ws, who were allegedly present at the spot, did not get the F.I.R. registered immediately after the incident. It is alleged that the appellants at the time of their surrender had produced the crime weapons, which were subsequently sent for FSL report but strangely the FSL report was not produced at the time of evidence. It was submitted formally through a statement by the DDPP on 04.01.2012, but since it has not been produced by any witness, its genuineness is not established on the one hand, and on the other the appellants were deprived of an opportunity to cross examine the witness to question its authenticity. We have also noted that that in the statement of the appellants recorded under section 342, Cr.P.C., the medical evidence i.e. postmortem report which establishes unnatural death of the deceased has not been confronted to them by the learned trial court. Additionally, it is also worth noting that P.W-3 namely Ghulam Jaffer Ex.13 in his evidence has stated that all the four accused made straight firing at the deceased which is not in harmony with the prosecution case. It has also been informed that the appellants are in jail since their arrest on 29.03.2003 and have spent more than 14 years in jail which fact coupled with the above stated circumstances makes

the case against the appellants Ghulam Nabi and Ali Gul to be one of mitigating circumstances.

13. While considering the above facts and circumstances of the case, we are minded that the request of learned Counsel for appellants Ghulam Nabi and Ali Gul for modification in their sentence is not unjustified. Accordingly, we dismiss their appeal and allow the appeal of Ghazi Khan and dispose of these appeals in the terms whereby appellant Ghazi Khan is acquitted of the charge, he shall be released forthwith if not required in any other case, whereas, the sentence of death awarded to the appellants Ghulam Nabi and Ali Gul through impugned judgment is modified and reduced to the imprisonment for life with benefit of section 382-B, Cr.P.C duly extended to them. They shall, however, pay compensation of Rs.200,000/- in equal share to the legal heirs of the deceased as provided u/s 544-A Cr.P.C and in case of default thereof to suffer S.I. for six months more.

14. Resultantly, death reference No.02 / 2012 for confirmation of death sentence to appellants Ghulam Nabi and Ali Gul is replied in negative and is accordingly disposed of. These are the reasons of our short order dated 20.12.2017.

JUDGE

JUDGE