IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Jail Appeal No.D- 66 of 2013
Confirmation Case No.22 of 2013

Present:
MR. JUSTICE NAIMATULLAH PHULPOTO
MRS. JUSTICE RASHIDA ASAD

Date of hearing:	11.08.2020
Date of Judgment:	26.08.2020
Appellant:	Rafique @ Peeko through Mian Taj Muhammad Keerio, Advocate.
Respondent:	The State through Mr. Shahzado Salim Nahyoon, D.P.G.

JUDGMENT

Rashida Asad J.– Rafiq alias Peeko, appellant has impugned the judgment dated 11.09.2013, passed by learned IIIrd-Additional Sessions Judge, Hyderabad, in Sessions Case No.390/2008, whereby the appellant was convicted (1) under section 302(b) P.P.C., and sentenced to death as Ta'zir subject to the confirmation by this Court, (2) under sections 324/337-F(ii) P.P.C., sentenced to ten years R.I. and three years R.I and also to pay Daman to the tune of Rs.25,000/- for actual injury caused to injured Muhammad Kashif, (3) under sections 324/337-F(ii), 337-D P.P.C., sentenced to ten years R.I. and five years R.I respectively and also to pay Daman to the tune of Rs.25,000/- for actual injury caused to injured Asif. He was also directed to pay compensation of Rs.1,00,000/- to the legal heirs of deceased Muhammad Rafique under section 544-A Cr.P.C and in default thereof to suffer S.I for six months. All the sentences were ordered to run concurrently. However, the appellant was extended benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case are that on 04.06.2008 at 2200 hours, complainant Abdul Latif lodged an F.I.R. stating therein that on 03.06.2008, at about 0300 hours, his elder brother Rafique went to his

sister-in-law's house situated at street No.5. Complainant was also standing in the same street when Rafique alias Peco, a distant relative of complainant started abusing with his nephews Asif and Kashif in front of him on issue of cable wire. At that time complainant's elder brother (Rafiq) along with his sister-in-law came out of the house, to stop the parties from quarrelling. At that time Shahid and others from the neighborhood also came and interfered. Suddenly, Rafique @ Peco went back to his house, brought a knife and directly attacked with knife to his brother Rafique while hitting others standing there. Accused Rafique @ Peco then fled away. Complainant and others took all the injured to hospital in rickshaw. Police officials of Phuleli PS came to the hospital, issued letter to the doctor for treatment and advised the complainant to lodge F.I.R. On 04.06.2008 his elder brother (Rafiq) succumbed to his injuries. F.I.R was recorded vide Crime No. 60/2008, under sections 302, 324 P.P.C. at PS Phuleli.

3. After usual investigation, challan was submitted against accused under section 302, 324 P.P.C. Trial Court framed charge against accused, in which he opted to contest and pleaded not guilty. At trial, prosecution examined SIP Salamat Feroze at Ex.6, P.W Abdul Latif at Ex.8, P.W ASI Ali Nawaz at Ex.9, P.W Asif at Ex.10, P.W Muhammad Kashif at Ex.11, P.W Shahid at Ex.12, P.W ASI Haji Allah Bachayo at Ex.13, P.W Dr. Javed Iqbal at Ex.14, and P.W SIP Muhammad Sharif at Ex.15. These witnesses produced all the relevant documents which include all memos, postmortem reports, FSL report, 164 Cr.P.C statements, sketch of place of incident, etc.

4. The statement of accused under section 342 Cr.P.C. was recorded, in which he has denied the case against him and has professed innocence. However, neither he examined himself on oath nor led any evidence in his defense.

5. The learned trial court vide its judgment dated 11.09.2013, found the appellant guilty, convicted and sentenced him as mentioned above and made reference to this court for confirmation of death sentence as required by the law. Hence, this appeal.

6. By this single judgment, we intend to decide above criminal appeal as well as confirmation reference made by the trial Court

7. Learned counsel for the appellant argued that the appellant has falsely been implicated in this case by the complainant and it was an unseen occurrence; that the witnesses being closely related to the deceased are interested witnesses and they have falsely deposed against the appellant; that there was no independent witness with the prosecution to support its version; that the prosecution witnesses have made dishonest improvements in their statements; that the medical evidence is in conflict with the ocular account; that the alleged recovery of blood stained Chhurri/knife at the instance of the appellant was doubtful; that injured P.Ws nowhere have stated about the presence of the complainant; that the motive alleged by the prosecution could not be established on record and that the prosecution has miserably failed to perform its legal duty in proving the case beyond shadow of reasonable doubt and prayed for the acceptance of this appeal. In support of his contentions, reliance has been placed upon the cases reported as **Sufyan Nawaz and another Vs. The State and others (2020 SCMR 192), Abdul Rahim Vs. Ali Bux and 4 others (2017 P.Cr.L.J 228) &Fazal Hussain alias Faqeera and others Vs. The State (2020 P.Cr.L.J 311)**.

8. Conversely, learned Deputy Prosecutor General vehemently opposed the contentions raised by learned counsel for the appellant and maintained that the appellant has murdered deceased Muhammad Rafiq and also caused injuries to injured P.Ws. Muhammad Kasif and Asif and there is no chance of misidentification or substitution as the parties are well-known to each other being relatives; that the prosecution witnesses have not made any dishonest improvements rather they have explained the manner of incident; that the ocular account is corroborated by the medical evidence; that the prosecution case against the appellant is further corroborated by the recovery of blood stained Chhurri at the instance of the appellant; that the motive has also been proved by the prosecution; that the prosecution has fully proved its' case against the appellant beyond any reasonable doubt; that this appeal may be dismissed and Murder Reference be answered in the affirmative.

9. We have heard the learned defence counsel, learned Deputy Prosecutor General assisted by learned counsel for the complainant and gone through the record with their able assistance.

10. In order to prove unnatural death of deceased Muhammad Rafiq and injuries on the persons of P.Ws Asif and Muhammad Kashif, prosecution has examined Dr. Javed Iqbal, who has deposed that on 03.06.2008 he was posted as Medical Officer at Liaquat University Hospital, Hyderabad. He received three injured persons namely Muhammad Rafiq, Kashif and Asif at 03-30 p.m and 09-30 p.m referred to him by S.H.O P.S Phuleli. Medico Officer examined Muhammad Rafique and found following injuries on his person:

1. *Stabbed wound 5 c.m x 2.5 c.m x cavity deep over left side of lower chest and abdomen.*

Medical Officer issued provisional Medical Certificate Ex.14/A. M.O then examined injured Kashif and found following injury on his person:

1. *Stabbed wound 3 c.m x 2 c.m x cavity deep?? over lower chest on the left side.*

Provisional Medical Certificate was issued. Thereafter M.O examined injured Asif and following injuries were found on his person:

1. *Stabbed wounds 3.5 cm x 2.5 cm x cavity deep on left side of chest, near lower 1/3rd*

2. *Stabbed wound 3 cm x 2 cm into cavity deep over middle of chest near xiphisternum.*

3. *Stabbed wound 3 cm x 2 cm that was the wound of entry over right elbow joint, at medial aspect and exit present over lateral aspect of right elbow joint 2.5 cm x 1.5 cm.*

All the three injured persons had received injuries by means of sharp cutting weapon and were fresh in nature. M.O. referred injured persons for expert opinion and received expert opinion. On 04.06.2008 M.O. received letter from the concerned police for conducting postmortem examination of Muhammad Rafique son of Allah Dino. M.O. started postmortem examination at 09:15 p.m. and finished at 11:00 p.m. The time elapsed between death and injuries was about 24 to 30 hours and the time between death and postmortem was about 1 ½ hour. On external as well as internal examination of the dead body of deceased Muhammad Rafique, a dead body of a young male muslim, aged about 30 years with average

built and height, face seen pale, eyes were closed, pupils seen dilated and fixed.

SURFACE WOUNDS AND INJURIES

1. Stitched operated wound 10 cm in length over left side of upper abdomen, just below the chest

2. Stitched operated wound of drain 5 cm in length over chest at left side.

Head

There was no detection

Thorax

Stitched operated wound 5 cm in length for intubations, both lungs and heart seen intact.

Abdomen

On seeing abdominal cavity, repair of left border of liver and also repair of stomach was seen other viscera's and structures seen intact, the stomach contain only gastric juice.

Remarks

Operated Notes/procedure exploratory plus chest tube placement. Anesthesia G/A. Indication was stabbed wound. The dead body brought by ASI Salamat Ali of police station Phuleli for postmortem as a case of stabbed wounds caused by sharp cutting weapon.

Opinion

In the opinion of Medical Officer, death of deceased occurred due to the injuries on vital organs of his body i.e. liver and stomach, which caused cardio respiratory failure. Death was the result of sharp cutting weapon. M.O. issued such postmortem report, which he produced as Ex.14/F. Medical Officer declared injuries sustained by injured Kashif Ghayar Jaifah Badiha and injuries sustained by P.W Asif were declared as Jaifah and Ghayar Jaifah Badiha. M.O issued medical certificate of both injured persons and produced as Ex.14/G and 14/H.

Medical Officer was cross-examined by the defence counsel. Evidence of the Medical Officer goes unchallenged and un-rebutted with regard to the number of injuries sustained by deceased and P.Ws and the weapon used. M.O has denied that postmortem and medical certificates have been managed by him. The efficiency and integrity of the Medical Officer were not questioned in the cross-examination. We have no hesitation to hold that deceased died of injuries caused by sharp cutting

weapon and both the injured had received injuries by means of sharp edged weapon as described by Medical Officer and finding of the trial court in this regard requires no interference by this court.

11. Now the question arises who was the author / responsible for causing the unnatural death of deceased and caused injuries to the P.Ws as alleged by prosecution. In order to substantiate the same, prosecution has proved its case through the direct evidence, produced Complainant Abdul Latif (PW-2), injured Asif (P.W.4), injured Muhammad Kashif (P.W-5), who furnished the ocular account of the occurrence.

12. Complainant Abdul Latif deposed that on 03.06.2008 at 03:00 p.m., a quarrel, on the issue of cable wire, took place between accused and his two nephews Asif and Muhammad Kashif, when he was standing near his house, at Islamabad chowk Hyderabad. During such quarrel accused Rafique @ Peeko inflicted knife blows to his brother Rafiq and nephews Asif and Muhammad Kashif on the abdomen. Thereafter, he with the help of Mohallah people shifted the injured to the civil Hospital Hyderabad where police also arrived. His brother and nephew Asif were in critical condition and shifted to ICU. The next day his brother succumbed to his injuries. Police visited the place of incident and inspected in his presence.

13. P.W/Injured Asif deposed that on 03.06.2008 at about 3:00 p.m. he along with his brother Kashif was standing outside their house. Accused Rafiq (Peeko), who was residing in front of their house, came out from his house and exchanged hot words over the issue of cable wires. In the meantime, his uncle Rafiq, who was visiting them, on hearing voices came out. Accused also exchanged hot words with his uncle Rafiq. Thereafter, accused rushed to his house and came out with churri/knife and inflicted churri blows to his uncle Rafiq, his brother Muhammad Kashif and to him as a result of which they fell down. He remained in hospital for about 15 days. Thereafter police recorded his statement. His statement was also recorded by the Magistrate. P.W/ Injured Muhammad Kashif also stated the same story. Though, they were cross-examined at length but nothing favourable to the accused came on record. Complainant, the brother of deceased Muhammad Rafiq, and his nephews/injured P.Ws Asif and Kashif were residents of

the same vicinity, so, keeping in view the relationship with the deceased and their residence in the vicinity, their presence at the scene of incident is self-explanatory. There is no cavil to the proposition that in such like criminal cases, the whole fate depends on the authenticity of the ocular account and in the instant case, all the eye witnesses have given a clear and straightforward account of the occurrence of murder of deceased and causing injuries to P.Ws Asif and Muhammad Kashif and further it is a daytime incident. Furthermore, it is not expected from such close relatives i.e. real brother and nephews of the deceased that they would let the real culprit of their near and dear one go scot-free and would falsely implicate the present appellant. During their statements before the learned trial court, all the witnesses remained stuck to their statements and they firmly and successfully faced rigor of cross-examination by the defence. Though complainant Abdul Latif, injured Asif and Muhammad Kashif are sufficiently reliable witnesses and their evidence cannot be discredited in any manner as they remained firm during the cross-examination after making a straightforward and crystal clear statement against the appellant having no malice prior to the occurrence against him which is fully trustworthy, cogent and confidence inspiring.

14. Learned counsel for the appellant doubted the veracity of the eye-witnesses being interested as closely related to the deceased. The close relationship of the witnesses with the deceased has no bearing to discard their testimony, if they are not inimical or interested to falsely implicate the appellant, who was also closely related to them. Reliance is placed upon the case reported as **Sheeraz Tufail v. The State (2007 SCMR 518)** wherein, the Honourable Supreme Court has held as under:

> "It is also a settled law that mere relationship is not sufficient to discard the statement of the interested witnesses as law laid down by this Court is Roshin's case PLD 1977 SC 557."

15. Likewise, in another case reported as **Khair Muhammad and another v. State (2007 SCMR 158),** same proposition has been discussed. The relevant portion is reproduced hereunder for ready reference: --

> "The contention of the learned counsel that witnesses being closely related to the deceased, were interested and not reliable, was without

> any substance as mere relationship is not sufficient to hold a witness interested or discard his evidence and in the present case, the accused were also closely related to the witnesses, therefore, there would be no chance of false implication or substitution."

We are, therefore, satisfied that the evidence of complainant Abdul Latif, PWs Asif and Muhammad Kashif was rightly accepted by the trial court.

16. As regards to the delay in lodging of the FIR is concerned, it has come on record that on the day of occurrence, after the incident, the complainant and the mohallah people shifted the injured persons to civil Hospital Hyderabad where police also arrived. His brother Muhammad Rafiq and nephew Asif were in critical condition and were shifted to ICU. In his cross-examination, the complainant asserted that police also reached in the hospital at 6:00 p.m., and issued a letter for treatment of injured. Later, his brother died and after the postmortem, dead body was handed over to him, thereafter, he proceeded to the police station for lodging FIR. The delay in lodging of the FIR was explained sufficiently, that due to exceptional circumstances of the case, where three persons were critically injured, preference was to treat the injured first. It is an admitted fact that the police arrived at the civil hospital after receiving the information about incident and it was the duty of the police to lodge the FIR promptly. Thus in view of peculiar facts and circumstances of the case with regard to delay in lodging of F.I.R., defence could not succeed to prove any consultation, deliberation or premeditation on the part of the complainant to falsely charged the appellant in the case. It is not possible in ordinary course or even not appealable to the prudent mind that the actual and real culprit is let off and instead an innocent person is charged. It is by now a settled principle of law that mere delay in lodgment of the FIR shall never be sufficient to believe or disbelieve the contents of the FIR, but question of guilt or innocence shall always need required standard of evidence.

17. The ocular account is in line with the medical evidence as the injuries attributed to the appellant caused by sharp edged weapon as reflected in the postmortem examination of deceased Muhammad Rafiq and medico legal certificates issued to injured P.Ws Asif and Muhammad Kashif. In this view of the matter, the ocular account finds strong

corroboration with the medical evidence in this case. Thus the medical evidence lends valuable corroboration to the ocular account of the eye witnesses for the reasons that these injuries on the deceased were inflicted by the appellant with knife.

18. The prosecution case is further corroborated by the evidence of recovery of chhuri/knife on the pointation of the appellant. We have noticed that the appellant produced said Chhuri/knife lying in a plastic bag which was concealed in the heap of garbage, lying in polythene bag on the side of Ganda Nala, Street No.5, Yasrab Colony. We are of the view that the place from where the Chhuri was recovered, was in the exclusive knowledge of the appellant. The sealed parcel containing this knife was sent to chemical examiner who reported that there was human blood on this weapon.

19. As regards to the arguments of learned advocate for the appellant that the motive in the commission of offence was not serious one, weapon used was knife not firearm and the incident had taken place at spur of the moment. In our considered view, these grounds could not be sufficient to withhold the award of punishment of death sentence. There was no cavil to such propositions however, each case has to be examined in the light of its own vistas. The facts and circumstances of each case are the best determinative factors for award of penalty of death or that of lesser punishment of life imprisonment. According to section 302(b) of the P.P.C., the normal punishment for Qatl-i-Amd is death but the imprisonment for life as Ta'zir can be awarded having regard to the facts and circumstances of the case in hand. To appreciate this reasoning, the provision of section 302(b) is reproduced which reads as follows:---

> "302. Punishment of Qatl i-Amd. Whoever commits Qatl-i-Amd shall, subject to the provisions of this Chapter be:
>
> (a) ----------
>
> (b) Punished with death or imprisonment for life as Ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or
>
> (c) ----------
>
> " (underlining is ours).

20. In other words, the law has conferred discretion upon the Court to withhold the penalty of death and to award the punishment of imprisonment for life, if the outlook of a particular case requires that course. Question arises, as to what could be those facts and circumstances in which penalty of death must be imposed and lesser penalty of life imprisonment should not be awarded.

21. The analysis of all the cases has led us to a conclusion that from the facts and circumstances of the case, if the Court finds the manner and method of incident, to be in the nature of a brutality, horrific, heinous, shocking, involving terrorist nature, creating panic to the society as a whole or in part, callous and cold blooded, in such cases (which list is not exhaustive), the penalty of death must not be withheld. In other words, grave inhuman attitude, acts, manners, method and the criminality of actions are the constituents, elements and the instances, where punishment of death must be awarded. The following judgments have helped us to reach to this conclusion:--

" In the case of HAJI MUHAMMAD alias JHOORA Versus The STATE (PLD 2014 Supreme Court 322), the Honourable Supreme Court of Pakistan has held as under:-

> *"12. …….. In the instant case there are no such mitigating circumstances which could help out the appellant for reducing his sentence. In the case in hand the appellant had caused death of an innocent person in a reckless manner while firing at the vital parts of his body leaving no chance for his survival."*

In the case of ZAFAR Versus THE STATE (2010 SCMR 1084), the Honourable Supreme Court of Pakistan has held as under:-

> *"9. ……. We are of the view that no mitigating circumstance has been pointed out by the learned counsel for the appellant nor it appears from the record to call for awarding sentence less than the normal sentence of death under section 302(b), P.P.C. The appellant is brother-in-law of the complainant and the only nominated accused in committing brutal murder of complainant's brother and there was no reason for false involvement of the appellant. The appellant has caused repeated hatchet blows on the vital parts of the deceased."*

In the case of MUHAMMAD JAVED Versus The STATE (2015 SCMR 864), the Honourable Supreme Court of Pakistan has held as under:-

> *4. While canvassing for reduction of the petitioner's sentence from death to imprisonment for life the learned counsel for the petitioner has submitted that the straining of relations between the petitioner and his wife was an admitted fact in this case and in that backdrop frustration of the petitioner upon failure of return of his spouse to his matrimonial fold was a factor which could have some bearing upon the matter of his sentence. We have, however, remained unable to subscribe to this submission of the learned counsel for the petitioner because of the simple reason that in this case the marriage between the petitioner and his spouse had been terminated through a judicial decree about one year prior to the present occurrence and, thus, there was hardly any scope of any reconciliation left in the field. At that stage if the petitioner still wanted his divorced spouse to come and live with him then he was asking for something which was not only bizarre but impossible to be acceded to by the complainant party and the former spouse. If the petitioner had felt frustrated over refusal of the complainant party and his former spouse in that regard then he had shown extreme highhandedness by launching aggression against the complainant party and killing his former brother-in-law namely Khalid Javed by firing not once but twice at him hitting him at the most vital parts of his body, i.e. chest and abdomen. The petitioner had been apprehended red-handed at the spot and was handed over to the local police along with the weapon of offence soon after the incident in issue and, thus, there was very little scope left for him to deny his presence and participation in the said occurrence. What is disturbing in this case is that the petitioner belonged to the police force and as a member of a disciplined force a responsibility heavier than normal was placed upon his shoulders to abide by the law and not to take the law in his own hands. Alas, the petitioner had not only failed to bother about that responsibility lying upon his shoulders but he had also considered himself to be above the law and had tried to take undue advantage of his being a member of the police force by pressurizing the complainant party on the issue of his failed matrimony. For all these reasons the petitioner has failed to evoke our sympathy in the matter of his sentence and even otherwise we have remained unable to find any circumstance warranting mitigation of his sentence of death."*

22. In the present case, during a quarrel between the appellant, deceased and injured Kashif and Asif, both nephews of deceased, the appellant went to the house, brought a knife and caused repeated blows to deceased and injured. The brutality demonstrated by the accused while selecting the vital part of the body and repetition of blows clearly showed that the appellant had committed murder intentionally. Learned advocate for the appellant could not point out any mitigating circumstance in the case to take lenient view. If the culprits are allowed to be treated leniently, the object and purpose of promulgation of penal law would be frustrated. The offence has been established against accused. He has been rightly punished to death under the law.

23. For what has been discussed above, we have come to irresistible conclusion that the appellant has inhumanly and ruthlessly killed deceased Muhammad Rafiq and injured Asif and Muhammad Kasif and thus appellant does not deserve any leniency or favour and that the prosecution has successfully proved its case against the appellant beyond reasonable doubt through the ocular account furnished by complainant and the injured prosecution witnesses fully corroborated by the medical evidence, evidence of recovery of Chhuri and evidence of motive part of the occurrence, therefore, this appeal is dismissed and the conviction and sentence awarded to him by the learned trial court are maintained. Consequently, the Confirmation Case No.22 of 2013 is answered in the AFFIRMATIVE and the death sentence awarded to appellant Rafiq alias Peeko is CONFIRMED.

JUDGE

JUDGE

Ali Haider