THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Appeal No.D-125 of 2016
Confirmation Reference No. 22 of 2016

Present:

Mr. JUSTICE NAIMATULLAH PHULPOTO
JUSTICE RASHIDA ASAD

Date of hearing:	03.09.2020
Date of decision:	07.10.2020
Appellant:	Abdul Razzak Through M/s Manzoor Hussain Subhopoto and Om Parkash H. Karmani, Advocates.
Respondent:	The State through Mr. Shahzado Salim Nahyoon, D.P.G.

J U D G M E N T

RASHIDA ASAD, J.– Meeral was shot dead in the middle of Bazaar (market), in front of shop of Muhammad Qasim at 10:30 a.m., on the fateful day of 23rd of September, 2010. According to the case of the prosecution, the complainant along with his brothers Meeral (deceased in the case), Qamaruddin and cousin Muhammad Juman were going to Bazaar however, Meeral was walking ahead of them. Suddenly they heard the reports of gun fire and rushed towards Meeral, and saw accused Muhammad Nawaz, Abdul Aziz, Abdul Razzak, all sons of Ghulam Rasool, and one Abu Bakar, duly armed with pistols, and within their sight, they made straight firing at Meeral who fell down and all accused ran away. Meeral succumbed to his injuries on the spot. They brought the dead body to the Civil Hospital, Johi and informed the police. After completing the postmortem, the dead body was handed over to the complainant, who brought the same at his

native village for burial. Thereafter, on the same day at 2300 hours, he went to the Police Station Drigh Bala and lodged the FIR bearing Crime No. 34/2010, under Sections 302 and 34 P.P.C.

2. Usual investigation ensued. Accused Abu Bakar was arrested on 24.09.2010 and sent up for trial, whereas remaining accused including appellant absconded and were declared proclaimed offenders. On 21.10.2013, appellant surrendered before the learned trial Court and joined the trial.

3. Trial Court framed the charge against both accused to which they pleaded not guilty and claimed to be tried. During pendency of trial, accused Abu Bakar expired and the trial against him stood abated vide order dated 15.10.2015.

4. At the trial, prosecution examined as many as eight witnesses and closed it's side. Statement of accused was recorded u/s 342 Cr.P.C., wherein he denied the allegations of prosecution and professed his innocence. However, he neither examined himself on oath in disproof of the prosecution allegations nor examined any witness in his defence as required u/s 340(2), Cr.P.C. However, he produced photocopy of FIR wherein the complainant party was nominated as accused.

5. The learned Additional Sessions Judge-II, Dadu, having appreciated the evidence available on record, found the appellant–accused guilty of the offence punishable under Section 302(b) P.P.C., and vide judgment dated 23.11.2016 convicted and sentenced him to death with directions to pay compensation of Rs.500,000/- to the legal heirs of the deceased in terms of Section

544-A Cr.P.C., and in case of default, he was directed to suffer S.I for six months. Questioning the said conviction and sentence, the appellant-accused, filed this criminal appeal and reference under Section 374, Cr.P.C. is made by the learned Additional Sessions Judge, for confirmation of death penalty. Being bound by a common thread, we intend to dispose of both the Criminal Appeal as well as Confirmation Reference made by the learned trial Court through this single judgment.

6. After reading out of the evidence and the impugned judgment, learned counsel for the appellant did not press his appeal on merits and prayed for reduction of the sentence from the death penalty to one of life imprisonment. Per learned counsel for the appellant, the death sentence cannot be awarded if there is any mitigating circumstance in favour of the accused and for imposition of death sentence all the circumstances must be aggravating. The learned counsel further contended that since the motive, for the accused to attack, as set up by the complainant could not be proved at trial, therefore, the same would take into account, as mitigating circumstances.

7. Learned D.P.G contended that based on the evidence on record the prosecution has proved its' case against the appellant beyond a reasonable doubt and as such the impugned judgment did not require interference. However, when he was asked by the court whether the motive as alleged by the prosecution has been proved at trial, he conceded that motive remained shrouded in mystery and further submitted that he would have no objection for conversion of death penalty into life imprisonment.

8. After hearing the learned counsel for the parties and perusal of available record, it has been observed by us that the incident allegedly took place in broad daylight at 10:30 a.m., in the Bazaar which was witnessed by Sharfuddin (the complainant), Qamaruddin and Muhammad Juman. The matter was reported to police on the same day at 2300 hours. The postmortem examination of the deceased was conducted by Dr. Mehboob Ali at Taluka Hospital Johi, who in his statement recorded during trial stated that he conducted postmortem of the deceased and opined that deceased had died due to firearm injuries at vital organs, caused excessive bleeding, shock and cardio respiratory failure. No question was raised regarding the efficiency and integrity of the Doctor. We are of the view that the deceased died his unnatural death as described by the Medical Officer. Finding of trial court in this regard requires no interference. The ocular account in this case was furnished by complainant Sharafuddin, P.Ws Qamaruddin and Muhammad Juman. The complainant (P.W-1) stated that due to an old dispute between complainant party and accused Muhammad Nawaz, the accused party had issued life threats, and on the fateful day, his younger brother Meeral was done to death, in the Bazar, by the gunshots made by accused Muhammad Nawaz, Abdul Aziz, Abdul Razzaq all sons of Ghulam Rasool and one Abu Bakar son of Muhammad Nawaz, in his presence. The incident was also witnessed by P.Ws Qamaruddin and Muhammad Juman.

9. The evidence of P.Ws Qamaruddin and Muhammad Juman is corroborated with evidence of P.W-1 complainant Sharafuddin on all material points. They have given sufficient explanation for their presence at the spot at relevant time and all of them have taken a consistent stand, attributing the role to each and every accused in

the commission of murder of deceased, by gunshots, which is corroborated by the medical evidence. In these circumstances, we have come to the conclusion that the prosecution has proved its' case against the appellant beyond reasonable doubt. However, about the motive, for the accused to attack on deceased, in the FIR, the complainant alleged that there was an old dispute between the parties but in order to substantiate, such motive at trial no independent evidence is produced. Complainant and eyewitnesses in their evidence had simply deposed that they had enmity with accused party but particulars of such animosity and nature of the dispute had not been brought on record. Even it has not come on record that when and where such dispute arose. The Investigation Officer had also failed to interrogate / investigate, in order to ascertain about the enmity between the parties. Therefore, we are convinced that motive as alleged in the FIR was unspecific and vague and has not been established at trial.

10. As regards to the quantum of sentence is concerned, since there are mitigating circumstances, which favour the case of appellant for reduction in the quantum of his sentence. It is settled law that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), Iftikhar Mehmood and another v. Qaiser Iftikhar and others (2011 SCMR 1165), Muhammad Mumtaz v. The State and another (2012 SCMR 267), Muhammad Imran alias Asif v. The State (2013 SCMR 782), Sabir Hussain alias Sabri v. The State (2013 SCMR 1554), Zeeshan Afzal alias Shani and another v. The State and

another (2013 SCMR 1602), Naveed alias Needu and others v. The State and others (2014 SCMR 1464), Muhammad Nadeem Waqas and another v. The State (2014 SCMR 1658), Muhammad Asif v. Muhammad Akhtar and others (2016 SCMR 2035) and Qaddan and others v. The State (2017 SCMR 148). Nonetheless, imprisonment for life is a legal sentence provided under the law, reference can be made to the case of Khalid Naseer versus The State Criminal Petition Nos. 534 and 513 of 2019 decided by Honourable Supreme Court of Pakistan on 17.09.2020.

11. In the peculiar circumstances, the death sentence to the appellant would be harsh. 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. Extra degree of care and caution is required to be observed by the Judges while determining the quantum of sentence, depending upon the facts and circumstances of particular case / cases as held by Honourable Supreme Court of Pakistan in the case of Ghulam Mohy-ud-Din alias Haji Babu and others v. The State (2014 SCMR 1034). The relevant portion of which reads as under:-

> *"20. Albeit, in a chain of case-law the view held is that normal penalty is death sentence for murder, however, once the Legislature has provided for awarding alternative sentence of life imprisonment, it would be difficult to hold that in all the cases of murder, the death penalty is a normal one and shall ordinarily be awarded. If the intent of the Legislature was to take away the discretion of the Court, then it would have omitted from clause (b) of section 302, P.P.C. the alternative sentence of life imprisonment. In this view of the matter, we have no hesitation to hold that the two sentences are alternative to one another, however, awarding one or the other sentence shall essentially depend upon the facts and circumstances of each case. There may be multiple factors to award the death sentence for the offence of murder and equal number of factors would be there not to award the same but instead a life imprisonment. It is a fundamental principle of Islamic Jurisprudence on criminal law to do justice with mercy, being the attribute of Allah Almighty but on the earth the same has been delegated and bestowed upon the Judges, administering justice in criminal cases, therefore, extra degree of care and caution is required to be observed by the Judges while determining the quantum of sentence, depending upon the facts and circumstances of particular case/cases.*
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> *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 one 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 matter 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."

12. For the foregoing reasons, we have decided to exercise caution in the matter of the appellant's sentence of death and have felt persuaded to reduce the said sentence of death to imprisonment for life. This appeal is, therefore, dismissed and the conviction of the appellant under section 302(b), P.P.C. is maintained but this appeal is partly allowed to the extent of the appellant's sentence of death, which is reduced to imprisonment for life. The amount of compensation ordered by the trial court to be paid by the appellant to the heirs of each deceased is maintained by way of compensation under Section 544-A, Cr.P.C. on in default of payment thereof to undergo simple imprisonment for six months. Benefit under section 382-B, Cr.P.C. is also extended to him. Reference made by trial court for confirmation of death sentence is answered in **NEGATIVE**. This appeal is disposed of accordingly.

JUDGE

JUDGE

Ali Haider