IN THE HIGH COURT OF SINDH, CIRCUIT COURT AT HYDERABAD

Cr. Jail Appeal No.S-109 of 2020

Present:
Mrs. JUSTICE RASHIDA ASAD

Dates of hearing:	28.09.2020
Date of judgment:	09.10.2020
Appellant :	Muhammad Ali, through Mr. Eijaz Ahmed Awan, advocate
Complainant:	Akbar Ali, through Mr. Ayaz Hussain Tunio, advocate
Respondent:	The State, through Ms. Safa Hisbani, Assistant Prosecutor General Sindh

JUDGMENT

Rashida Asad J.– Muhammad Ali, appellant was indicted by the learned Additional Sessions Judge, Kotri, to face trial in case crime No.185/2003, registered at Police Station Kotri on 23.12.2003, for offences under Sections 302/504 P.P.C., On conclusion of trial, the learned trial court vide judgment dated 16.04.2008, convicted the appellant under Section 302(b) P.P.C., and sentenced him to life imprisonment as Ta'zir. However, the appellant was not extended benefit of Section 382-B of the Code of Criminal Procedure, 1898. The appellant has preferred this criminal jail appeal against the above said judgment.

2. Precise but relevant facts as alleged in the FIR are that, on 23.12.2003 at 0230 hours the father of the complainant, Akber Ali (PW-1), namely Ali Sher (deceased) had been killed by Mohammad Ali (the brother-in-law of complainant and son-in-law of deceased), by firing gunshot at him, over some domestic affairs.

3. Usual investigation ensued. Accused Muhammad Ali was sent up for trial. The trial court framed charge against accused under Sections 302/504 P.P.C., to which he pleaded not guilty and claimed to be tried.

4. In order to substantiate the charge, prosecution examined as many as seven witnesses and closed their side. Statement of the accused under section 342, Cr.P.C. was recorded, wherein he denied the prosecution allegations and professed his innocence. However, he neither examined himself on oath in disproof of prosecution allegations nor examined any witness in his defence. The trial court after hearing the learned advocate for accused and prosecutor, on assessment of evidence convicted and sentenced accused Muhammad Ali as stated above.

5. Mr. Ejaz Ahmed Awan, learned counsel for the appellant has mainly contended that the appellant is innocent and has been falsely implicated in the instant case; that the conviction and sentences recorded against the appellant is not sustainable as the prosecution case is fraught with doubts, inconsistencies, material contradictions and dishonest improvements; that the case rests only on the evidence of interested witnesses; that there are material lapses in investigation; that there is delay of two hours for which no plausible explanation has been furnished by the prosecution; that recovery of the alleged crime weapon is inconsequential as no empty was recovered from the place of incident. Lastly, it is contended that learned trial Court withheld benefit of section 382-B Cr.P.C. without recording any reason and he would be satisfied and would not press the appeal on merits if the appellant is extended benefit of Section 382-B Cr.P.C. In support of his contention learned counsel for appellant placed reliance on the cases of Ramzan and 3 others versus The State (PLD 1992 S.C 11), Mehmood Ahmed and 3 others versus The State and another (1995 SCMR 127), Ghulam Murtaza versus The State (PLD 1998 S.C 152), Bashir alias Bashir Ahmed and another versus The State (1998 SCMR 1794), Muhammad Azad versus Ahmad Ali and 2 others (PLD 2003 S.C 14), Muhammad Anwar versus The State (2014 SCMR 338), Government of Khyber Pakhtunkhwa through Secretary Home and Tribal Affairs Department Peshawar and

others versus Mehmood Khan (2017 SCMR 2044) & Muhammad Mansha versus The State (2018 SCMR 772).

6. Mr. Ayaz Hussain Tunio, learned counsel for Complainant argued that the impugned judgment recorded by the learned trial Court is well-reasoned and case was proved against the appellant beyond any reasonable shadow of doubt; that ocular evidence is supported by medical evidence; that the trial court has already taken a lenient view and awarded life imprisonment instead of death penalty; that the learned trial Court rightly withheld the benefit of Section 382-B Cr.P.C as brutal murder was committed by the appellant in presence of his family members. He prayed for dismissal of the instant Appeal. In support of his contention, learned counsel has placed reliance on the cases of Wahid Bakhsh versus The State (2000 SCMR 1815), Ehsan Ellahi and others versus Muhammad Arif and others (2001 SCMR 416), Faqir Hussain versus The State (2003 SCMR 1565), Mst. Hafeez Bibi versus The State (2005 SCMR 1159), Abdul Shakoor versus The State (2006 SCMR 1506), Safdar Mehmood and others versus Tanvir Hussain and others (2019 SCMR 1978), Bakht Munir versus The State and another (2020 SCMR 588), Mukhtar Alam versus Fazal Nawaz and another (2020 SCMR 618)&Aamir Hanif and another versus The State and others (2020 SCMR 675).

7. Ms. Safa Hisbani, Assistant P.G. for the State while supporting the impugned judgment contended that the case of prosecution is fully established through the ocular as well as medical evidence and the judgment of the learned trial court is well reasoned covering all aspects of the case, as such, does not require any interference by this court.

8. I have heard the learned defence counsel, learned counsel for complainant and Assistant Prosecutor General and have gone through the record with their able assistance.

9. In order to prove unnatural death of deceased Ali Sher, prosecution has examined Medical Officer Dr. Shahzad Saleem (P.W-4), who deposed that dead body of deceased Ali Sher was brought to Taluka Hospital Kotri by HC Liaqat Ali of I.T. Kotri, for postmortem examination and report. On examination he found the following injuries:

> "No.1. Lacerated fire arm injury extending from frontal to occipital region and from temporal to temporal region measuring 22 cm x 20 cm in deep up to brain matter resulting in multiple fracture of bones of vault of skull (frontal, occipital and temporal bones). Brain matter was damaged as protruded out of cranial cavity & blood stained. Wad and three pallets recovered from the cranial cavity."

10. The cause of death of the deceased was opined as hemorrhage and shock and damage of brain matter resulted from injury No.1 caused by firearm. In the cross-examination, unnatural death of deceased Ali Sher has not been denied by defence. Efficiency and competence of the MLO has also not been questioned. I, therefore, hold that deceased Ali Sher died his unnatural death as described by the MLO.

11. In order to prove its' case, the prosecution examined complainant P.W-1 Akbar Ali, who deposed that deceased Ali Sher was his father. On 23.12.2003 his father was sleeping alone in his room, which was also used as Otaq / Bethak whereas, he (complainant), his brothers Rustam and Shahnawaz and his mother were sleeping in the veranda. At about 2.30 a.m. on hearing fire report, they all woke up and in the light of blubs, they saw accused Muhammad Ali, the husband of his sister, who also lived with them, holding SBBL gun. Accused, on seeing them made hakals and said that he has committed murder of his father and ran away by closing the door of the Bethak from outside. Their cries attracted Mohalla people. Complainant left his brother Rustam to guard the dead body of his father Ali Sher and went to report the matter to the duty officer, who kept entry in Roznamcha, which was signed by him. He has further deposed that police came with him at his house and completed legal proceedings. This version of the complainant was duly supported on all material points by other two eye witnesses of the incident P.W-2 Mst. Rajul and P.W 3 Shahnawaz.

12. From perusal of the evidence of the complainant Ali Akbar and P.Ws Rajul and Shahnawaz, it transpired that evidence of the eye-witnesses is consistent and straight forward. The place of occurrence shows that the incident had taken place inside the house of the complainant party. In the FIR the appellant was nominated as the sole perpetrator of the alleged murder. The ocular account of the incident in

question had been furnished before the trial court by above three eye-witnesses who were, the wife and sons of the deceased and were residing in the same house with the deceased where accused-appellant was also residing with his wife, the sister of complainant. The said eye-witnesses were inmates of the house wherein the occurrence had taken place and, thus, were nothing but natural witnesses. Since the present appellant was also closely related to the above mentioned eye-witnesses as well as to the deceased and, thus, the case in hand could not be a case of a mistaken identity. The consistent ocular account furnished by the above mentioned eye-witnesses had received full support from the medical evidence inasmuch the date and time of occurrence and the injury stated by the eye-witnesses had all been confirmed by the medical evidence. There is also no question of substitution of the real culprit with the present appellant because not only this phenomenon is rare but also there is no record to suggest that there was any enmity between the parties to give an excuse to the prosecution to falsely implicate the appellant. Even otherwise, it is the settled position of the law that substitution is a phenomenon of a rare occurrence because even interested witnesses would not normally allow real culprits for the murder of their relations let-off by involving innocent persons. Reference can usefully be made to the case of Khalid Saifullah v. The State (2008 SCMR 688). Relevant portion is reproduced as under:-

> "8. The complainant being close relative (Hamzulf of the petitioner) had no reason to falsely implicate the petitioner in the commission of the offence substituting him, letting off the real culprits. There is no such material available on record which would indicate substitution of the petitioner in the case with the real culprit. Substitution is a phenomenon of a rare occurrence because even the interested witnesses would not normally allow real culprits for the murder of their relations let-off by involving innocent persons. In this context, reference can usefully be made to the case of Irshad Ahmed and others v. The State and others PLD 1996 SC 138. The petitioner has not been able to establish any animosity of the complainant or the police for his false involvement in the case."

13. As regards to the contention of the defence counsel that it was night time and identity of accused was doubtful, is concerned it is quite apparent that there was sufficient bulb light at the relevant time, even otherwise, the complainant party had no difficulty to identify the accused as he was husband of complainant's sister. Insofar as the contention of the defence

counsel regarding inordinate delay in lodging of the FIR is concerned, I have deeply considered this aspect of the case and come to the conclusion that in such a pathetic condition, when murder of the father of the complainant committed in presence of other family members, at night time, traumatized and shocked the complainant to report the matter to the police with promptitude and delay of few hours in lodging the F.I.R. was quite natural. Moreover, learned counsel for the appellant has failed to point out any undue advantage which was derived by the prosecution from such delay.

14. For the foregoing reasons, I have come to the conclusion that the learned trial Court has undertaken an exhaustive analysis of the evidence available on the record and has then concurred in his conclusion regarding guilt of the appellant having been established to the hilt and upon my own independent evaluation of the evidence, I have not been able to take a view of the matter different from that taken by the trial Court.

15. With regard to not extending the relief provided by section 382-B, Cr.P.C., no specific sufficient and convincing reason or cause has been shown in the impugned judgment, except that ***"since the accused has been punished for life imprisonment, question of extending benefit of section 382(b) Cr.P.C does not arise"***. The learned trial Court has seriously erred not to follow the object of section 382-B, Cr.P.C., the purpose of this provision is to compensate accused for the delay in conclusion of trial. For the sake of convenience section 382-B, Cr.P.C. is reproduced herein below:--

> *382-B. Period of detention to be considered while awarding sentence of imprisonment.---Where a Court decides to pass a sentence of imprisonment on an accused for an offence, it shall take into consideration the period, if any, during which such accused was detained in custody for such offence.*

16. A bare reading of Section 382-B, Cr.P.C. reveals that it is mandatory and ordinarily its benefit is to be extended to the accused for the period he remained or detained in custody as an under-trial prisoner at the time of awarding him sentence of imprisonment by the trial Court in the normal course, unless the case is of exceptional facts and

circumstances or the conduct of accused warrants denial of such benefit to him. It is settled that the courts while passing sentence of imprisonment must state in the order/judgment whether benefit of section 382-B, Cr.P.C. is extended to the accused or not and if accused does not deserve the said concession, the court must record reasons, in brief, for refusing to extend benefit of this section. Judicious discretion is always to be exercised in favour of convict unless it is unjustified or cause harm to any other party.

17. In the present case, the trial Court refused to take into consideration the pre-sentence custody period at the time of passing the sentence of imprisonment for life, which is the alternate but maximum sentence for the offence of murder and non-making allowance for the pre-sentence custody period, it would be punishing the appellant with imprisonment for life plus the pre-sentence custody period, that is to say, more than the maximum legal punishment. The provision makes no distinction whether the sentence to be passed is for imprisonment for life or for shorter period, the benefit granted to an accused that the period during which he was detained in custody shall be taken into consideration and need not be whittled down. Since no reasonable cause is available for denial of benefit of Section 382-B Cr.P.C. to the accused in the present case therefore, benefit should not be declined. Reliance in this respect may be placed on the cases reported as Shah Hussain Vs. The State (PLD 2009 S.C 460), Aloo versus The State (2000 SCMR 1655), Sultan and another versus The State (2000 SCMR 1818), Javed Iqbal versus The State (1998 SCMR 1539). In view of the above circumstances, I have no hesitation to hold that by not extending the benefit of this mandatory provision, the trial Court rather committed gross irregularity and infirmity, which part of judgment cannot be sustained, therefore, the impugned judgment to such an extent is set aside.

18. For the foregoing reasons, the instant Criminal Jail Appeal is dismissed on merits; however, with modification that the benefit of the provision of Section 382-B Cr.P.C. shall be extended to the appellant in the matter of computation of the sentence of life imprisonment passed

against him. However, it is observed that in the judgment, the learned trial Court has omitted to award compensation as required under section 544-A Cr.P.C. It is, therefore, ordered that the appellant shall pay a sum of Rs.100,000/- (Rupees one hundred thousand only) to the heirs of deceased by way of compensation under section 544-A, Cr.P.C. or in default of payment thereof to undergo simple imprisonment for six months. This appeal is disposed of in these terms.

JUDGE

Ali Haider