

## IN THE HIGH COURT OF SINDH, KARACHI

Cr. Jail Appeal **No.816** of **2019**  
Confirmation Case **No.34** of **2019**

**Present:**

**Mr. Justice Nazar Akbar**

**Mr. Justice Zafar Ahmed Rajput.**

Appellant	:	Muhammad Jamal S/o. Abdul Rehman, through Mr. Muhammad Farooq, Advocate
Respondent	:	The State, through Muhammad Iqbal Awan, DPG.
Date of hearing	:	----- 22.10.2020
Date of order	:	29.10.2020 -----

### JUDGMENT

**ZAFAR AHMED RAJPUT, J:-** The instant Criminal Jail Appeal is directed against the judgment dated 28.09.2019 passed in Sessions Case No. No.880 of 2015, arose out of Crime No.502/2014, registered at P.S. Gulistan-e-Jauhar, Karachi under section 302/397/34, P.P.C., whereby the learned Additional Sessions Judge/Model Criminal Trial Court, Karachi-East convicted the appellant Muhammad Jamal s/o Abdul Rehman for the offence under section 302(b), P.P.C. as *Ta'zir* and sentenced him to death and to pay compensation to the tune of Rs.2,00,000/- to the legal heirs of the deceased; in case of default thereof, he should further undergo simple imprisonment for six months. The appellant was also convicted for the offence under section 397, P.P.C. and sentenced to suffer R.I. for ten years.

**2.** Learned trial Court after awarding death penalty to the appellant has made above Reference to this Court for its confirmation in terms of section 374, Cr.P.C.

**3.** Brief facts giving rise to this appeal are that, on 27.10.2014, Complainant Hot Ali Khan s/o Koro Khan lodged the aforesaid FIR,

alleging therein that he was working as spare Cashier at Rida Filling Station/Total Parco, situated at Gulistan-e-Jauhar, University Road, Block-7, Karachi and on 26.10.2014, at about 2315 hours, he was present on his duty along with cashier Wali Muhammad, Muhammad Siddique, Khair Muhammad and Ashfaq when the appellant came with another person on a motorcycle and after getting his motorcycle filled with the petrol, he took out a pistol and robbed the cash of rupees about twenty-five thousand from cashier Wali Muhammad, who resisted him, on that he made straight fire at the chest of Wali Muhammad, who fell down. The staff members caught hold the appellant alongwith pistol and motorcycle. Co-accused succeeded to make his escaped good from the scene, whose name was disclosed by the appellant as Imran @ Nadeem Bangali. The staff members shifted the injured Wali Muhammad to Memon Hospital for his treatment. Meanwhile, police arrived on the spot and obtained the custody of the appellant along with pistol and motorcycle. Thereafter, the complainant proceeded to Memon Hospital where Wali Muhammad succumbed to injuries. Hence, such FIR was lodged against the appellant and co-accused Imran.

**4.** After completing usual investigation police submitted the report under Section 173 Cr.P.C. against appellant and absconding accused Imran for the offence punishable under section 302/397/34, P.P.C. Having been conducted requisite proceedings, the Judicial Magistrate IX<sup>th</sup>, Karachi-East declared the absconding accused Imran as proclaimed offender and sent up the appellant to stand his trial before the Court of Sessions Judge, Karachi-East, as the case was exclusively triable by the Court of Sessions, wherefrom the case was received to trial Court.

**5.** Formal charge was framed against the appellant on 26.08.2015, at Exh.04, to which he pleaded not guilty and claimed for trial, vide his plea recorded at Exh.4/A.

6. In order to substantiate the charge against the appellant, the prosecution examined six witnesses, namely, PW-1 complainant Hot Ali Khan, PW-2 Khair Muhammad (mashir), PW-3 SIP Zulfiqar Ali Mirani, PW-4 SIP Muhammad Siddiq, PW-5 PC Izhaar Ahmed (mashir), PW-6 SIP Nazar Muhammad (investigation officer) and PW-7 Dr. Afzal Ahmed (MLO), who produced relevant documents in their depositions i.e. memorandums, FIR, entries, FSL and postmortem reports, etc. at Exh.05/A to Exh. 31.

7. The statement of appellant under section 342, Cr.P.C. was recorded at Exh.33, wherein he denied the allegations and claimed to be innocent and prayed for justice. However, he neither opted to examine himself on oath under Section 340(2), Cr.P.C. nor did he lead any evidence in his defence.

8. Learned counsel for the appellant at the very outset has contended that he would not press this Criminal Jail Appeal on merits if the death sentence awarded to the appellant by the trial Court for the offence under section 302(b), P.P.C. is converted into imprisonment for life and conviction and sentence recorded for the offence under section 397, P.P.C. is set aside as the prosecution has failed to prove the motive and commission of robbery. In support of his contentions, learned counsel has relied upon the case of *Ghulam Muhammad and another v. The State and another* (2017 SCMR 2048), *Saeed Ahmed v. The State* (2015 SCMR 710), *Zeeshan Afzal alias Shani and another v. The State and another* (2013 SCMR 1602).

9. Conversely, learned DPG while opposing the proposition of learned counsel for the appellant has maintained that the motive behind the occurrence as ascribed by the prosecution is fully established as it has come on record through evidence of prosecution witnesses that the appellant while committing robbery fired at deceased with deadly weapon

causing his death; hence, he deserves the maximum punishment provided for the alleged offence.

**10.** Heard the learned counsel for the appellant as well as DPG and perused the material available on record.

**11.** It is case of the prosecution, as narrated in the FIR and deposed by the P.W. 1, complaint Hot Ali Khan, that the appellant snatched the cash of about Rs.25,000/- from deceased cashier Wali Muhammad and on his resistance he fired at deceased, who sustained injury on his chest and subsequently died. The appellant is stated to have been caught hold by the complainant and other staff members of the petrol pump at the spot; however, the alleged robbed amount has not been stated to have recovered from him in the memo of arrest and recovery (Exh.5/A). PW-2 Khair Muhammad in cross-examination while stating that the cash amount was robbed by the appellant has further deposed that the companion of the appellant took away the robbed money and ran away from the spot; however, this fact has neither been stated in the F.I.R. by the complainant nor even deposed by him in his evidence. Hence, in absence of recovery of alleged robbed amount, the prosecution has failed to prove the motive behind the alleged murder of the deceased as well as factum of robbery. It has been held by the Honourable Supreme Court of Pakistan in the case of Ghulam Muhammad and another (supra) while altering the sentence of death awarded to appellant in the said case to imprisonment for life that *“it is well settled by now that once the prosecution alleges a motive and fails to prove the same during the trial, the same can be taken as a mitigating circumstance while deciding the quantum of sentence of a convict”*. In the case of Zeeshan Afzal (supra) the Apex Court has observed that it has been repeatedly held that if motive is not alleged or is not proved, normally the sentence of death is converted into imprisonment for life.

**12.** In view of above, we are of the view that under alleged mitigating circumstances the appellant has been able to make out a case for altering the sentence from death to imprisonment for life. Accordingly, this Cr. Jail Appeal is dismissed; however, the sentence awarded to appellant under section 302(b), P.P.C. is converted from death to the sentence of life imprisonment. The amount of compensation and the sentence of six months simple imprisonment in default thereof as ordered by the learned trial Court are maintained. The conviction and sentence awarded to the appellant for the offence under section 397, P.P.C. is set aside. The benefit of section 382-B, Cr.P.C. is extended to the appellant.

**13.** Consequently, Reference No. 34 of 2019 for confirmation of death sentence is not confirmed and is answered in “negative”.

JUDGE

JUDGE

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