

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD
Criminal Jail Appeal No.D-172 of 2012
{Confirmation Case No.11 of 2012}
Criminal Appeal No.D-207 of 2012

Before;

Mr. Justice Irshad Ali Shah
Mr. Justice Amjad Ali Sahito

Appellants: Amir Hussain son of Mohammad Mir
Makranki and Sobho son of Noor
Muhammad Makrani,
Through Ms. Ambreen Siyal, advocate.

Complainant: In person.

State: Ms. Rameshan Oad, A.P.G.

Date of hearing: 21.11.2019

Date of decision: 21.11.2019

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The facts in brief necessary for passing the instant judgment are that the appellants in furtherance of their common intention committed Qatl-e-Amd of Javed Ali by causing him lathi and brick blows, for that they were booked and reported upon by the police.

2. At trial, the appellants did not plead guilty to the charge and prosecution to prove it, examined PW-1 complainant Syed Mumtaz Ali Shah at (Ex.11), he produced FIR, his further statement and receipt where dead body of the deceased was delivered to him; PW-2 Mazhar Ali at (Ex.12); PW-3 Nisar Ahmed at (Ex.13); PW-4 Syed Muhammad Ali Shah at (Ex.14), he produced memo(s) of place of incident, injuries, arrest and body search, arrest and recovery; inspection of dead body, last

wearing clothes, "Danishtnama" and recovery of lathi; PW-5 SIP Bisharat Mallah at (Ex.15), he produced "lashchakas" form, Roznamcha entry and chemical examiner report; PW-6 SIP Gul Hassan at (Ex.16); PW-7 HC Muneer Hussain at (Ex.17), he produced receipt where dead body of the deceased was delivered to the complainant; PW-8 Tapedar Mehar Ali at (Ex.18), he produced sketch of vardat; PW-9 Dr. Pir Zainuddin at (Ex.19), he produced post mortem report and police letter; PW-10 SI Muhammad Azam at (Ex.20) and then closed the side.

3. The appellants in their statements recorded u/s 342 Cr.PC denied the prosecution allegation by pleading innocence. They did not examine anyone in their defence or themselves on Oath to disprove the prosecution allegation against them.

4. On conclusion of the trial, the learned Illrd Additional Sessions Judge, Shaheed Benazirabad found the appellants guilty for the above said offence and then, vide his judgment dated 31.05.2012 convicted and sentenced them as under;

" Accused Sobho has been assigned the role of instigation to co-accused Amir and no overt act has been ascribed against him resultantly, there are strong mitigating circumstances for awarding him sentence other than the capital punishment. Therefore, he is awarded the imprisonment for life u/s 302(b) PPC and he is further ordered to pay fine of Rs.100,000/- one lac as compensation to be paid to legal heirs of deceased Javed Ali Shah u/s 544-A Cr.P.C. Accused Amir is liable to the punishment of Qisas for Qatl-e-amd. Therefore, I convict and sentence accused Amir to death as Qisas u/s 302(b) PPC. He be hanged by his neck till his

death. He is further ordered to pay fine of Rs.200,000/-(Rupees two lac) as compensation to the heirs of deceased u/s 544-A Cr.P.C. Benefit of section 382 Cr.P.C is awarded to them.”

5. The appellants have impugned the above said judgment by preferring captioned appeals while learned trial Court has made a reference for confirmation of death sentence to appellant Amir Hussain. Those now are being disposed of through instant judgment.

6. It is contended by learned counsel for the appellants that the appellants being innocent has been involved in this case falsely by the complainant party; the deceased had died on account of his fall from roof where he was flying a kite; the presence of the complainant and his witnesses at the place of incident is not free from doubt and even otherwise, no role in commission of incident is attributed to appellant Sobho excepting instigation while appellant Amir Hussain being young man has been involved in this case falsely by the complainant party. By contending so, she sought for acquittal of the appellants.

7. Learned A.P.G for the State was fair enough to say that she would be having no objection if, appellant Sobho is acquitted of the offence for which he is convicted while death sentence awarded to the appellant Amir Hussain (by considering the mitigating circumstances of the case) is

modified into Rigorous Imprisonment for life with compensation payable to the legal heirs of the deceased.

8. Learned counsel for the appellants readily accepted the suggestion made by learned A.P.G for the State while complainant sought for dismissal of the captioned appeals.

9. We have considered the above arguments and perused the record.

10. Appellant Sobho has been involved in this case on the basis of allegation of instigation; as such his involvement in this case is appearing to be doubtful one and learned A.P.G for the State has rightly consented for his acquittal. He (Sobho) is therefore acquitted of the offence for which he has been charged, tried and convicted by the learned trial Court. He shall be released forthwith, if is not required in any other custody case.

11. So far case of appellant Amir Hussain is concerned, it is different to that of appellant Sobho. It was he, who has been attributed role of causing lathi and brick blows to the deceased, which resulted his death. Complainant Mumtaz Ali, PWs Mazhar Ali and Nisar Ahmed have fully implicated him (Amir Hussain) in commission of incident by stating that he caused lathi blow to the deceased on his head, who after sustaining that blow fell down on the ground and then he hit the head of the deceased with the wall, resultantly he become seriously injured and then died in the hospital during course of treatment.

They have stood by their version successfully on all material points, despite lengthy cross examination. Whatever is stated by them takes support from ancillary evidence collected by the prosecution during course of investigation.

12. The factum of death of the deceased being un-natural on account of five injuries with hard blunt substance is also proved by the prosecution through the medical evidence which is furnished by medical officer Dr. Peer Ziauddin. As per him, the deceased was found sustaining following injuries;

- (i). Swelling on both eyes and ecchymoses present.
- (ii). Multiple small bruises on left side of face and blow the left eye and left cheek.
- (iii). Diffuse swelling of the head more so left side of head.
- (iv). Bruises on right ear and in front of it.
- (v). Multiple bruises on the upper part of the front of chest.

13. Based on above discussion, it could be concluded safely that the prosecution has been able to prove its case against him (Amir Hussain) beyond shadow of doubt.

14. However, the death sentence awarded to the appellant Amir Hussain requires to be modified into Rigorous Imprisonment for life being alternate sentence for the reasons that he is a young man, having no criminal record, there was no deep rooted enmity between him and the deceased, motive of the incident is shrouded in mystery and learned A.P.G for the State has also consented for such modification, which we think she has consented rightly under the circumstances of the case.

Therefore, the death sentence awarded to appellant Amir Hussain is modified with Rigorous Imprisonment for life with fine of Rs.100,000/-payable to the legal heirs of said deceased as compensation and in case of his failure to make such payment, he would undergo Simple Imprisonment for three months with benefit of section 382-B Cr.P.C.

15. When motive was not proved. The Hon'ble Supreme Court of Pakistan in case of ***Nadeem Zaman vs The State (2018 SCMR 149)*** has reduced the death sentence to life while making the following observation;

“----S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Sentence, reduction in---Mitigating circumstances---Motive not proved---Motive set up by the prosecution was that the accused killed the deceased as he suspected her to have caste magic on his sister because of which she became mentally ill---Said motive had not been established by the prosecution--- Even the investigating officer of the case had failed to collect any material in support of the asserted motive---Lady who had statedly fallen mentally ill because of application of magic on her by the deceased had not even been examined by the investigating agency nor any investigation had been conducted in such regard---Motive asserted by the prosecution had, thus, remained far from being proved--- During the investigation a dagger had allegedly been recovered from the custody of the accused but it was admitted that the recovered dagger was not stained with blood and, hence, the same did not stand connected with the alleged murder---In the absence of proof of the asserted motive the real cause of occurrence had remained shrouded in mystery and thus caution was to be exercised in the matter of the sentence of death awarded to accused--- Sentence of death awarded to accused was reduced to imprisonment for life in

circumstances---Appeal was disposed of accordingly.”

16. Again, in case of **Muhammad Akram alias Akri (2019 SCMR 610)**, when the motive was not proved, the death sentence was reduced into life by Hon’ble Supreme Court of Pakistan by making following observation;

“---S. 302(b)--- Qatl-i-amd--- Reappraisal of evidence--- Sentence, reduction in---Death sentence reduced to imprisonment for life--- Motive not proved---Specific motive was set out by the complainant in the FIR and in his statement recorded before the Trial Court by claiming that four days prior to the occurrence, accused along with his vagabond friends had come and stood in front of the house of the complainant, and the deceased had reprimanded the accused, whereupon an altercation took place between the two; that the accused had allegedly threatened the deceased of dire consequences and on account of such grudge, the accused committed the crime---In his cross-examination, the complainant admitted that he had never reported to police that accused along with his vagabond friends used to come and stand in front of their house---Nothing was available on record to prove that the incidence of altercation between accused and deceased was ever reported to police---Complainant also did not disclose the names of vagabond friends of the accused who used to come and stand in front of the house of the complainant---Real cause of the occurrence had not been disclosed by either of the sides---In such circumstances, the motive set out by the prosecution remained far from being proved---Prosecution's failure to prove the motive set out by it certainly benefited the accused---Conviction of the accused under S. 302(b), P.P.C. was maintained but his sentence of death was converted into imprisonment for life”.

17. In case of **Ghulam Mohiuddin alias Haji Babu & ors Vs. The State (2014 SCMR-1034)**, the death sentence was modified by Hon'ble apex Court by making observation that;

“---S.302(b)---Qatl-e-amd---Sentence---Death sentence or imprisonment for life---Single mitigating circumstance---Sufficient to award life imprisonment instead of death penalty---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---If a single doubt or ground was available, creating reasonable doubt in the mind of Court/Judge to award either death penalty or life imprisonment, it would be sufficient circumstance to adopt alternative course by awarding life imprisonment instead of death sentence---No clear guideline, in such regard could be laid down because facts and circumstances of one case differed from the other, however, it became 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 entertained 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---Better to respect human life, as far as possible, rather than to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed”.

18. The captioned appeals and death reference are disposed of accordingly.

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