

**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

Criminal Jail Appeal No.D- 69 of 2014
[Confirmation Case No. 18 /2014]

PRESENT:

Mr. Justice Naimatullah Phulpoto
Justice Mrs. Rashida Asad

Date of Hearing : 08.09.2020
Date of Judgment : 17.09.2020

Appellant: Sartaj son of Muhammad Ali by caste Jagirani
through Mr. Zafar Ali Wighio, Advocate.

The State: through Mr. Shahzad Saleem Nahiyoan, D.P.G.
alongwith complainant Niaz Ali.

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant Sartaj was tried by Mr. Muhammad Manazir-ul-Haq, Additional Sessions Judge, Shahdadpur for offence u/s 302 PPC. On conclusion of the trial vide judgment dated 09.07.2014, appellant was convicted u/s 302(b) PPC as ta`zir and sentenced to death for committing the murder of Mst. Gulshan Khatoon. Appellant was also directed to pay the compensation of Rs.2,50,000/- to the legal of deceased in terms of Section 544-A Cr.P.C. Trial Court made Reference to this Court for confirmation of death sentence as required u/s 374 Cr.P.C.

2. Brief facts of the prosecution case as reflected in the impugned judgment are that complainant Niaz Ali lodged the FIR at Police Station Shahdadpur on 02.12.2011 bearing No.341/2011, stating therein that about three months back his daughter Gulshan Khatoon aged about 18 years was

married to Sartaj (appellant) in exchange of sister of Sartaj namely Naheeda was married to his son namely Zameer Hussain. Brother of the complainant namely Muhammad Umar was residing with him. About one week ago complainant left his daughter-in-law Mst. Naheeda in the house of her parents at Larkana and brought his daughter Gulshan Khatoon at his house after seeking permission. On the preceding day in the evening time his son-in-law Sartaj came to the house of the complainant. His brother Muhammad Umar, son Zameer Hussain and other family members after taking night meal went to their beds. His son-in-law Sartaj and Gulshan Khatoon went to sleep inside the room of the house. Complainant got up and went towards the room but it was bolted from inside. Sartaj did not open the door. Complainant went on the roof and started removing the bricks upon which the accused Sartaj opened the door. Complainant came down and alongwith Muhammad Umar and Zameer Hussain entered into the room and through the light of electricity they saw and found the dead body of Gulshan Khatoon lying on the cot. Her neck was tied with string / Kamar Band and was also tied with cot. They tried to apprehend accused Sartaj who offered resistance upon which they inflicted hatchet and lathi blows upon the accused Sartaj and apprehended him in injured condition. On enquiry accused told them that he asked his wife Mst. Gulshan Khatoon to accompany him to his house but she refused therefore, he killed her. Thereafter, complainant lodged such FIR. It was recorded on 02.12.2011 at 2330 hours vide Crime No.341 of 2011 u/s 302 PPC at P.S. Shahdadpur.

3. After usual investigation challan was submitted against the accused u/s 302 PPC.

4. Trial Court framed charge against the appellant at Ex.3 to which he pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined in as much as eight (08) witnesses who produced the relevant record. Thereafter, prosecution side was closed.

6. Trial Court recorded the statement of accused u/s 342 Cr.P.C. at Ex.14 in which he claimed false implication in this case and denied the prosecution allegations. Appellant replied that he is innocent; he had love with deceased wife. However, appellant did not examine himself on Oath nor led any evidence in his defence in disproof of the prosecution allegations.

7. Learned trial Court after hearing the learned counsel for the parties, assessment of the evidence available on record, found the appellant guilty and convicted him and sentenced to death accordingly and made Reference to this Court for confirmation of the death sentence. It is in these circumstances, the present appeal has been filed.

8. We have heard Mr. Zafar Ali Wighio, learned counsel for the appellant, Mr. Shahzado Saleem Nahiyoon, learned D.P.G. for State.

9. The facts of this case as well evidence produced before the trial Court find an elaborate mention in the judgment passed by the trial Court and therefore, the same may not be reproduced here so as to avoid duplication and un-necessary repetition.

10. Un-natural death of the deceased Gulshan Khatoon is not disputed. Eye witnesses as well as Dr. Abdul Aziz stated that Mst. Gulshan Khatoon aged about 18 years died her un-natural death. Evidence of the Medical Officer Abdul Aziz PW-7 is relevant to prove the un-natural death of deceased. Dr. Abdul Aziz PW-7 has deposed that on 03.12.2011 he received the dead body of Gulshan Khatoon through SHO P.S Shahdadpur for conducting her postmortem examination and report. After conducting the postmortem examination, Dr. was of the opinion that probable time that elapsed between injuries and death was instantaneous. Cause of death was

asphyxia as a result of strangulation. Trial Court has held that deceased died her un-natural death. Finding of the trial Court is based upon sound reasons and requires no interference. We also hold that deceased died due to strangulation as described by Doctor.

11. In order to prove its` case, prosecution examined complainant Niaz Ali PW-1. He has stated that three months back his daughter Gulshan Khatoon aged about 18 years was married to accused Sartaj by way of exchange marriage. In the exchange, sister of accused namely Mst. Nadia was married to the son of the complainant namely Zameer Hussain. One week prior to the incident, complainant left his daughter-in-law Mst. Nadia to the house of the parents situated in Larkana for visiting with her parents. On 01.12.2011 at about 5-00 p.m, present accused came to the house of complainant to meet his wife. After taking the night meals, husband and wife went to sleep but in separate rooms. Complainant heard the cries of his daughter at night time and knocked the door but accused did not open the door. Complainant then went to the roof of the room and removed the bricks. Thereafter, accused opened the door. At that time, PWs Muhammad Umar and Zameer Hussain were also attracted and saw that Mst. Gulshan Khatoon was lying dead on a cot having a piece of strip around her neck. Accused tried to run away but the complainant party while causing him injuries, caught him hold. Complainant has deposed that he inquired from the accused as to why he had killed his wife, to which accused disclosed that his wife was not willing to accompany him to Larkana, on her refusal he killed her. Complainant while leaving the accused in the custody of P.Ws and leaving the dead body at home, went to the police station for registration of the FIR and lodged FIR against the accused. He produced it as Ex.5/A. He was cross examined by the defence counsel at length and denied the suggestion that murder of Mst. Gulshan Khatoon has been committed by complainant party.

Eye witness (P.W-2) Muhammad Umar Jagirani has also narrated more or less the same story and stated that on the relevant night he was sleeping in the house of complainant alongwith his wife. At about 11-00 p.m, he heard the cries of Mst. Gulshan from her room and saw that accused Sartaj had committed the murder of his wife and he tried to run away but he was caught hold. In cross examination, he has denied the suggestion that accused has been falsely implicated in this case.

Zameer Hussain (P.W-3) has deposed that complainant is his father and deceased was his sister. She married to the appellant three months, prior to the incident. It was exchange marriage. Mst. Nadia, the sister of accused went to Larkana for visiting the parents. On 02.12.2011 accused came from Larkana to the house of complainant. After taking the meals, he went to sleep. His deceased wife was also sleeping in a separate room. At about 11-45 p.m, he heard the cries of sister from the room but accused refused to open the door. Complainant party tried to enter into the room from roof. Thereafter, door was opened by the accused. It was found that the sister of above named P.W was lying dead on a cot in the result of strangulation. Complainant went to the police station and lodged FIR. In the cross examination he has denied the suggestion that deceased has been killed by the complainant party and accused has been falsely implicated in this case.

Muhammad Saleh Jakhro (P.W-4) has acted as mashir of inquest report, arrest of accused from the house of complainant, mashir of place of wardat and produced mashirnamas.

Aijaz Hussain (P.W-5) was the Tapedar. He had prepared the sketch of place of incident in which it is mentioned that incident occurred in the house of complainant, location of eye witnesses and dead body were shown in the said sketch.

Investigation was carried by SIP Dodo (P.W-6). He has deposed that on 02.12.2011, complainant Niaz Ali appeared at the police station for lodging FIR regarding the murder of his daughter. He lodged FIR against the accused. Thereafter, he alongwith complainant and subordinate staff went to the place of wardat, inspected it in presence of mashirs. Investigation Officer arrested the accused who was caught hold by the complainant party in presence of the mashirs. Appellant had sustained injuries. Mashirnama of injuries was prepared. Thereafter, I.O. prepared the inquest report and collected the string / strip from the place of incident by means of which offence was committed by the accused. I.O. recorded the statements of P.Ws u/s 161 Cr.P.C, the postmortem examination of deceased was conducted by Doctor. I.O. dispatched the case property to the chemical examiner, received the positive reports. On the conclusion of usual investigation, he submitted challan against the accused. I.O. was cross examined at length and he denied the suggestion that accused was innocent and has been falsely implicated in this case.

12. Mr. Zafar Ali Wighio, learned counsel for the appellant argued that prosecution has failed to proved its` case against the accused; that all the P.Ws are closely related to the deceased and interested; that independent persons of the locality, attracted at the place of wardat were not examined by the prosecution at the trial. It is further contended that deceased lady had love with appellant husband; that prosecution has failed to prove the motive for commission of the offence; that there were exchange of harsh words amongst the brothers of the deceased and appellant before the incident; that it was exchange marriage; that brothers of the deceased killed her as she wanted to go with the appellant husband. Lastly, it is submitted that the sketch of the place of wardat was prepared by Tapedar at Police Station; that prosecution has failed to establish its` case against the appellant and prayed for acquittal

of the appellant. In support of the contentions reliance is placed upon the cases reported as (1) Raqib Khan v. The State and another (2000 SCMR 163), (2) Ali Sher and others v. The State (2008 SCMR 707), (3) Jalat Khan alias Jalo v. The State (2020 P.Cr.L.J 503), (4) Ammar Yasir Ali v. The State (2013 P.Cr.L.J 783), (5) Fazal Hussain alias Faqeera and others v. The State (2020 P.Cr.L.J 311) (6) Azeem Khan and another v. Mujahid Khan and others (2016 SCMR 274) and (7) Khalid Javed and another v. The State (2003 SCMR 1419).

13. Mr. Shahzado Saleem Nahiyoon, learned D.P.G. argued that the prosecution has proved its` case against the appellant, ocular evidence was corroborated by medical evidence; appellant was arrested at spot in the house of the complainant in the injured condition as appellant tried to run away after commission of the offence but he was caught hold when he offered resistance. Learned D.P.G. has very rightly and frankly argued that the prosecution has failed to prove the motive, real cause of occurrence in between the husband and wife in the room has not come on record. Learned D.P.G. lastly submitted that the motive remained shrouded in mystery, sentence of death may be converted to imprisonment for life.

14. Bearing in mind the above evidence, let us now examine the evidence of eye witnesses. Complainant has deposed that on 02.12.2011 present incident had occurred in his house at night time when his son-in-law (appellant) was sleeping with deceased wife in room and on some commotion they woke up and knocked door. Complainant entered into the room by making hole in the roof of room and found his daughter lying dead. P.W-2 Muhammad Umar was also the eye witness of incident. He has deposed that on the relevant night, he was sleeping in the house of complainant and heard cries, went inside the room, where appellant and his wife were sleeping and saw that appellant was killing his wife by way of strangulation. Third eye

witness namely Zameer Hussain has also deposed that he had seen the appellant while killing his wife by means of strangulation. Ocular evidence was corroborated by medical evidence. All the eye witnesses have deposed that appellant was caught hold by them in the house of complainant where he was trying to run away. Complainant party caused him lathi blows. Appellant was medically examined. M.O. deposed that appellant had sustained injuries. Prosecution had succeeded to prove that appellant had committed the murder of his wife on the night of incident by means of strangulation.

15. The quantum of sentence of appellant has engaged our serious consideration and we have looked at this aspect of the case from the divert angles. We have noticed that motive as set up in the FIR was for refusal of deceased to accompany appellant to Larkana but it has not been proved at trial. Evidence of complainant and P.Ws on motive was generalized in nature. No P.W had heard conversation between husband and wife in room before incident. Evidence of the Investigation Officer reflects that no serious efforts were made by him to collect any evidence regarding the motive asserted by the complainant party. Upon our assessment of evidence available on record, we felt no hesitation in concluding that specific motive set up by prosecution had indeed remained far from being established on the record. Evidence of complainant regarding motive that appellant disclosed that he had committed the murder of his wife on her refusal to join him to Larkana is not corroborated by some independent piece of evidence. Prosecution has also failed to satisfy us as to why appellant killed his young wife in the house of her parents. Real cause of occurrence in the house of complainant shrouded in mystery and was completely suppressed by both the parties to the case. Unfortunately, Investigation Officer had also failed to interrogate / investigate about motive for commission of the offence where the prosecution asserted a motive but failed to prove the same then failure on the part of prosecution may re-act

against the sentence of death passed against the convict on the charge of murder as held by Honourable Supreme Court of Pakistan in the judgment of Mst. Nazia Anwar v. The State and others (2018 SCMR 911). 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).

16. The Hon'ble Supreme Court of Pakistan has diluted upon this question in the case of **Ghulam Mohy-ud-Din alias Haji Babu and others v. The State** (2014 SCMR 1034), as under:-

"If the intent of legislature was to take away the discretion of the court, then it would have omitted from S.302(b), P.P.C. the alternative sentence of life imprisonment".

In the same judgment, the Hon'ble Supreme Court further held that:-

"Sentence of death and life imprisonment were alternative to one another, however, awarding one or the other sentence essentially depended upon the facts and circumstances of each case".

17. Learned D.P.G. had also argued that motive was shrouded in mystery and prayed for reducing the sentence from death to life. We have come to conclusion that the real cause of occurrence was something different which had been completely suppressed by both the parties to the case and that real cause of occurrence remained shrouded in mystery. Such circumstances of

this case have put us to caution in the matter of appellant`s sentence. As such, maintaining death sentence would be unwarranted in this particular case and life imprisonment would be the appropriate sentence. Reliance, in this regard, can be placed upon above cited authorities.

18. In the view of above, Criminal Jail Appeal No.D-69 of 2014 is dismissed to the extent of appellant`s conviction for offence u/s 302(b) PPC as ta`zir but the same is partly allowed to the extent of death sentence which is reduced to imprisonment for life. Appellant is ordered to pay compensation of Rs.2,50,000/- to be paid to the legal heirs of deceased as ordered by the trial Court. In case of default thereof, appellant shall suffer SI for six months more. The appellant shall be entitled to benefit of Section 382-B Cr.P.C. Confirmation Reference No. 18 of 2014 made by trial Court for confirmation of the death sentence is answered in **NEGATIVE** and death sentence is **NOT CONFIRMED**.

JUDGE

JUDGE

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