

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

Criminal Jail Appeal No.D-03 of 2020
[Confirmation Case No.03 of 2020]

Present:-

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Amjad Ali Sahito

Appellant: Javed Ali Son of Umed Ali Mughal through Ms. Fouzia Khoso, Advocate.

Respondent: The State through Mr. Shahid Ahmed Shaikh, Additional Prosecutor General, Sindh.

Complainant: Qurban Ali through Mr. Aijaz Shaikh, Advocate.

Date of hearing: 27.10.2021.

Date of judgment: 07.12.2021

J U D G M E N T

AMJAD ALI SAHITO, J:- Being aggrieved and dissatisfied with the judgment dated 14.01.2020, passed by the learned Model Criminal Trial Court-I, Hyderabad in Sessions Case No.547 of 2016 arising out of FIR No.38/2016 for an offence punishable under sections 302, 324 P.P.C registered at P.S. Bhitai Nagar, Hyderabad whereby appellant Javed Ali was convicted under section 302 (b) P.P.C for murdering Zafar alias Boota, and sentenced him to death subject to confirmation by this Court. He was also directed to pay compensation of Rs.200,000/- [Rupees two hundred thousand only] to the legal heirs of deceased Zafar alias Boota or in case of default to suffer S.I for six months more. A reference for confirmation of the death sentence was also sent to this Court. He was also convicted for an offence under section 337-A(i) P.P.C to suffer R.I for two years and to pay Daman Rs.10,000/- to injured PW Abu Sufyan; for an offence under section 337-A(ii) P.P.C to suffer R.I for five years as Tazir and to pay 5% percent of Diyat amount to victim Abu Sufyan as Arsh; for an offence under section 337-F(ii) P.P.C to suffer R.I for three years and to pay daman Rs.10,000/- to injured PW Abdu Sufyan and for an offence under section 324 P.P.C to suffer R.I for ten years.

2. According to the complainant Qurban Ali on 10.04.2016 during night time in Nursery located near Old Filter Plant Jamshoro, appellant Javed with sharp edged weapon at the

instigation of acquitted co-accused Muhammad Ali intentionally, deliberately and knowingly committed Qatl-e-Amd of complainant's brother deceased Zafar alias Muhammad Boota by causing him injuries on his head and neck so also attacked upon injured PW Muhammad Sufiyan with the intention to commit his murder thereby caused injuries on his head, hence this F.I.R was registered.

3. After completing the investigation of the case, the report under Section 173 Cr. P.C (Challan) was submitted by the investigating officer against the above named accused before the concerned Magistrate.

4. The trial Court framed the charge against the appellant/accused and acquitted co-accused, to which they pleaded not guilty and claimed to be tried. To establish accusation against the accused, the prosecution examined as many as 09 witnesses, PW-01 complainant Qurban Ali at Ex:3, who produced FIR at Ex:3/A and his further statement recorded on 19.04.2016 at Ex:3/B; PW-2 injured eye witness Abu Sufyan at Ex:4; PW-3 Muhammad Akram at Ex:5, who produced receipt of receiving dead body at Ex:5/A and memo of recovery of hatchet at Ex:5/B; PW-4 Sajjad at Ex:6; PW-5 mashir Bhoora Masih at Ex:7, who produced memo of site inspection at Ex:7/A, memo of clothes of deceased at Ex:7/B, memo of injuries of injured Abu Sufyan at Ex:7/C, memo of arrest of accused Javed Ali and recovery at Ex:7/D, memo of arrest of accused Muhammad Ali at Ex:7/E and Danishtnama was also taken on record at Ex:7/F; PW-6 Dr. Waseem Khan at Ex:8, who produced provisional as well as final medico-legal certificates of injured Abu Sufyan at Ex:8/A & Ex:8/B, post-mortem report of deceased Zafar alias Boota, lash chakas form at Ex:8/C & D, police letters at Ex:8/E & Ex:8/F; PW-7 I.O Malik Sher Ali at Ex:9, who produced letter of SSP at Ex:9/A, copy of entry No.34 at Ex:9/B, entry No.15 at Ex:9/C, entry No.18 at Ex:9/D, entry No.20 at Ex:9/E, entry No.21 at Ex:9/F, entry No.22 at Ex:9/G, entry No.24 at Ex:9/H, entry No.27 at Ex:9/I, entry No.26 at Ex:9/J, entry No.32 at Ex:9/K, entry No.48 at Ex:9/L, receiving letter of chemical examiner at Ex:9/M and entry No.18 at Ex:9/N, application for recording

164 Cr.P.C statement of eye witness Abu Sufyan at Ex:9/O and chemical examiner report at Ex:9/P; PW-8 Zahoor Ahmed at Ex:10, who produced entry No.5 at Ex:10/A, six pictures of place of incident at Ex:10/B, entry No.13 at Ex:10/C, entry No.29 at Ex:10/D and entry No.33 at Ex:10/E and PW-9 Muqtader Ali Khan at Ex:11, who produced sealed envelope at Ex:11/A, original confessional statement of accused Muhammad Ali at Ex:11/B and confessional statement of accused Javed Ahmed at Ex:11/C, application moved by I.O for recording statements of accused under section 164 Cr.P.C at Ex:11/D, application for recording 164 Cr.P.C statement of eye witness Abu Sufyan and his recorded statement at Ex:11/F however witness Tapedar was given up by the learned DDPP vide statement and the prosecution closed its side vide statement at Ex:12. Statements of the accused were recorded under section 342 Cr. P.C at Ex:13 & 14, wherein they denied the prosecution allegations leveled against them and claimed their innocence. However, they neither examined themselves on oath under section 340(2) Cr. P.C nor led any evidence in their defence. Accused Javed Ali while recording his statement has given detail in a manner in which he was arrested and recorded his confessional statement.

5. The learned trial Court after hearing the learned counsel for the respective parties and appraisal of the evidence, convicted and sentenced appellant Javed Ali in a manner as stated above while co-accused Muhammad Ali was acquitted under section 265-H(i) Cr. P.C on the benefit of the doubt. The conviction and sentence, recorded by the learned trial Court, have been impugned by appellant Javed Ali before this Court by way of filing the instant Criminal Jail Appeal.

6. Learned counsel for the appellant submits that the judgment is against the law and facts of the case; that the appellant is innocent has falsely been implicated in this case; that all the witnesses cited in the case are closely related inter-se are chance witnesses; that the medical evidence conflicts with the ocular evidence; that on the same set of evidence co-accused Muhammad Ali has been acquitted by the learned trial Court; that there is a contradiction in the statements of

eyewitnesses; that further statement of complainant has been recorded with the delay of about nine days from F.I.R; earlier no motive has been shown in the F.I.R but same has been mentioned in the further statement of the complainant. He lastly prayed for the acquittal of the appellant.

7. While rebutting the above contentions, learned Additional Prosecutor General, Sindh for the State argued that the name of the appellant transpires in the F.I.R with a specific role that he had caused hatchet injuries to deceased Zafar alias Muhammad Boota on his head, neck and other parts of his body; that there is no question of mistaken identity as parties are known to each other which may justify the appellant's false implication in this case by the complainant party; that ocular account is consistent with medical as well as circumstantial evidence. He further argued that no material contradiction and discrepancy has been pointed out by the learned defence counsel to show his false implication in this case, therefore, in such circumstances, the learned trial Court has rightly awarded conviction and sentence to the appellant following the law. He lastly prayed for dismissal of the instant appeal.

8. We have heard the learned counsel for the parties and have gone through the evidence with their able assistance.

9. The ocular evidence is only based on the evidence of one eye-witness namely Abdu Sufiyan who was injured in the present case. Law does not fix any particular number of witnesses for establishing the guilt of the accused. Always the cases are decided based on the quality of evidence and not on the quantity of evidence. Deceased Zafar alias Muhammad Boota was father of the witness Abu Sufiyan. Appellant Javed was their employee at their nursery and about 4/5 days before the incident had left the job. He worked with them for about 20/25 days. On the day of the incident viz. 10.04.2016 at about 2300 hours, the appellant came to the Nursery and knocked the door where the deceased Zafar alias Muhammad Boota and the injured (PW Abu Sufyan) were present. Deceased Zafar alias Muhammad Boota opened the door and asked him that why he had come here, he disclosed that he would sleep there and in the morning he would work. All three started sleeping in the

room. In the late night, PW-2 heard cries of his father and woke up and saw that appellant Javed Ali was inflicting hatchet blow on his father; he tried to separate the appellant but he inflicted a hatchet blow on the left side of his head, the upper side of left ear and he became unconscious. He found later on that the appellant had taken away money, a computer and a bike. PW-4 Sajjad deposed that he along with his father Imamuddin used to work in the Boota nursery. On the day of the incident they noticed that plants were not watered as Boota used to water the plants at 0500 hours. They saw that China lock was hanging on the gate, they opened the iron gate of room and saw that Abu Sufyan was lying in injured condition and Boota was lying dead. They closed the gate and phoned to Seth Akram who is the elder brother of Seth Boota. Abu Sufyan was injured who was taken to Hospital and subsequently information was given to the police station Bhattai Nagar.

10. In the instant case, the complainant Qurban Ali is not an eyewitness of the incident, but he had received a call from his brother Muhammad Akram and on the information given by the injured he lodged the F.I.R that the appellant Javed Ali killed his brother and injured him after registration of the case. On 10.04.2016 police arrested appellant Javed Ali and recovered currency notes Rs.800/- one mobile phone, and a Motorcycle LEQ-6034 from the appellant and on his pointation police also recovered hatchet from the side of the nursery. Police also arrested accused Muhammad Ali.

11. In cross-examination PW-2 Abu Sufyan stated that *“I have disclosed almost true time of incident. I joined senses in the morning when my uncles came at nurseries and they took me to hospital. I remained admitted for 8/10 days in private hospital as well as Civil Hospital. There was light in the room when the incident has occurred.”*

12. In the instant matter, the eyewitness has sufficiently explained the date, time and place of occurrence, as well as, each and every event of the occurrence in a clear cut manner. The parties were known to each other as is evident from their evidence. We would not hesitate to say that where the witness falls within the category of natural witness and gives a detail of

the incident in a confidence-inspiring manner, then the only escape available to the appellant is to satisfactorily establish that witness is not the witness of truth but interested one. No substance has been brought on the record by the appellant to justify his false implication in the case at the hands of the complainant party on account of the previous enmity. In this context, the reliance can be safely placed on the cases of **LAL KHAN Vs. THE STATE [2006 SCMR 1846]**, **Farooque Vs. The State [2008 SCMR 917]**, and **Zulfiqar Ahmed and others Vs. The State [2011 SCMR 492]**.

13. In the instant case after the arrest of the appellant he was produced before the Magistrate for recording his confessional statement. PW-9 Muqtader Ali Khan Civil Judge & Judicial Magistrate deposed that on 21.4.2016 he was posted as Civil Judge & J.M-VII Hyderabad on that day I.O SIP Malik Sher Ali of P.S. Hali Road Hyderabad brought an application with the prayer to record confessional statements of two accused namely Javed and Muhammad Ali he has informed the accused that he has been produced before the Magistrate and is not bound to confess and if he does so it can be used as a piece of evidence against him. He was further informed that whether he confesses his guilt or not he will not be remanded to police custody and given one hour time for his reflection thereafter one by one he has recorded the confessional statements of accused persons. He recorded the confessional statement of accused Javed Ali and produced the same at Ex.11-C. He has also appended the certificate on the confessional statement and produced other documents.

14. In cross-examination he denied the suggestion that **“It is incorrect to suggest that accused Javed did not respond to my question in English word yes sir, or in no sir.”** We have perused the confessional statement of the appellant which was recorded in the manner prescribed by law, certain questions were put to him that any family member has been sent for the police officials to pressurize you and what are the circumstances which are inducing him to confess his guilt. Further he was warned that you are not bound to confess and he was also informed that if you make a confession it will be

used against you as a piece of evidence. As such, it can be gathered that confessional statement is appearing to be true and voluntarily and also supporting the version of the complainant.

15. As per medical evidence deceased had received incised wound and the kind of weapon was sharp cutting. In the instant matter, the provisional and final medical certificates were produced by Dr. Waseem Khan as well as a post-mortem report of the deceased Zafar alias Muhammad Boota as Ex.8/A to Ex.8/C in which he confirmed that the deceased died due to incised wound and weapon was used as sharp cutting. He has also produced the final medical certificate of injured Abu Sufyan. He has received three injuries which were 337-A(ii), 337-F(ii), and 337-A(i) P.P.C. kind of weapon was sharp cutting. The prosecution also examined the I.O of the case PW-7 Malik Sher Ali he was posted at Hali Road Hyderabad after receiving the police papers along with custody of accused Javed Ali one C.D 70 red colour with No.LEQ-6034 motorcycle, one black colour mobile phone of Q-Company cash of Rs.800/- in different shapes. He started further investigation.

16. In cross-examination he admitted that ***“I am confident that I have conducted fair investigation. I visited the place of incident for 2/3 times during investigation. It was in my knowledge that hatchet was used in crime. It is correct to suggest that I have checked the nursery carefully. It is correct to suggest that on 17/4/2016, during my visit, I did not find the hatchet at same place. Voluntarily says, it was hidden by the accused in the plants.”*** He has also sent the bloody clothes of deceased Zafar alias Boota. Hatchet recovered from accused Javed and received a report that *“article No.1 noted above is human blood and article No.2 to 4 above noted are stained with human blood”*.

17. Medical evidence has also supported the ocular version. The ocular evidence is further supported by the recovery of motorcycle, cash amount, Q-Mobile. The hatchet recovered from the appellant was sent to the office of the chemical examiner and found that articles were stained with human blood. The earth secured from the place of the incident was also found

stained with human blood. The prosecution witnesses are in line in respect of the vital points in their depositions and they could not be shaken during cross-examination. The presence of the appellant at the place of the incident is also established during the evidence of eyewitness Abu Sufyan. We have not observed any major contradiction in the depositions.

18. The appellant while recording his statement under section 342 Cr.P.C has denied the commission of the offence and submits that nothing was recovered from him. He further disclosed that he recorded a confessional statement on the wish of the complainant party and recovery was foisted upon him. As to the sentence, a lenient view cannot be taken as the circumstances, in this case, indicate that act of the appellant was gruesome and merciless, there are no mitigating circumstances to alter the sentence to life imprisonment. An unjustified killing of a human being has been declared by Almighty Allah as the murder of the entire mankind. In the instant case, the appellant confessed his guilt before the learned Magistrate and while recording his confessional statement the learned Magistrate after observing all the codal formalities became satisfied that the confessional statement made by the accused is voluntarily true without fear or force and duress. According to article 21 of Qanoon-e-Shahadat Order, 1984 a motive set up by the prosecution may be proved even by the conduct of the accused persons and the conduct of the appellant in the present case had gone a long way in proving the motive set-up by the prosecution. Article 2(4) of Qanoon-e-Shahadat Order 1984 provides that **“A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”** Reliance is placed on the case of **Malik MUHAMMAD MUMTAZ QADRI Vs. THE STATE and others [PLD 2016 Supreme Court page-17].**

19. In the circumstances of this case considering the prosecution case regarding the motive in juxtaposition with the appellant’s instance and conduct of the appellant taken in his

statement recorded under section 342 Cr.P.C that he should take the name of accused Muhammad Ali else they would not spare his family children, he was tortured for 3/4 days continuously and was being detained in different bungalows, police stations, putting chemical on his nose and he was tortured and compelled for confession finally he made his confession but his version is totally belied by the learned Magistrate while recording his confessional statement in which he has put the question whether any family member is under the custody of police to pressurize you he replied that no sir. He has also failed to produce any witness in his defence to support his version. In the circumstances, the claim that he has been falsely implicated in this case is not helpful to him to save him from the charge leveled against him. The deceased was aged about 40 years and was deprived of his life only on the simple dispute.

20. The upshot of the above discussion is that the prosecution has successfully established its case against the appellant through an ocular account furnished by the eyewitness, which is corroborated by the medical evidence coupled with circumstantial evidence. Learned counsel for the appellant has failed to point out any material illegality or serious infirmity committed by the learned trial Court while passing the impugned judgment, which in our humble view is based on proper appreciation of the evidence and same does not call for any interference by this Court. Thus, the conviction and sentence awarded to the appellant by the learned trial Court are hereby maintained and the appeal filed by the appellant merits no consideration, which is dismissed accordingly.

21. As a result of the above findings the reference bearing No.03 of 2020 submitted by the learned trial Court for confirmation of death sentence to the appellant is answered in the **AFFIRMATIVE.**

JUDGE

JUDGE