

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

Criminal Jail Appeal No.D- 149 of 2019.
[Confirmation case No.36 of 2019]

Present.
Mr. Justice Naimatullah Phulpoto.
Justice Mrs. Rashida Asad.

Date of hearing: 11.08.2021 and 17.08.2021.
Date of judgment: 25.08.2021.

Appellant: Mashooque son of Achar Mangwano through
Mr. Wali Muhammad Khoso, Advocate.

The State: through Mr. Shahzado Saleem Nahiyoon,
Additional Prosecutor General, Sindh.

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Mashooque appellant was tried by learned 1st Additional Sessions Judge/MCTC, Shaheed Benazirabad in Sessions case No.468 of 2012 for offence under Sections 302 / 34 PPC. After regular trial, the learned trial Court vide its' judgment dated 07.08.2019, convicted the appellant for committing Qatl-e-Amd of Amin Mangwano under section 302(b) PPC as Tazir and sentenced him to death. Appellant was directed to pay the compensation in terms of Section 544-A Cr.P.C to the tune of Rs.400,000/- (Rupees four hundred thousand only) to be paid to the legal heirs of deceased Amin Mangwano; in case of default thereof, appellant was further directed to suffer SI for one year more. However, death sentence was subject to confirmation by this court. The case against absconding accused Ghulam Mustafa son of Gulsher Mangwano was kept on dormant file.

2. Prosecution case is as under: that Amin son of Ghulam Nabi Mangwano (now deceased) was the cousin of complainant and worked as Peasant of Sharif Mangwano. As per routine, after taking meals, complainant alongwith Muhammad Amin, Sultan and Ghulam Sarwar used to sleep on separate cots in front of the hotel of Muhammad Nawaz Mangwano on protective band. On 27.07.2012 at night time, complainant and others went to sleep in front of the hotel and electric bulbs on back and front side of the hotel were on. On 28.07.2012 at about 12-30 a.m, in midnight, the complainant and others woke up on hearing of footsteps knocks and on the light of electric bulbs saw that accused Mashooque son of Achar Mangwano, armed with hatchet and one unknown person who was also armed with hatchet, complainant claimed to identify him if brought before him, raised hakals that no one should raise from their cots. Due to fear, complainant and others remained silent. Accused Mashooque stated that Amin Mangwano had evil eye on his wife Mst. Kaz Bano, therefore, he would be murdered. Then it is alleged that accused Mashooque Mangwano inflicted sharp side of hatchet blows on Amin Mangwano. The complainant and others raised cries. However, accused Mashooque and unknown person succeeded to run away to katcha area. Thereafter, complainant party saw that Muhammad Amin had sustained hatchet blows on left and right side of neck and on left shoulder. The villagers were attracted, on the cries of complainant party. Injured Muhammad Amin was taken to Government Hospital Kazi Ahmed but he succumbed to injuries on the way to hospital at about 01-30 a.m. Sultan, the brother of complainant informed the police through telephone and after postmortem, dead body was taken to village Hero Khan Mangwano near Baqar Shah District Sanghar for funeral ceremony. Thereafter, complainant lodged FIR against accused Mashooque for committing the murder of Muhammad Amin. It was recorded on 28.07.2012 at 1900 hours vide crime No.04/2012 for offence u/s 302, 34 PPC against accused at P.S. Nasri.

3. After usual investigation, challan was submitted against accused/appellant under Sections 302, 34 P.P.C. Co-accused Ghulam Mustafa was declared as proclaimed offender and proceedings u/s 87/88 Cr.P.C were concluded against him by the trial court.

4. Trial Court framed charge against accused under Section 302, 34 P.P.C. Accused pleaded not guilty and claimed to be tried.

5. At trial, prosecution examined in all nine (09) witnesses. Thereafter, prosecution side was closed.

6. Trial court recorded the statement of accused Mashooque under Section 342 Cr.P.C at Ex.18. All the incriminating evidence was put to accused and he denied the same. Accused did not lead any evidence in defence and declined to give statement on Oath. On analysis of the entire evidence, learned trial court found the appellant / accused guilty and he was sentenced to death in the manner mentioned above. Trial court has made Reference to this court for confirmation of death sentence or otherwise as required u/s 374 Cr.P.C.

7. We have heard Mr. Wali Muhammad Khoso, learned counsel for appellant, Mr. Shahzado Saleem Nahiyoon, Additional Prosecutor General Sindh and perused the evidence available on record.

8. Mr. Wali Muhammad Khoso, learned advocate for appellant after arguing the appeal at some length, submitted that he would not press this appeal on merits but prayed for reduction of sentence of death to the imprisonment for life on the ground that prosecution has failed to prove the motive at trial. It is submitted that in FIR it is alleged that deceased had an evil eye upon the wife of appellant and appellant committed the murder of deceased due to such motive. It is further argued that prosecution did not examine the wife of appellant at trial and failed to prove the motive at trial. He further submitted that trial court failed to put the incriminating evidence regarding motive to the appellant in his statement recorded u/s 342 Cr.P.C

for his explanation. In support of his submissions, learned counsel for the appellant has placed reliance upon the case of **Mst. Nazia Anwar v. The State and others (2018 SCMR 911)**.

9. On the other hand, Mr. Shahzad Saleem Nahiyoan, learned Additional Prosecutor General Sindh argued that prosecution has established the guilt of accused. However, he conceded to the contention of defence counsel that motive as set up by prosecution in FIR could not be substantiated at trial and recorded no objection for reduction of sentence of death to imprisonment for life.

10. We have heard the arguments of learned counsel for the parties, gone through the entire evidence which has been read out by learned advocate for the appellant.

11. We firmly believe that though the appeal is not pressed on merits but it is the primary duty of this court to satisfy itself whether prosecution has proved its` case against the appellant / accused at trial. FIR Ex.7/A was registered at Police Station on the information furnished by PW-1 Nangar. The contents of FIR which was recorded by complainant have already been mentioned above. Complainant has deposed that deceased was his paternal cousin who was permanent resident of Hero Mangwano District Sanghar. Deceased was working as hari of Sharif Mangwano. PW-1 was also labourer on the same land. He alongwith Sultan and Ghulam Sarwar used to visit the deceased Amin, time to time. In the midnight of 27/28th July 2012, he alongwith Sultan and Ghulam Sarwar took meals at the hotel of Ali Nawaz situated at Bacha Band Village Mir Muhammad Mangwano, where cots of complainant, deceased and other PWs were lying for sleeping. Then they went to sleep. At about 0030 hours (midnight), they were sleeping, electricity of the hotel was available there. Complainant deposed that they woke up on the noise of feet and found appellant Mashooque armed with hatchet, who challenged complainant, deceased and other PWs, not to raise from their cots. Thereafter, it is

stated by him that Mashooque said to Amin that he had an evil eye upon his wife Mst. Kaz Bano, he would kill him. Thereafter, he caused hatchet blows to Amin, at the left side of his neck and at his shoulder then appellant alongwith co-accused ran away. PW-1 has clearly stated that he identified accused Mashooque but could not identify another accused. After incident injured Amin was shifted to Rural Health Center Kazi Ahmed in injured condition for treatment but he succumbed to injuries on the way to hospital. Brother of complainant namely Sultan went to P.S Nasri for information to police about the incident. Postmortem examination of the deceased was conducted at Rural Health Center Kazi Ahmed. Police inspected the place of wardat and prepared inquest report. After postmortem examination, dead body was handed over to complainant. After funeral ceremony, in their native village in District Sanghar, the complainant went to police station Nasri on 28.07.2012 at 0700 p.m for lodging the F.I.R. FIR was lodged by him against appellant. Complainant was cross examined at length but denied the suggestion that he had given the name of appellant in FIR falsely at the instance of Ghulam Nabi due to enmity. He had also denied the suggestion that he had not witnessed the incident. PW-3 Sultan was also the eye witness of incident. He narrated the same story / episode before trial court and clearly deposed that appellant caused hatchet blows to the deceased while stating that deceased had an evil eye upon his wife. PW Sultan had also denied the suggestion in cross examination that he had deposed falsely against the appellant at the instance of Ghulam Nabi. PW-2 Ghulam Sarwar was also the eye witness of incident; he deposed that on the night of incident he was also sleeping on a separate cot with complainant and deceased. At midnight, he woke up and saw that accused Mashooque was inflicting hatchet blows to the deceased while challenging him that deceased had evil eye upon the wife of accused. PW further deposed that he could not identify both accused at the time of incident.

Prosecution has also examined PW-4 Dr. Muhammad Hashim (Ex.10), who produced the postmortem report at Ex.10/B. He noted following injuries on the person of deceased Muhammad Amin:-

1. An incised wound measuring 12.c.m x 6 c.m bone deep over left clavicle area on upper part of left shoulder.
2. An incised wound measuring 10 c.m x 5 c.m Muscle deep cutting carotid vessels present on left side of mid of neck.

As per opinion of the doctor, death was caused due to above mentioned injuries, inflicted with sharp cutting weapon. Probable duration between injuries and death was of a few minutes and time elapsed between death and postmortem was about 1-2 hours.

12. From the evidence of doctor coupled with postmortem report, it can be safely concluded that the death of deceased was a homicide and caused by sharp cutting weapon. That conclusion takes us to the next question as to whether it was the appellant Mashooque who committed the said murder of Muhammad Amin as alleged by prosecution. The crucial evidence relied upon by prosecution is that of complainant (PW-1) which spoke about the incident specifically in a tune that what he had stated in FIR. It was deposed by complainant that he had witnessed the incident and appellant had committed the murder of deceased because appellant had declared that deceased had evil eye upon his wife Mst. Kaz Bano. Other eye witnesses, namely Sultan and Ghulam Sarwar had also witnessed the incident, as on the relevant night they were also sleeping with deceased in the premises of hotel on separate cots. As stated above, eye witnesses were subjected to thorough and detailed cross examination, the defence could not elicit any material to shake their credibility which was perfectly in tune with FIR. All the three eye witnesses have given a graphic description of the incident occurred at the time of occurrence. As regards to the presence of PWs at the time of incident alongwith deceased, there is huge evidence and presence of all the eye witnesses

at place of incident at the relevant time has been established by prosecution. Moreover, evidence of eye witnesses have been supported by medical evidence and corroborated by other pieces of evidence. Contention of the defence that eye witnesses are planted witnesses, on considering the evidence available, we do not think that said contention is legally sustainable.

13. We have carefully perused the evidence of eye witnesses and found no material contradiction except in the evidence of PW-3 Ghulam Sarwar who has stated that he could not identify the accused persons at the time of incident but complainant and PW Sultan have clearly deposed that they identified the appellant who was armed with hatchet and at the time of incident, there was bulb light of the hotel. There is evidence about the availability of light near the place of occurrence. Even otherwise, that there may not have been any source of light is hardly considered relevant in view of the fact that the parties were known to each other from earlier. The criminal jurisprudence developed in this country recognizes that the eye sight capacity of those who live in rural areas is far better than compared to the town folks. Identification at night between known persons is acknowledged to be possible by voice, silhouette, shadow, and gait also. Therefore, we do not find much substance in the submission of the defence counsel that identification was not possible in the night to give them the benefit of doubt. In our view, merely because of the reason that there is some contradiction in the deposition of one witness namely Ghulam Sarwar, we have no reason to disbelieve the entire evidence unless it is so contradictory as to disprove the material aspect spoken by other eye witness. The attempt of the Court is always to find out the grains of truth from such evidence, by carefully scrutinizing the evidence as a whole. This is particularly so, when dealing with the evidence of witnesses who are the labourers with rustic backgrounds. Evidence of complainant is fully supported by PW Sultan in all respects. Further, evidence of two eye witnesses has been corroborated by medical evidence. Appellant was

arrested during investigation on 01.08.2012. He led the police to pointed place viz. Hadd bungalow bachao bund to southern side and produced the blood stained hatchet which was sent to chemical examiner and it was found blood stained. Report of chemical examiner Ex.11/H was positive and it has been produced in evidence. In short, when we are taking into consideration the entire evidence of prosecution witnesses, it clearly goes alongwith prosecution as to manner in which the offence was committed by appellant. It is the matter of record that eye witnesses / PWs are closely related to deceased. It is well settled position of law that, merely because the witnesses are close relatives of deceased, the evidence of such witnesses cannot be discarded, treating as an interested version unless otherwise established, it cannot be concluded that a person who is closely related to the deceased would make a statement for falsely implicating any person so as to permit the real person to escape from the clutches of law.

14. It may be observed here that instant appeal is not pressed on merits and the prayer has been made for reduction of sentence of death to imprisonment for life, on the ground that the motive asserted in FIR has not been established at trial. In FIR, it is mentioned that appellant Mashooque committed the murder of deceased as according to appellant, deceased had evil eye upon his wife Mst. Kaz Bano. We have come to conclusion that prosecution has failed to prove motive at trial for the reasons that Mst. Kaz Bano who was the material witness in this case as deceased had evil eye upon her but neither she was examined by Investigation Officer nor produced at trial. Presumption under Illustration (g) of Article 129 of Qanoon-e-Shahadat, 1984 would fairly be drawn in case she would have been examined on that point, she might have not supported the case of prosecution. Reliance is placed upon the case of Riaz Ahmed v. The State (2010 SCMR 846). Relevant portion is reproduced as under:-

“4.Furthermore, the statement of the complainant is neither supported nor corroborated by any

piece of evidence. One of the eye-witnesses Manzoor Hussain was available in the Court on 29-7-2002 but the prosecution did not examine him, declaring him as unnecessary witness without realizing the fact that he was the most important, only serving witness, being an eye-witness of the occurrence. Therefore, his evidence was the best piece of the evidence, which the prosecution could have relied upon for proving the case but for the reasons best known, his evidence was withheld and he was not examined. So a presumption under Illustration (g) of Article 129 of Qanun-e-Shahadat Order, 1984 can fairly be drawn that had the eye-witness Manzoor Hussain been examined in the Court his evidence would have been unfavourable to the prosecution.

Investigation Officer in his evidence has stated nothing about the motive. Trial court had also failed to put this incriminating piece of evidence to the accused for his explanation in his statement recorded u/s 342 Cr.P.C. Unfortunately, trial court had also failed to record any finding on the piece of motive in impugned judgment. Learned Additional P.G. has rightly conceded that the prosecution has failed to prove motive at trial. Such circumstance of the case has put us to a caution in the matter of appellant's sentence. Whole prosecution evidence is silent on this aspect of the case. We have no hesitation to hold that real cause of occurrence was shrouded in mystery and was completely suppressed by both the parties. 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 appellant on the charge of murder as held in the case of **Mst. Nazia Anwar v. The State and others (2018 SCMR 911)**). Relevant portion is reproduced as under:-

“The law is settled by now that if the prosecution asserts a motive but fails to prove the same then such failure on the part of the prosecution may react against a sentence of death passed against a convict on the charge of murder and a reference in this respect may be made to the cases of Ahmad Nawaz v. The State (2011 SCMR 593), IftikharMehmood and another v. QaiserIftikhar 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 NadeemWaqasand 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).”

15. For the above stated reasons / mitigating circumstances maintaining the death sentence would be unwarranted in the peculiar circumstances of this case and life imprisonment would be an appropriate imprisonment.

16. For what has been discussed above, instant Criminal Jail Appeal No.D-149 of 2019 is dismissed to the extent of appellant's conviction for offence u/s 302(b) PPC but the same is partly allowed to the extent of his sentence of death which is reduced to imprisonment for life. Appellant is ordered to pay compensation of Rs.4,00,000/- (Rupees four hundred thousand only) to be paid to the legal heirs of deceased as directed by trial Court. In case of default thereof, appellant shall suffer SI for six months, instead of one year. Appellant shall be entitled to the benefit of Section 382-B Cr.P.C. Confirmation Reference No. 36 of 2019 made by trial Court for confirmation of death sentence is answered in **NEGATIVE** and death sentence is **NOT CONFIRMED**.

JUDGE

JUDGE

Tufail