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

Criminal Appeal No. D- **250** of 2011.
Confirmation case No. D- **14** of 2011.

Present:

Mr. Justice Mohammad Karim Khan Agha.
Mr. Justice Zulfiqar Ali Sangi.

Appellant:	Abdul Rahim s/o Imam Bux Shaikh, Through Mian Taj Muhammad Keerio, Advocate.
Complainant:	Mushtaque Hussain Baloch, through Mr. Aijaz Shaikh, Advocate.
Respondent:	The State, through Mr. Fayaz Hussain, Saabki A.P.G.Sindh.
Dates of hearing:	08.06.2021.
Date of Judgment:	16.06.2021.

JUDGMENT

Zulfiqar Ali Sangi, J: This criminal appeal is directed against the judgment dated 15.08.2011, passed by learned Sessions Judge, Hyderabad, in Sessions Case No. 379 of 1997 (Re: The State V Abdul Rahim), emanating from Crime No.26 of 1997, registered at Police Station Bhitai Nagar, Hyderabad, under sections 302 PPC, whereby the appellant was convicted under Section 302 PPC and sentenced to death subject to confirmation by this Court. He was also directed to pay compensation of Rs.200,000/- to the legal heirs of the deceased as provided under section 544-A Cr.P.C, and in default whereof to suffer R.I for six (6) months more.

2. Brief facts of the prosecution case as per F.I.R, registered by complainant Mushtaque Hussain Baloch at Police Station Bhitai Nagar, Hyderabad are that, his sister Mst. Tanveer was married to Abdul Hafeez Shaikh, out of wedlock, there were two babies; that there was some

matrimonial dispute between his brother-in-law and his brothers. On 29.05.1997 at 2045 hours, his brother-in-law informed him through telephone that his brother Abdul Rahim has murdered his sister by firing from repeater. On receipt of such information, complainant along with his brother went to the house of his brother-in-law i.e. Bungalow No.B-4, Prince town where he saw that the dead body of his sister was lying in T.V lounge; his brother-in-law told them that Mst. Tanveer was sitting outside the door of T.V lounge while he was standing on main gate, and his brother Abdul Rahim was standing on the roof of his house which was situated adjacent to his house and he was holding a repeater which was pointed towards his house and he fired, then he saw that his wife stood up at once and fell down in T.V lounge and expired, his brother runaway. Thereafter the complainant registered the FIR.

3. After registration of FIR, police arrested the appellant and after usual investigation, submitted challan before the concerned court. After completing necessary formalities the trial court framed the charge against the appellant, to which he pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove its case, has produced as many as 07 prosecution witnesses and exhibited numerous documents and other items. The statement of accused was recorded under Section 342 Cr.P.C whereby he claimed his false implication. He, however, neither examined himself on oath nor produced any witness in his defence.

5. Learned trial court after hearing the parties and examining the evidence available on record convicted and sentenced the appellant as stated above.

6. Learned trial court in the impugned judgment has already discussed the evidence in detail and there is no need to repeat the same here, so as to avoid duplication and unnecessary repetition.

7. Mian Taj Muhammad Keerio, learned advocate for appellant has contended that the case registered against the appellant is false and has been registered due to enmity on matrimonial dispute; that prosecution case is highly doubtful; that the evidence brought on record is contradictory on material particulars of the case; therefore, the same cannot be safely relied upon for maintaining conviction. He further contended that learned trial court has passed the impugned judgment which is based upon surmises, conjectures, same is perverse and against the natural norms of justice so also against the principles of criminal justice; that learned trial court while passing impugned judgment has failed to apply judicial and prudent mind; that impugned judgment is against the law, facts and as such cannot be upheld; that it was the case of acquittal but learned trial court has wrongly discussed the points for determination and convicted the appellant; that material points and issues involved in the case were not discussed by learned trial court; that all the PWs are interested and false implication of the appellant can not ruled be out; that learned trial court has misread and non-read the evidence of witnesses and as such has not appreciated the same and passed impugned judgment in hasty manner; that prosecution evidence is not trustworthy. He prayed that the appeal may be allowed and the appellant may be acquitted. In the last he also submitted that in case the court has not convinced with his arguments then the death penalty may be reduced to imprisonment for life keeping in view the fact that the appellant remained in custody since his arrest viz 30-05-1997 which are about 24 years and the motive has not been proved by the prosecution. In support of his contention he relied upon the case of **Muhammad Imran v. The State (2010 SCMR 857), Muhammad Asif v. The State (2017 SCMR 486), Mst. Yasmeen v. Javed and another (2020 SCMR 505)** and **Mst. Mir Zalali v. Ghazi Khan and others (2020 SCMR 319).**

8. Mr. Fayaz Hussain Saabki, learned A.P.G Sindh after going through the entire evidence of prosecution witnesses as well as other record of the case has supported the impugned judgment. However, he submitted that the prosecution not been able to prove the motive therefore, he conceded and raised no objection for modification in sentence of the appellant from death to life imprisonment.

9. learned counsel for the complainant argued that the prosecution proved the case against the appellant by producing reliable, trustworthy and confidence-inspiring evidence; that all the witnesses supported the case in all respects; that the main eye witness is the real brother of the appellant and gave full particulars in his evidence and deposed against his real brother; that the death penalty was rightly awarded by the trial court. In support of his contentions he placed reliance on the cases of **Muhammad Ibrahim v. The State (2017 P.Cr.L.J 1130), Shaheryar Hussain and others v. The State and others (2021 P.Cr.L.J 647), Talib Hussain and others v. The State (1995 SCMR 1776), Khadim Nabi v. Rasheed ur Rehman and another (2020 P.Cr.L.J 433), Wilayat Ali v. The State and another (2004 SCMR 477),** and **Muhammad Latif v. The State (PLD 2008 Supreme Court 503).**

10. We have heard learned counsel for the appellant, learned DPG for the state and learned counsel for the complainant and have perused the material available on record with their able assistance.

11. The case of prosecution is based upon the evidence of eye witness who is real brother of the appellant and husband of the deceased, whereas the other two witnesses PW-1 (complainant) and PW-2 are the witnesses who after receiving information from PW-3 came at the place of wardat and saw the dead body of deceased, the medical evidence in shape of postmortem. The other main piece of evidence produced by the prosecution

is recovery of repeater from the appellant and recovery of two cartridges from the roof of the house of the appellant.

12. The evidence of PW-1 (complainant) Mushtaque Hussain and the PW-2 Abdul Hafeez is on one and the same line. They both deposed that on the day of incident they were informed by PW-3 Abdul Hafeez on telephone that his brother Abdul Rahim (appellant) had fired from his repeater upon his wife (sister of PW-1 and 2) and she after receiving fire shots has died. On such information they rushed their and saw the dead body of their sister soaked with blood which was lying in T.V lounge. They were cross-examined by the defence counsel but we could not find any substantial material which could benefit the appellant.

13. PW-3 Abdul Hafeez the brother of the appellant and the husband of the deceased lady was examined by the prosecution who deposed that on 29-05-1997, he was present at his house along with his two daughters and at about 8-45 pm he saw appellant Abdul Rahim fired two shots on his wife from his repeater and at that time he was at the roof of his house and deceased was sitting in the courtyard, she rushed towards inside and fell down in lounge cum kitchen. He further deposed that he rushed towards her and found her dead and then he informed the brothers of the deceased (complainant PW-1 and 2) who came there and also saw the dead body lying in the lounge cum kitchen. The motive for her murder was also stated by him that appellant was of the view that his wife used to instigate him for the dispute which was going on between the brothers. We have noted that the chief-examination of this witness was recorded on 25-05-1999 and he was cross-examined on 14-12-2002 after about three and half years. He was cross-examined at length but his evidence was not shattered. This witness was inmate of the house, where incident took place, therefore, his presence was natural and further it was supported by PWs-1 and 2 who on his information came and found him available in the house as well as they

found dead body there. **We also noticed that on 05-06-1997 statement under section 164 Cr.P.C, of this witness was recorded before the magistrate in presence of the appellant and the appellant had cross-examined him and suggestions were made that fire was not made by the appellant on deceased Mst. Tanveer intentionally but mistakenly he fired and killed her. Another suggestion was also made that it is incorrect that appellant fired only one shot upon the deceased. However, it was the case of prosecution that appellant fired two shots on the deceased**, which again in our view is an admission that appellant fired two shots.

14. The medical evidence is in support of the ocular evidence. The doctor was examined by the prosecution who conducted the postmortem of the deceased and exhibited the same in his evidence and the same has not been denied by the defence. The evidence of doctor also supports the case of prosecution in respect of the weapon used in the commission of offence. PW-3 the brother of the appellant deposed that fires were made by the appellant from repeater and as per the postmortem report and evidence of the doctor pellets were recovered from the body of deceased and the investigation officer recovered two empty cartridges from the roof of the appellant's house wherefrom he fired upon the deceased. The other supportive evidence produced by the prosecution is recovery of said repeater from the appellant and to prove the recovery prosecution examined PW-4 Khuda Bux who deposed that on 04-06-1997, SHO PS Bhittai Nagar took the appellant from lockup in his presence for interrogation, during interrogation appellant agreed to provide crime weapon. The appellant then took the police to the place where he concealed it. He further deposed that SHO also took the private person to made them as mashir of the recovery and when they reached prince town appellant asked the SHO to stop the vehicle then he took the police to place where he concealed the property in

the ditch where appellant dug out the earth from the ditch and gave repeater and four cartridges to the SHO along with license. During the cross-examination a question was put by the defence counsel from this witness to which he relied that **"It is incorrect that accused at the time of recovery was out of sense and was not good in health".**

15. Turning to the contentions of learned advocate for the appellant that the witnesses are near relatives to the deceased and are interested therefore their evidence cannot be relied upon, such contradictions has no force as in the instant case, the eye-witness has sufficiently explained the date, time and place of occurrence as well as each and every event of the occurrence. The appellant is real brother of PW-3 who is the only eye witness of the occurrence and they are known to each other, so there was no chance of mistaken identity of the appellant. We would not hesitate that where the witnesses fall within the category of natural witnesses and detail the manner of the incident in a confidence-inspiring manner then only escape available to the accused/appellant is that to satisfactorily establish that witnesses are not the witnesses of truth but "interested" one. An interested witness is not the one who is relative or friend but is the one who has a motive to falsely implicate the accused. No substance has been brought on record by the appellant to justify his false implication in this case at the hands of the complainant party on account of previous enmity. Even no suggestions were made to police witnesses that they have foisted the empties and the crime weapon upon the appellant on the basis of some enmity with them. Reliance is placed on the case of **Lal Khan v. State (2006 SCMR 1846**) wherein Supreme Court has held as under:-

> ... The mere fact that a witness is closely related to the accused or deceased or he is not related to either party, is not a sole criteria to judge his independence or to accept or reject his testimony rather the true test is whether the evidence of a

> witness is probable and consistent with the circumstances of the case or not.

Thus, mere relationship of these eye-witnesses with the deceased alone is not enough to discard the testimony of the complainant and his witnesses. In the matters of capital punishments, the accused would not stand absolved by making a mere allegation of dispute/enmity but would require to bring on record that there had been such enmity which could be believed to have motivated the "natural witnesses" in involving the innocent at the cost of the escape of **"**real culprits". We would mention here that where the natural witnesses are blood-relations then normally the possibility of substitution becomes rare. Thus, no material has been brought on record by the appellant to show that any deep-rooted enmity existed earlier between the parties, which could have been the reason for false involvement of the appellant in this case, particularly when it is a case of single accused. Reference may be made to the case of **Zahoor Ahmed v. The State (2007 SCMR 1519),** wherein the Supreme Court has held as under:-

> 6. The petitioner is a maternal-cousin of the deceased, so also the first cousin of the deceased through paternal line of relationship and thus, in the light of the entire evidence it has correctly been concluded by the learned High Court that the blood relation would not spare the real culprit and instead would involve an innocent person in the case. Further it has rightly been observed that it was not essential for the prosecution to produce each of the cited witnesses at the trial.

16. Another contention of learned Advocate for the appellant that there is only one eye-witness of the incident and the PW-1 and 2 are not the eye-witnesses and there evidence is based on hearsay and the same cannot be relied upon for awarding capital punishment has also no force as in the present case the evidence of eye witness PW-3 is supported by medical evidence so also the recovery of blood from the place of wardat including the recovery of two cartridges from the roof of the house of the appellant and

the recovery of crime weapon viz repeater from the appellant coupled with the admission of the appellant while conducting cross-examination of PW-3 (eye witness) at the time of recording his statement under section 164 Cr.P.C. It is settled by now that the testimony of a solitary witness, if rings true, found reliable and is also corroborated by some other evidence as well then, it can be made basis for conviction on capital charge as has been held by the Supreme Court in case of **Muhammad Ismail V. The State (2017 SCMR 713)**, which reads as under:-

> 14. At the same time, we are not supposed to make a departure from the principle of law, consistently laid down that testimony of a solitary witness, if rings true, found reliable and is also corroborated by some other evidence as well then, it can be made basis for conviction on capital charge. As has been discussed above that, Mst. Bachi Mai (PW-6) was the inmate of the same house, being the widow of the deceased, her presence at the fateful time, cannot be doubted on any premises whatsoever. Thus, her testimony is sufficient for conviction of the appellant because the same is supported by the recovery of the crime weapons on the spot, stained with the human blood; besides, the medical evidence provides ample support to the same.

17. We find some minor contradictions in the evidence which might have occurred due to lapse of time as cross-examination of PW-3 was conducted after a delay of three and half years of recording his chief-examination. It is settled by now that where in the evidence prosecution established its case beyond reasonable doubt then if there may some minor contradictions which always are available in each and every case as no one can give evidence like photograph such may be ignored. Reliance is placed on the case of **Zakir Khan V. The State (1995 SCMR 1793)**, wherein Supreme Court has held as under:-

> "13. The evidence recorded in the case further indicates that all the prosecution witnesses have fully supported each other on all material points. However, emphasis has been laid by Mr. Motiani upon the improvements which can be found by him in their respective statements made before the Court and some minor contradictions in their evidence were also pointed out. A contradiction, unlike an omission, is an inconsistency between the earlier version of a witness and his subsequent version before the Court. The rule is now well established that only material contradictions are to be taken into consideration by the Court while minor discrepancies found in the evidence of witnesses, which generally occur, are to be overlooked.

> There is also a tendency on the part of witnesses in this country to overstate a fact or to make improvements in their depositions before the Court. But a mere omission by witness to disclose a certain fact to the Investigating Officer would not render his testimony unreliable unless the improvement made by the witness while giving evidence before the Court has sufficient probative force to bring home the guilt to the accused."

18. Based on the particular facts and the circumstances of the case and on the above discussion we are of the view that the prosecution has proved its case against the appellant beyond reasonable doubt by producing reliable, trustworthy and confidence-inspiring evidence. However we have found that the motive set-up by the prosecution was the enmity of appellant with PW-3 and not with the deceased and as per the evidence of PW-3 he was available in the house with his two daughters wherefrom he saw the appellant but the appellant did not made any fire upon PW-3 and as such the prosecution has failed to prove the asserted motive during the evidence nor the same was investigated by the investigation officer. It has also not come on record what was the actual dispute in between the parties resulting in the death of the wife of PW-3. It has been held by Supreme Court in many cases 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 a capital charge. 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). In the

instant case, we find that in the absence of proof of the asserted motive the real cause of occurrence had remained shrouded in mystery and such factor has put us to caution in the matter of the appellant's sentence of death.

19. Thus, based on the particular facts and circumstances of this case and by relying on the above-cited precedents and the evidence of the prosecution witnesses as discussed above appeal is dismissed to the extent of the appellant's conviction for the offence under section 302(b), P.P.C. but the appeal of the appellant is partly allowed to the extent of his sentence of death which is reduced to imprisonment for life. All other sentences and penalties awarded by the trial court are maintained. The benefit under section 382-B, Cr.P.C. shall be extended to the appellant. The confirmation reference made by the trial court is answered in the **negative**.

20. The appeal and the confirmation case are disposed off in the above terms.

JUDGE

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