

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

Cr. Jail Appeal No.D-77 of 2019

Confirmation Case No.08 of 2019

PRESENT

Mr. Justice Naimatullah Phulpoto

Justice Mrs. Kausar Sultana Hussain

Appellant: Gulzar son of Allah Dino Brohi,
through Mr. Sajjad Ahmed Chandio,
Advocate.

The State: Through Mr. Shahzad Saleem
Nahiyoon, Deputy P.G, Sindh.

Date of Hearing: 21.04.2021

Date of Judgment: 04.05.2021

JUDGMENT

NAIMATULLAH PHULPOTO, J.- Appellant Gulzar Brohi was tried by learned IInd Additional Sessions Judge, Hyderabad, for offence under Section 302 PPC. After regular trial vide its judgment dated 17.07.2013 appellant was convicted under Section 302(b) PPC as Ta'zir and sentenced to death on two counts. Appellant was also directed to pay compensation of Rs.200,000/- each to the legal heirs of both deceased. In case of default thereof to suffer S.I for six months more.

2. Precise but relevant facts leading to the present tragedy as narrated by PW-2 Muhammad Juman in Para No.7 of the impugned judgment dated 17.07.2013 are as under:-

“On 08.09.2007 at about 07:30 a.m. I was on the way from my house to Hyderabad for Labour. While I was passing by

the house of accused Gulzar at about 07-35 a.m., situated in my way, I heard cries of maltreatment coming from his house. His wife is my cousin. From the door, I saw that he was maltreating his wife Mst. Hakimzadi and children. I returned and came to Ghulam Hussain and Ghulam Nabi, the brothers-in-law of accused Gulzar and Mst. Asath, the mother-in-law of the accused and informed them about the incident. I then informed my maternal uncle Gul Hassan. Accompanying all of the aforesaid persons came to the house of the accused. Ghulam Hussain tried to make the accused understand upon which the accused annoyed and fired from his pistol at Ghulam Hussain, who fell down injured. His mother Mst. Asath tried to rescue her son Ghulam Hussain. Consequently, accused Gulzar also fired at her and she also fell down injured. Both of them lost their lives on the spot.”

3. The FIR of the above incident was lodged by complainant Ghulam Nabi at P.S Tando Yousuf; it was recorded vide Crime No.26 of 2007 under Section 302 PPC on 09.09.2007 at 1130 a.m.

4. After usual investigation, challan was submitted against the accused under Section 302 PPC. Trial Court framed the charge against the accused at Ex-02. Accused did not plead guilty and claimed to be tried.

5. At the trial, prosecution examined nine witnesses namely PW-01 Ghulam Nabi, PW-02 Muhammad Juman, PW-03 Gul Hassan, PW-04 Mst. Hakimzadi, PW-05 Mst. Sabira Sultana, PW-06 Dr. Shakeel Ahmed, PW-07 Ghulam Shabbir, PW-08 Habibullah, PW-09 Tufail Ahmed, who produced the relevant documents in their evidence. Thereafter, prosecution side was closed.

6. Trial Court recorded statement of accused under Section 342 Cr.P.C at Ex-15, in which accused claimed false implication in this case and denied the prosecution allegations. Accused raised plea that he has been falsely involved in this case due to matrimonial dispute as the complainant party was unhappy with marriage of appellant with

Mst. Hakimzadi. Appellant did not lead evidence in defence and declined to give statement on oath in disproof of prosecution allegations.

7. Trial Court, after hearing the learned Counsel for the parties and assessment of the evidence available on record, convicted and sentenced the appellant to death on two counts vide judgment dated 17.07.2013 and made reference to this Court for confirmation of death sentence as required by the law.

8. By this single judgment, we intend to decide the aforesaid appeal as well as confirmation reference made by the trial Court.

9. Learned Counsel for the appellant, at the very outset, stated that appellant does not intend to challenge his conviction on merits and only prays for reduction of the quantum of sentence on the ground that it is not the case of capital punishment and there are some mitigating circumstances, which necessarily call for reducing the sentence of death into imprisonment for life. It is mainly argued that prosecution has failed to prove the motive at trial. It is also argued that it was the case of sudden fight and life imprisonment is the alternative sentence in the circumstances of the case. In support of his contentions, learned Counsel has placed reliance upon the cases of GHULAM MOHY-UD-DIN alias HAJI BABU & others v. The STATE (2014 SCMR 1034) and GHAFFAR ALI v. THE STATE and others (2021 SCMR 354).

10. Mr. Shahzad Saleem Nahiyoon, learned Deputy Prosecutor General did not oppose the prayer so made by the

appellant for reduction of the sentence of death to the imprisonment for life in the light of the above cited judgments.

11. Notice was issued to the complainant; it was served upon him but he has chosen to remain absent.

12. No doubt, appeal is not pressed on merits regarding conviction and prayer is made for reduction of sentence of death to life imprisonment. We, firmly believe it is the duty of this Court to re-examine the prosecution evidence to satisfy, whether prosecution had succeeded to prove its' case against the appellant beyond shadow of doubt?

13. As regards to un-natural deaths of deceased persons, prosecution has examined following Doctors:-

Dr. Shakeel Ahmed (PW-06) conducted autopsy of deceased Ghulam Hussain on 08.09.2007. From the external as well as internal examination of the dead body of deceased Ghulam Hussain, the Doctor came to the conclusion that deceased died by means of following fire arm injuries:-

1. Punctured lacerated wound of fire arm size 0.5cm in diameter, margins inverted, blackening negative over left temporal parietal region of head. This is wound of entry.
2. Punctured lacerated wound of fire arm size 01cm x 01cm with irregular shape, margins averted over right temporal mandibular joint in front and adjacent the right ear. This is wound of exit.

Dr. Sabira Sultana (PW-05) also conducted autopsy of deceased Mst. Asath on 08.09.2007. From the external as well as internal examination of deceased Mst. Asath, the Lady Doctor also

came to the conclusion that deceased died by means of following fire arm injuries:-

- 1a. Wound of entry in the area of heart, left side of sternum, punctured type, size 1.5cm, margins inverted, slight blackening around the wound margin seen.
- 2b. Punctured lacerated wound, size about 02cm in diameter, margins averted, situated on the back of left side of chest. (Wound of exit).

Learned Counsel for the appellant did not dispute unnatural death of both deceased by means of fire arm. Trial Court has held that both deceased persons died o firearm injuries as described by Medical Officers. Finding of the trial Court, in this regard requires no interference by this Court.

14. With the assistance of learned Counsel for the parties, we have perused the entire evidence. In the present case evidence of eye-witnesses Muhammad Juman (PW-2), Gul Hassan (PW-3) and Mst. Hakimzadi (PW-4) have been believed by the trial Court. Complainant Ghulam Nabi in his examination-in-chief has given true picture of the incident in the following words:-

“On 08.09.2007 at about 7-30 am, Muhammad Juman, my cousin, came to my house situated at the distance of half kilometer from his house and informed that accused Gulzar was quarrelling and maltreating his wife Mst. Hakimzadi, who was my sister. My mother Mst. Asath and my brother Ghulam Hussain, who heard the story, as above, went to the house of accused Gulzar. At about 8-00 am on the same day, Gul Hassan, my cousin came to me and informed that he had accompanied my mother and brother named above for getting accused Gulzar to understand the situation. However, accused Gulzar did not understand. On the contrary, he fired from pistol at Ghulam Hussain, who feel down injured. Mst. Asath was also fired at by the accused when she came forward to rescue her son Ghulam Hussain and as such was also injured. On hearing report about the incident from Gul Hassan, I accompanied him came to the place of incident. There, I found that Ghulam Hussain and my mother Asath had succumbed to the injuries sustained

by them. Their dead bodies were lying there stained with blood. I took the dead bodies for post mortem examination. After which, the dead bodies were buried. On the next date I lodged the FIR, which I produce at Ex.4/A, and say that it is same, correct and bears my signature. I had shown place of incident to the police. Accused Gulzar present in the Court is same."

PW-02 Muhammad Juman has stated that on 08.09.2007 at about 7-30 am, he was on the way from his house to Hyderabad for Labour and while passing by the house of accused Gulzar at about 07-35 am., he heard cries of maltreatment coming from the house of accused. From the door, he saw that accused Gulzar was maltreating his wife Mst. Hakimzadi and children. He then came to Ghulam Hussain and Ghulam Nabi, the brothers-in-law of accused Gulzar and Mst. Asath, the mother-in-law of the accused and informed them about the incident. He also informed his maternal uncle Gul Hassan. All of the aforesaid persons came to the house of the accused. Ghulam Hussain tried to make the accused understand upon which the accused annoyed and fired from his pistol at Ghulam Hussain, who fell down. Mst. Asath tried to rescue her son Ghulam Hussain but accused Gulzar also fired at her and she also fell down. Both of them lost their lives on the spot. In cross-examination, he has denied the suggestions that they were not happy over the marriage of Mst. Hakimzadi with accused Gulzar; that he had not witnessed the incident; that accused has not committed the offence; that unknown accused have committed murders of Mst. Asath and Ghulam Hussain.

PW-03 Gul Hassan has stated that on 08.09.2007 at about 8-00 am, he alongwith Muhammad Juman, Ghulam Hussain and Mst. Asath came to the house of accused Gulzar on receiving information from Muhammad Juman that accused Gulzar was maltreating his wife.

Accused Gulzar fired from his pistol at Ghulam Hussain, who fell down. Thereafter, Mst. Asath tried to rescue Ghulam Hussain but accused also fired at her, who also received fire arm injury and both of them lost their lives on the spot and accused also attempted to commit murder of his wife and children but they saved themselves by locking in the room from inside. The people rushed there but accused made his escape good, by making aerial firing. In his cross-examination, PW Gul Hassan has denied suggestions that he was not happy over the marriage of Mst. Hakimzadi with accused Gulzar; that he had not witnessed the incident; that unknown accused had committed murders of Mst. Asath and Ghulam Hussain.

PW-4 Mst. Hakimzadi has stated that on 08.09.2007 at about 8-00 am, she was present in her house alongwith children. Quarrel in between her children took place, on which accused Gulzar, her husband, started maltreating children, upon which, she took her children inside the room and locked the door from inside. Thereafter, her brother Ghulam Hussain and mother Mst. Asath came in house. She did not know what happened later on in the home.

15. We have carefully perused the evidence available on record. There appears no legal infirmity in the evidence of the eyewitnesses. They have successfully faced the test of cross-examination. Eye-witnesses had no enmity to involve the appellant falsely in this case. Moreover, it was day time incident and the case of single accused. Appellant had not been able to lay down any foundation for his substitution in place of real culprit. Evidence of the eyewitnesses is quite reliable and confidence inspiring and corroborated by the medical evidence. Realizing this fact, learned

Counsel for the appellant did not press the appeal on merits. In the view of evidence discussed above, we agree with trial Court that prosecution has succeeded to prove its` case against the appellant beyond any shadow of doubt. However, as regards to the motive, the complainant in his FIR has stated that relations of the appellant and his wife Mst. Hakimzadi were strained. Appellant had married to Mst. Hakimzadi about 18 years back, out of the said wedlock, they have 7/8 children. Mst. Hakimzadi (PW-04) has deposed that incident took place on 08.09.2007 at about 08:00 a.m. She was present at her house. Quarrel took place in between her children and husband, on which, appellant Gulzar started to beat the children, then she took the children inside the room and locked the door. Thereafter, her brother Ghulam Hussain and mother Mst. Asath came in the house and then incident took place at relevant time she was in the room and could not see as to what actually happened outside the room. The motive as setup in the FIR was that appellant had married 18 years before the incident with Mst. Hakimzadi and out of said wedlock there are 7/8 children. Appellant was unemployed and Mst. Hakimzadi, his wife, used to quarrel with the appellant due to his unemployment and thereby relations between the husband and wife became strained. On the day of incident, appellant was quarrelling with the children and the eyewitnesses and deceased came to know about such maltreatment of appellant and entered into the house of the appellant where appellant was armed with pistol. Mst. Hakimzadi dragged her children into the room and appellant committed murders of deceased Ghulam Hussain and Mst. Asath, who being brother and mother came to rescue Mst. Hakimzadi from attack of the appellant. The said motive could not be established at trial. Mst. Hakimzadi in her evidence has stated that

appellant started maltreatment to the children on the day of incident. In the meanwhile, her brother Ghulam Hussain and mother Mst. Asath came in the house and she took the children in the room and her brother and mother were killed by the appellant when she was inside the room. **In this case, matrimonial dispute between the complainant and appellant has been cited as motive behind the crime but it has not been established at the trial. Moreover, appellant had motive against his wife Mst. Hakimzadi, who was pressurizing the appellant to do some job for the children but appellant became angry with his wife and consequently committed murders of deceased Mst. Asath and Ghulam Hussain, however, the appellant had no motive against deceased persons. Suddenly, both the deceased came in the house of the appellant and thus, it is far from being clear as to what really actuated the appellant to take lives of the deceased persons. Thus, the motive remained absolutely unproved being shrouded in mystery.** In the case of **NAWAZ KHAN and another v. GHULAM SHABBIR and another** reported as **1995 SCMR 1007**, while determining the proper quantum of sentence, the honourable Supreme Court has held as under:-

“9. Adverting to the question of sentence raised by the learned counsel for Mowaz Khan, we find that Abdullah Khan (P.W. 9) and Muhammad Akhtar (P.W. 10) have deposed about the motive but they were not present when the incident of motive took place. The circumstance of chopping of nose and cutting the ear of the deceased will show that the act of the accused of killing the deceased was somewhat provoked. So, the real motive for the crime remains shrouded in mystery. The question of benefit of reasonable doubt is necessarily to be determined not only while deciding the question of guilt of an accused person but also while considering the question of sentence, particularly in a murder case because there is a wide difference between the two alternative sentences-death or imprisonment for life. Benefit of reasonable doubt in

respect of the real cause of the occurrence was thus available to the accused. Needless to add that whenever the real cause of murder is shrouded in mystery, is unknown or is concealed, the Courts have normally awarded the lesser punishments under section 302, P.P.C. as a matter of abundant caution.” (Underlining is ours).

16. We have also observed that present incident took place at the spur of the moment when both deceased entered into the house of the appellant, who was fighting with the children and became annoyed when deceased intervened. This could be the ground for mitigation as held in the case of **GHAFFAR ALI v. The STATE and another** reported as **2021 SCMR 354**, the relevant portion whereof is reproduced as under:-

“6. We have observed that High Court mentioned in the judgment that complainant and the witnesses had made improvement in order to establish the motive and extended the benefit of this to the petitioner by awarding him the lesser sentence but we observe that the witnesses had not made any improvement in their examination in chief and the detail of motive was brought on record during cross-examination and in such manner the same cannot be considered as improvement because in the FIR it is mention that a quarrel took place between the petitioner and Tehseen Ullah deceased and he being outraged started firing with Kalashnikov resulting into the death of three persons and injury to one. The stance of both the witnesses remained the same but during cross-examination they disclosed that as wife of the petitioner was not invited hence a quarrel took place. Although this was not a valid reason for mitigation of the sentence but we observe that occurrence took place suddenly at the spur of the moment after a quarrel between complainant an Aamir and petitioner fired indiscriminately. This could be a ground for mitigation and the High Court rightly extended such benefit to the petitioner by altering the sentence of death on three counts to imprisonment for life on three counts. We observe that High Court had withheld the benefit of section 382-B of the Cr.P.C. which was against the mandate of the said provision, hence the benefit of section 382-B, Cr.P.C. is extended to the petitioner. With the above modification, this petition is dismissed and leave to appeal is declined.”

17. In the case of **BAKHT MUNIR v. The STATE and another** reported as **2020 SCMR 588**, it is also held that there was no previous enmity existed between the parties and the circumstances of the case unequivocally suggested that the occurrence had taken place at the spur of the moment without any premeditation on the part of the accused. In the present case position is same, appellant had no knowledge that both deceased would come to his house, as such, the incident occurred at the spur of moment without premeditation on the part of the appellant when both deceased Mst. Asath and Ghulam Hussain intervened to rescue Mst. Hakimzadi and her children. Relevant portion of the judgment of BAKHT MUNIR (*supra*) is reproduced as under:-

“4. It is crystal clear that there was no previous enmity between the parties. The circumstances of the case unequivocally suggest that the occurrence had taken place at the spur of the moment without any premeditation on the part of the appellant.

5. For the foregoing, the instant criminal appeal is partly allowed. The conviction of the appellant under section 302(b), P.P.C. is upheld and the sentence of death of appellant on two counts is converted into imprisonment for life on two counts. The convictions and sentences of appellant on other penal heads are maintained. The amounts of compensation and sentences in default thereof are also not disturbed. Benefit of section 382-B, Code of Criminal Procedure is extended to the appellant. All his sentences of imprisonment shall run concurrently.”

18. In view of the above stated circumstances, we have decided to withhold the sentence of death passed against the appellant.

19. For what has been discussed above, this appeal is dismissed to the extent of appellant's conviction for offence under

Section 302(b) PPC but the same is partly allowed to the extent of his death sentence on two counts, which is reduced to the imprisonment for life on two counts. The amount of compensation and the sentence in default thereof are also not disturbed. However, benefit of Section 382-B Cr.P.C is extended to the appellant. All the sentence of the imprisonment shall run concurrently. Consequently, confirmation reference made by the trial Court is answered in negative. The appeal and confirmation reference are disposed of in the above terms.

JUDGE

JUDGE

Shahid