

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

Criminal Appeal No.D-55 of 2012
Confirmation Case No.03 of 2012

Cr. Jail Appeal No.D-57 of 2012
Confirmation Case No.04 of 2012

Present:-

Mr. Justice Muhammad Iqbal Kalhoro.

Mr. Justice Adnan-ul-Karim.

Dates of hearing: 16.01.2019, 24.01.2019, & 31.01.2019.

Date of decision: 31.01.2019.

Appellants: Hassan alias Ali Hassan and others.
Through Mr. Ahsan Gul Dahri, Advocate.

Complainant: Mst. Halima Chandio
Through Mrs. Razia Ali Zaman Khan Patoli, Advocate.

The State: Through Ms. Rameshan Oad Assistant P.G.

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MUHAMMAD IQBAL KALHORO,J:- Appellants have impugned the judgment dated 21.02.2012, passed by III-Additional Sessions Judge, Shaheed Benazirabad whereby they were convicted under section 302(A) PPC and sentenced to death as Qisas in Sessions Case No.183/2007, bearing Crime No.100/2007, u/s 302, 34 PPC, registered at P.S Kazi Ahmed. They were also imposed an amount of Rs.2,00,000/- each as compensation in terms of section 544-A Cr.P.C to be paid to the legal heirs of the deceased.

2. The brief facts of the prosecution case are that on 24.06.2007 at 1730 hours, complainant Mst. Haleema lodged aforesaid FIR stating that she had six sons out of whom Muhammad Punhal was aged about 29/30 years and was married. On the same day at about 4-00 pm Hassan alias Ali Hassan called her said son out of house and asked him to accompany him to watercourse for cleaning (dredging) it, whereupon he went with him. At about 4-30 pm she heard fire shots on which she, her son-in-law Sarwar and brother Abdul Hameed went running there and saw that accused Hassan and accused Ali Nawaz duly armed with pistols were standing. Accused Hassan giving hakals to the complainant party stated that her son was 'KARO' with his niece namely Mst. Zuhra d/o Amir Bux and fired straight on Muhammad Punhal who fell down raising cries. Thereafter, both the accused went towards house of Amir Bux. After a while they heard cries coming from there on which complainant, her son-

in-law Sarwar and her brother Abdul Hameed went running towards the house and saw that Mst. Zuhra had a firearm injury and was lying on the ground. Accused Hassan and Ali Nawaz having pistols were standing there and called out to the complainant not to come near them. They further stated that their niece was 'KARI' and they had killed her and then fled away. Mst. Zuhra had sustained firearm injuries on front side and was dead. Punhal had also received firearm injuries on front side and was dead. Complainant leaving the aforesaid witnesses over the dead body of her son appeared at police station and lodged the FIR

3. Usual investigation led to filing of the challan and commencement of the trial against the accused. A formal charge was framed against them which they opted to contest and pleaded not guilty. Hence, evidence of following witnesses was recorded. Complainant Mst. Haleema at Ex-20, PW Abdul Hameed at Ex-21, PW Ghulam Sarwar at Ex-22, PW Dr. Naheed Saleh at Ex-23, PW Muhammad Hashim at Ex-24, PW Dr. Capt. Sikander Ali at Ex-25, PW Abdul Hameed at Ex-27, PW SIP Raja Abdul Haq at Ex-28, PW SIP Azizullah Morio I.O at Ex-29, PW Ali Madad Tapedar at Ex-30, and PW Bashiruddin at Ex-31. These witnesses have produced all the relevant documents which include all memos, postmortem reports, FSL report, sketch of place of incident, etc.

4. Subsequent to evidence of prosecution witnesses, statements of the appellants under section 342 Cr.P.C. were recorded. They have denied the case against them and have professed innocence. However, neither they examined themselves on oath nor led any evidence in their defense. Finally at the conclusion of trial, the learned trial Court after hearing the parties convicted the appellants vide impugned judgment in the terms as stated above. Being aggrieved by the same, the appellants have preferred instant appeal.

5. Mr. Ahsan Gul Dahri learned Counsel appearing for appellants has contended that the prosecution case is full of doubts and infirmities; that there is enmity between the parties; that there are material contradictions and discrepancies in the evidence of prosecution witnesses; that the alleged incident is un-witnessed one, and the witnesses were planted whose presence at the spot is unnatural; that all the PWs are interested and related to each other and as such their evidence is without any sanctity; that conviction cannot be based on the circumstantial evidence alone and that in criminal trial, if a single infirmity arises, the benefit of which is to be extended to the accused not as a matter of grace, but as a right; that the alleged pistol was foisted upon accused Hassan which is evident from his acquittal in its recovery case. Learned counsel further submitted that against appellant Ali Nawaz no incriminating evidence has come on record; that his mere presence at the spot

is shown but even that assertion is not supported by pw Abdul Hameed; that none of the witnesses has assigned him role of causing any injury to the deceased nor any weapon was recovered from him; that only appellant Hassan is shown to have killed deceased but in view of contradictions in the evidence of witnesses the case against him is also doubtful; that in his statement u/s 342, Cr.P.C he was not put to incriminating evidence regarding postmortem, recovery of pistol, FSL report, motive, etc. to enable him to explain the same which has caused serious prejudice to him in defending his case because the trial court while convicting him has relied upon such evidence as well as motive. He further submitted that as an alternate since mandatory provisions of S. 342 Cr.P.C. have not been complied with in the case of appellant Hassan, his case may be remanded back for recording his statement u/s 342 Cr.P.C afresh to enable him to explain circumstances in evidence against him.

6. Mrs. Razia Ali Zaman Khan Patoli learned counsel appearing for complainant has supported the impugned judgment and has submitted that prosecution case is free from doubts; that all the PWs have fully supported the case against the appellants and there are no material contradictions in their evidence; that eye witnesses were subjected to a lengthy cross-examination but their evidence has remained un-shaken; that the pistol was recovered from possession of accused Hassan @ Ali Hassan; that FSL report about his pistol and empties recovered from the spot is in positive which shows that said weapon was used in the alleged offence; that the ocular account is supported by medical and circumstantial evidence and no enmity has been alleged against the PWs; that there is no delay in lodging the FIR; that Investigation Officer recovered the crime weapon from appellant Hassan in presence of mashirs, who have fully supported such fact; that prosecution has succeeded to prove its case beyond any shadow of doubt. Learned counsel however conceded that appellant Hassan was not confronted with all the circumstances appearing in evidence against him in his statement u/s 342 Cr.P.C. She therefore did not oppose remanding the case to the trial court for recording his statements u/s 342 Cr.P.C. afresh and to decide the case accordingly.

7. Ms. Rameshan Oad, learned Assistant Prosecutor General Sindh has conceded to the case of appellant Ali Nawaz and submitted that there is no sufficient evidence against him to justify his conviction and sentence, none of the witnesses has deposed that he caused any firearm injury to any of the deceased and no weapon was recovered from him. She although supported the impugned judgment against appellant Hassan but could not deny that the trial court has not properly recorded his statement u/s 342 Cr.P.C. and has used such evidence against him which was not put to him u/s 342 Cr.P.C. to enable him to explain the same.

8. We have considered submissions of the parties and have perused the material available on record. The case against appellant Ali Nawaz, does not appear to be free from doubt. In FIR he has not been assigned any active role except that he was present along with main accused Hassan when he killed Punhal and then he went with him to the house of Amir Bux where his daughter Mst. Zuhran was killed. The FIR and the evidence of witnesses do not indicate who killed Mst. Zuhran out of two accused because by the time the complainant and witnesses reached her house she was already killed and no one from house of Mst. Zuhran has been examined to disclose name of her killer out of two accused. The only evidence available on record in this respect is that when the complainant and the witnesses reached her house after hearing fire shots, the appellants informed them that they had killed Mst. Zuhran who was lying on floor with a fire arm injury, and then they left the spot threatening them. Such evidence does not conclusively indicate who out of two accused killed her and therefore creates a reasonable doubt over role of appellant Ali Nawaz. Nothing is available to show either relationship of appellant Ali Nawaz with main accused or for that matter to the deceased to connect him with motive part of the story i.e. 'Karo Kari'. From both the places of incident only one empty cartridge each was recovered, which would mean each deceased was fired at only once. That seems to be supported by the witnesses as their evidence evinces that they had seen only appellant Hassan firing at deceased Punhil and for only once, and that they had heard only one fire shot report coming from the house of Mst. Zuhran, which led them to discover her murder. The two cartridges that were recovered from the spots as per FSL report match with the crime weapon recovered from appellant Hassan. If all such facts are considered together, it would seem that the fire at each deceased is unambiguously attributed to appellant Hassan and not to appellant Ali Nawaz. We have also noted that pw Abdul Hameed who is an eye witness has not even deposed about presence of appellant Ali Nawaz at the place where Punhal was killed which is contrary to what complainant and other witness have claimed in their deposition. Further said pw has shown his presence at the place where Mst. Zuhran was killed but without attributing any role to him and without explaining his presence there. He states that accused Ali Hassan after killing Punhal went to house of Amir Bux, (then) they heard sound of fire (coming from the said house) and reached there and saw accused Ali Hassan and Ali Nawaz armed with pistols present there. So if we look at his evidence, even presence of Ali Nawaz at the spot does not seem to be free from doubt. Therefore, in our humble view there could arise even no question of his sharing common intention with appellant Hassan. Such a view gets further fortification from the fact that no evidence in this respect has been brought on record and as noted above there seems no connection of this appellant with alleged motive.

Relevant to above discussion is an application of the complaint available at page 46 of paper book, she has stated therein that his son has been murdered by **Hassan and others** as Karo on account of money dispute whereas appellant Ali Nawaz is issuing them threats to withdraw the case otherwise her other sons would be killed. She does not seem to allege killing of her son to appellant Ali Nawaz and appears to be aggrieved by his issuing threats to her to withdraw the case. But when it came to depose against him the complainant has stated in her cross examination that appellant Ali Nawaz used to keep an evil eye on her daughter Mst. Hameedan and as such would keep them under pressure. This statement further removes appellant Ali Nawaz from alleged motive and proves that stance of the complainant about him changed materially during the trial from issuing threats to her to withdraw the case to keeping a bad eye on her daughter. In these facts and circumstances, in our view the case against Ali Nawaz is doubtful and therefore while extending him benefit of doubt we acquit him of the charge. He shall be released forthwith if not required in any other custody case. The death reference against him is replied in negative and is accordingly disposed of.

9. As to the case of appellant Hassan alias Ali Hassan, we have noted in the impugned judgment that learned trial court while convicting him has relied upon medical evidence, report of ballistic expert and report of chemical examiner besides sketch of place of incident as supporting evidence, but he has not been put to such evidence in his statement u/s 342 Cr.P.C. to enable him to explain the same as required under the said provision of law. Even he has not been confronted with motive part of the story in such statement. It is an established law that provisions of section 342 Cr.P.C. are mandatory in nature and if any piece of evidence is not put to the accused in his statement u/s 342 Cr.P.C. the same cannot be used against him for conviction. In support of such a view reliance can be placed on the case law reported as 2010 SCMR 1009, 2016 SCMR 267 and 2017 SCMR 148.

10. Further, in the case of **Allah Jurio alias Jurio & other Vs. The State (SBLR 2018 Sindh 1987)**, when the divisional bench of this court was faced with similar situation, it decided to remand the case to the trial court by observing that “... ***the learned trial Court while passing the judgment has committed illegality and violated the provisions of Section 342 Cr.P.C. as well Article 132 of Qanun-e-Shahadat Order, 1984. Consequently, the judgment dated 14.07.2010 passed by the learned trial Court is hereby set-aside and Reference for confirmation of death sentence is declined. Case is remanded back to the learned trial Court with direction to record statement of the accused under Section 342 Cr.P.C. afresh by putting all incriminating pieces of evidence including the reports of chemical***

examiner as well as evidence of Tepedar”. We fully concur with the said findings and dispose of the appeal against appellant Hassan alias Ali Hassan in the following manner.

11. The conviction and sentences awarded to appellant Hassan alias Ali Hassan is set aside and his case is remanded to the trial court with direction to record his statement under section 342 Cr.P.C. afresh by putting him all incriminating evidence such as medical evidence, report of ballistic expert, report of chemical examiner, sketch of place of incident, evidence of Tepedar, motive part of the story, etc. to seek his explanation thereto as provided under the said provision of law and decide the case within a period of one month thereof after affording an opportunity of hearing to all the parties. Accordingly the death references No.03 & 04 of 2012 against him are replied in negative and disposed of. These are the reasons of following short order dated 31.01.2019, whereby we had disposed of the instant appeals.

“For reasons to be recorded later on, the instant appeals to the extent of appellant Ali Nawaz are hereby allowed, conviction and sentence of death awarded to him vide impugned judgment dated 21.02.2012 is set aside and he is acquitted of the charge. He shall be released forthwith if not required in any other custody case. However, the appeals to the extent of appellant Hassan alias Ali Hassan are disposed of in the terms whereby conviction and sentence of death awarded to him is also set aside and the case is remanded to the trial court to record statement of accused Hassan alias Ali Hassan u/s 342, Cr.P.C afresh by putting him all the incriminating pieces of evidence which have been deposed against him by the prosecution witnesses for seeking his explanation thereto and then after affording an opportunity of hearing to both the parties decide the case within a period of one month thereof i.e. statement u/s 342, Cr.P.C.

Accordingly, both Criminal Appeals No.D-55/2012 and Criminal Jail Appeal No.D-57/2012 filed by both the appellants against one and same judgment are disposed of in the above terms. In the light of above, Death References No.03 and 04 of 2012 for confirmation of death sentence to appellants are replied in negative and are accordingly disposed of.”

Let a copy of this judgment be forwarded to the trial court for compliance.

JUDGE

JUDGE