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

Criminal Jail Appeal No.D-190 of 2019

Present:-

Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Adnan-ul-Karim Memon.

Date of hearing: 18.08.2022

Date of decision: 01.09.2022

Appellant: Nazeer through Mr. Aijaz Shaikh advocate.

The State: Through Mr. Shahzado Saleem Nahiyoon, APG.

JUDGMENT

MUHAMMAD IQBAL KALHORO, J:- Appellant, accompanied by accomplices, since acquitted vide judgment dated 20.05.2019 in a previous trial, committed murder of deceased Barkat Ali with a shotgun, witnessed by his relatives including complainant, his brother, on a matrimonial dispute behind TTC College Wall Kotri on 20.01.2013 at 1500 hours, was referred to the court for a trial, and has been convicted and sentenced to death u/s 302(b) PPC vide impugned judgment dated 08.10.2019, by learned 1st Additional Sessions Judge/MCTC Kotri, which he has challenged by means of instant appeal.

2. In the trial, prosecution examined 07 witnesses and produced all the necessary documents i.e. FIR, relevant memos, postmortem report etc. to establish the charge against appellant. Appellant to rebut the same u/s 342 CrPC has pleaded innocence but did not examine himself on oath u/s 340(2) CrPC nor led any evidence in defence. Complainant Imam Ali, examined in the previous trial against co-accused, and Investigation Officer died during abscondence of the appellant and thus were not examined in the trial commenced after arrest of the appellant on 11.08.2019.

3. We have heard the parties and perused material available on record including the case law cited in defense. Learned defense counsel has pleaded for acquittal of the appellant on the grounds that evidence of same witnesses was not believed qua guilt of the co-accused and they were acquitted, as such their evidence cannot be treated otherwise this time; although motive of the incident is alleged to be matrimonial dispute but it has not been proved by the prosecution; medical evidence

and motive part of the story were not confronted to the appellant in his examination u/s 342 CrPC, hence, the same cannot be considered against him; witnesses have contradicted each other on a number of points; recovery of articles from the clothes of deceased at the spot has not been mentioned in the memo of place of incident; widow of the deceased had filed a constitutional petition before this court at Karachi alleging highhandedness by the witnesses of this case, as such, their evidence is not reliable and false implication of the appellant in this case is a strong possibility. Learned counsel has relied upon 2006 SCMR 1707 to support his contentions.

4. Learned Additional Prosecutor General has supported the impugned judgment au contraire, and requested for dismissal of the appeal.

5. Among all 07 witnesses examined in the present trial, there are two eye-witnesses, PW-3 Ahsan Ali (Ex.37) and PW-7 Abbas Ali (Ex.42). Both these witnesses, although subjected to a lengthy cross-examination, have stood the ground and supported each other on all salient features of the case: the time, place and date of the incident, locale of the injuries sustained by the deceased, proximate distance (1 to 5/7 feet) from which the fire was made to the deceased, the identity of weapon i.e. shotgun used by the appellant and their presence at the crucial time at the spot. Their narration of incident is in sync with the story alleged in FIR and is further supported by evidence of PW-1 (Ex.35) Medico Legal Officer qua unnatural death of the deceased, the kind of weapon, the distance of fire etc. He has confirmed conducting postmortem of deceased on 20.01.2013, finding pellets in his body and handing the same over to investigating officer, which is duly documented. Their evidence, appearing free from any material contradiction, inspires confidence and is reliable. FIR, registered promptly on the same day, excludes any chance of deliberation on the part of complaint for substituting the real culprit, a rare phenomenon even otherwise in a murder case, with the appellant. The marginal witnesses-- Tapedar, Mushirs-- examined to support preparation of necessary memos, sketch of place of incident, its visit, and arrest of appellant in the manner as alleged have stood the test of cross-examination and nothing is available or was pointed out by learned defense counsel rendering the case against the appellant doubtful or uncertain on these aspects. It is clear that prosecution has proved the

case against the appellant beyond any reasonable doubt. This is daytime incident and parties are known to each other, which rules out any probability of mistaken identity. Long abscondence of the appellant after the incident, though independent of considerations being put to test here, if seen in the context of convincing evidence against him, would lead persuasively to his guilty conscious, a circumstance hardly ignorable indeed.

6. The acquittal of co accused in a previously-held trial is of no consequence, for it is the appellant who has been assigned main role of committing murder of the deceased by shooting at him twice from his weapon viz. shotgun. Those co accused are simply shown present at the spot without participating actively in the incident except accused Muhammad Arab, assigned the role of instigation, a fact hard to establish mostly but never considered by the courts to reflect adversely on the role of main accused in a murder case. It is also notable that co-accused's acquittal has been recorded on a benefit of doubt. That, in our humble estimation, would not imply that the entire incident: murder of deceased at the place of incident with the kind of weapon used is totally false or suspicious. It would merely mean that inactive part alleged against the co-accused, the prosecution could not establish to the satisfaction of the court.

7. Not confronting motive part of the story to the appellant in his 342 CrPC statement will not help him either, as the trial court although has referred to the motive in his judgment but has recorded conviction against the appellant mainly on the basis of direct evidence of the witnesses. The reason, which we endorse, appears to be that although the prosecution has alleged the motive but has not convincingly proved it. It is true that the trial court has discussed and relied upon medical evidence in the impugned judgment to hold that the deceased died unnatural death from firearm injuries, and has not put the same to appellant in his 342 CrPC statement. However, the question is whether seeking explanation in this regard from the appellant was necessary. Section 342 CrPC confers power on the court to examine the accused at any stage of trial or any inquiry and put him such questions as it deems fit to enable him to explain any circumstances appearing in evidence against him. This clearly is about putting to an accused all incriminating pieces of evidence for the purpose of inviting his explanation and rebuttal in defense, if any. The medical evidence is not

a piece of evidence against an accused in *sensu stricto* but, as relevant and important as it may be, is a supporting piece of evidence and is meant to establish unnatural death of the deceased as alleged. It neither identifies the accused nor describes any other details motivating him to commit the crime or precise identity of the weapon used save a generic reference to it as a firearm or a blunt or a sharp weapon. Such facts, constituting mosaic of actual incident, are proved only through oral account of eye witnesses. And therefore need to be put to the accused for his explanation to enable the court to have both parts of the story before it for appreciation and arriving at a just conclusion. Asking the accused to explain such pieces of evidence is hence a necessary requirement of law in terms of section 342 CrPC as without which an informed decision for dispensing justice is not conceivable. Therefore any failure to confront the accused such evidence shall, understandably, take it (evidence) out of consideration of the court while deciding the case. The medical evidence bereft of all such revealing particulars identifying the accused and manners wielded by him to commit the offence etc. is not there for incriminating a particular accused or his particular act but, in essence, to establish a claim of unnatural death of the deceased. Therefore, in our humble view, not putting such a piece of evidence to the appellant in his 342 CrPC statement for his explanation has not undermined the prosecution case against him a bit.

8. For foregoing discussion, finding no merit in contentions made in defense, we hold the appellant guilty of the offence he is charged with, and maintain his conviction. But considering failure of prosecution to prove motive part of the story as a mitigating factor in the light of ratio laid down by the Honourable Supreme Court in the cases reported as 2017 SCMR 1662, 1668 and 1976, we commute his death sentence into rigorous imprisonment for life u/s 302 (b) PPC with benefit of section 382 CrPC. The order of payment of compensation of Rs.2 lacs u/s 544-A CrPC to the legal heirs of the deceased shall remain intact, and its default by the appellant shall expose him to further six months imprisonment.

9. The appeal in hand with modification as above is dismissed and disposed of accordingly. The death reference, resultantly, is replied in negative and disposed of accordingly.

JUDGE

JUDGE