

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

Criminal Jail Appeal No.D- 14 of 2017
[Confirmation case No.05 of 2017]

Present.
Mr. Justice Naimatullah Phulpoto.
Mr. Justice Shamsuddin Abbasi.

Date of hearing: 26.01.2022.
Date of judgment: 17.02.2022.

Appellant: Teekam @ Tikoo son of Karnoo by caste Kolhi through Mr. Ali Hassan Chandio, Advocate.
The State: through Mr. Shewak Rathore, Deputy Prosecutor General, Sindh.
None present for complainant.

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellant was tried by learned 2nd Additional Sessions Judge, Mirpurkhas in Sessions case No.238 of 2012 for offence under Section 302 (b) PPC. After regular trial, the learned trial Court vide its' judgment dated 17.02.2017, convicted the appellant 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 of Rs.300,000/- (Rupees three lac) to be paid to the legal heirs of deceased Alam Chand; in case of default thereof, appellant was further directed to suffer SI for one year more. Appellant was extended benefit of Section 382-B Cr.P.C. However, death sentence was subject to confirmation by this court as required u/s 374 Cr.P.C.

BRIEF FACTS

2. The brief facts of the prosecution case as mentioned in the impugned judgment dated 17.02.2017 are as under:-

“Complainant Ramchand s/o Alam Chand has lodged the FIR on 09.11.2012 at 1200 hours with P.S Jhudo stating therein that he has taken land of Zamindar Arbab Jam on lease. The land is situated in Deh 353 where he resides with his family and father Alam Chand. There is an old enmity between them and Teekam Kolhi due to murder of the brother of Teekam namely Laljee Kolhi. Today i.e. on 09.11.2012 from the leased land, his relative had gone to village Gul Hassan Leghari and he alongwith his brother Ramesh went to Mela. Due to death in their relatives, his father Alam Chand, uncle Dharmoon and Kirshan s/o Rano went to village of Gul Hassan, meanwhile, he received information through telephone that his father Alam Chand has been murdered by Teekam Kolhi by causing hatchet blows. On receipt of such information, he immediately emerged where Kirshan told him that they were in Janaza and were giving shoulder to the deceased turn by turn and when Alam Chand had finished his turn of giving shoulder, then from back Teekam @ Teeko s/o Karmoon Kolhi having hatchet came and inflicted straight hatchet blows upon Alam Chand which hit him on the back side of his neck. One hatchet blow hit on his back. On sustaining hatchet blows who became serious injured and fell down on the ground. They raised hakals but Teekam did not listen them. After sometime Alam Chand succumbed due to injuries and expired. They saw that Teekam ran away alongwith hatchet towards southern side. The complainant Ramchand hearing these facts left his uncle Kirshan and Dharmoon on the dead body of his father Alam Chand for shifting its dead body to Hyderabad, went to PS and lodged the FIR.”

It was recorded vide crime No.84/2012 for offence u/s 302 PPC at P.S Jhudo.

3. After usual investigation, challan was submitted against accused u/s 302 PPC. Trial Court framed charge against accused at Ex.2. Accused pleaded not guilty and claimed to be tried.

4. At trial, prosecution examined in all six (06) witnesses. Thereafter, prosecution side was closed.

5. During the questioning by the Court under Section 342 Cr.P.C at Ex.10, accused claimed false implication in this case and denied the prosecution allegations. Accused raised plea that complainant was

reluctant to lodge FIR against him but it was lodged under the influence of villagers. Accused did not lead evidence in defence and declined to give statement on Oath in disproof of the prosecution allegations.

6. Trial court after hearing the learned counsel for the parties and assessment of the evidence vide judgment dated 17.02.2017 convicted and sentenced the appellant to death as stated hereinabove. By this single judgment, we intend to decide the aforesaid appeal as well as confirmation reference, as the same require same appreciation of evidence.

7. We have heard Mr. Ali Hassan Chandio, learned counsel for appellant, Mr. Shewak Rathore, Deputy Prosecutor General Sindh and perused the evidence available on record.

SUBMISSIONS

8. Mr. Chandio, learned advocate for appellant after arguing the appeal at some length, submitted that he would not press the appeal on merits in case, the court is convinced to reduce the sentence of death to the imprisonment for life on the ground that there are several mitigating circumstances in this case; that prosecution has failed to prove the motive against appellant at trial. It is further submitted that imprisonment for life is alternate sentence u/s 302(b) PPC. In support of his submissions, learned counsel for the appellant has placed reliance upon the cases of **Mst. Nazia Anwar v. The State and others (2018 SCMR 911)** and **Ghulam Mohy-Ud-Din v. State (2014 SCMR 1034)**.

9. On the other hand, Mr. Shewak Rathore, learned Deputy Prosecutor General Sindh argued that prosecution has established its' case against the appellant beyond shadow of doubt. However, he conceded to the contention raised by learned defence counsel that motive as set up by prosecution in FIR could not be established at trial and

recorded no objection for reduction of sentence of death to imprisonment for life.

APPRECIATION OF EVIDENCE

10. In order to prove the un-natural death of deceased Alam Chand, the learned trial court had examined Dr. Muhammad Saraz, who deposed that on 09.11.2012, he received the dead body of Alam Chand for conducting his postmortem examination and report. Dr. started postmortem examination on 09.11.2012 at 03-15 p.m and finished at 03-45 p.m. Deceased had received three injuries which were caused by hard and blunt substance. Postmortem examination report was prepared and it was produced before the trial court. The Medical Officer from the external as well as internal examination of the deceased Alam Chand was of the opinion that the death was caused due to incised wounds, cutting arteries and Veins of neck, causing severe haemorrhage and shock. Unnatural death of deceased is not disputed by defence counsel. Hence, we have no hesitation to hold that deceased died his unnatural death as described by Doctor. In this regard, finding recorded by the trial court requires no interference by this court.

11. Learned advocate for appellant did not press the appeal on merits mainly on the ground that there are mitigating circumstances in the case. In FIR No.84/2012 lodged by complainant Ramchand it is clearly mentioned that there was old enmity between the complainant party with present appellant over the murder of brother of appellant namely Laljee Kolhi. In the evidence of complainant, he has stated that on the day of incident he had gone to attend Festival where he received information on telephone from his brother Ramesh that their father has been murdered in village Gul Hassan Leghari. He has denied the suggestion for deposing falsely against the accused.

PW-2 Dharma who is the eyewitness of incident deposed that on 09.11.2012, a woman expired in village Gul Hassan Leghari. They were

attending funeral ceremony when his brother Alam Chand (deceased) gave shoulder to the dead body in street in the meanwhile accused Teekam Kolhi inflicted hatchet blow on his shoulder and when he turned then accused again inflicted another hatchet blow on his back side of head and third blow on his back side. The accused tried to run away but was arrested from his house by police. He has also denied the suggestion that he was deposing falsely at the instance of landlord.

PW-3 Kirshan was also eye witness of the incident, he also narrated the same facts as deposed by PW-2 Dharma while stating that when Alam Chand gave shoulder to dead body, accused Teekam inflicted hatchet blows upon the deceased Alam Chand who fell down.

PW-6 SIP Abdul Shakoor had conducted investigation of the case and produced positive report hatchet and other articles before the trial court.

12. 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.

13. Record reflects that occurrence had taken place on 09.11.2012 at 1100 hours whereas matter was promptly reported to the police on same day at 1200 hours. Perusal of the crime report clearly reflected that there was specific part ascribed to the accused who caused three hatchet blows on the vital part of the deceased. Ocular account was furnished by eye witnesses namely Dharma and Kirshan. Statements of both the eye witnesses qua the date, time, mode and manner of the occurrence were identical and despite lengthy cross examination nothing detrimental to the prosecution case could be extracted from them. Occurrence had taken place in a street in the village in a broad day light when the deceased was attending the funeral ceremony alongwith co-villagers and the parties were known to each other since long. There was no chance of any

misidentification. "There is no proposition in law that relatives are to be treated as untruthfulness witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused." All the said factors were evaluated conjointly made it abundantly clear that prosecution had succeeded to establish its' case against the accused without any reasonable doubt.

14. As regards to the motive, complainant Ramchand in his FIR has stated that brother of the appellant namely Lalji was murdered before the incident and appellant committed murder of the father of complainant for taking such revenge but at trial complainant Ramchand and eye witnesses of the incident namely PW-2 Dharma and PW-3 Kirshan failed to mention / disclose that who had committed the murder of Lalji and what was the fate of the case of Lalji? It has also not come on record that who were the culprits of the murder of Lalji and on which date, time and place Lalji was murdered. No nexus of the appellant with the murder of Lalji has been brought on record. Investigation Officer had also failed to interrogate / investigate about the motive for commission of the murder of deceased Alam Chand. Unfortunately, trial court also failed to put up the question to the appellant regarding motive in his statement recorded u/s 342 Cr.P.C. Trial court had also failed to record any finding regarding motive in the impugned judgment. Learned advocate for appellant as well as D.P.G are in agreement that prosecution has succeeded to prove its' case against appellant but prosecution has failed to prove the motive against appellant at trial. Another circumstance has also come on record, according to doctor, deceased had received three injuries by means of hard and blunt substance but eye witnesses of the incident have deposed that appellant caused hatchet blows to the deceased. D.P.G could not explain the ambiguity. At the cost of repetition, it is mentioned that the prosecution has failed to prove motive at trial. Main eye witnesses of the incident namely Dharma (PW-2) and Kirshan (PW-3) have also failed to depose

about the motive for commission of offence. For the sake of convenience, evidence of both these eye witnesses is reproduced hereunder:-

Evidence of eye witness Dharma.

“On 09.11.2012 death of one lady was happened in Village Gul Hassan Laghari, Ahoari. We were present in the funeral and were giving shoulders to the deceased when my brother Alamchand gave shoulder to the dead body of lady meanwhile accused Tekam Kolhi inflicted straight hatchet blow on the shoulder when he turned then he again inflicted hatchet on the back side of his head and third one on the back side. The accused tried to escape away but was caught hold from his house by the police. The police was called by the zamindar of the village. Zamindar arranged the Datsun and we shifted the dead body of Alamchand at Jhudo Police Station. The police only collected the cards of us and after three days it was returned back. The accused Tekam present in Court is same.”

Evidence of eye witness Kirshan.

“The incident took place on 11.09.2012 in village Gul Hassan Leghari. On the date of alleged incident there was funeral of lady. We were present in the funeral in relation regarding the death of lady. We went there and were brining the Janaza and when we covered an area of about one acre and saw that Tekam was present having hatchet in his hand. When Alam Chand gave shoulder to the Janaza the accused Tekam inflicted hatchet blow upon the deceased Alam Chand who fell down. Thereafter he tried to escape away and went to his home. Gul Hassan Leghari told us that there is no need to enter in the house for arrest of accused. Police came there and brought the accused from his house and we came at the place of incident. Datsun was also arranged by Gul Hassan in which we brought the deceased at R.H.C. Jhudo where the postmortem of the dead body was conducted. At about 4-00 or 5-00 p.m the dead body was handed over to us and then we brought the dead body to village. Thereafter, I and Ramchand Kolhi went to police station where our signatures were obtained. We then went for arranging the funeral of deceased Alam Chand. On the next day he was buried. At the time of alleged incident the deceased was wearing white colour clothes, white banyan having holes and string of white colour. I produce the memo of site inspection at Ex.5/A, mashirnama of clothes of the deceased at Ex.5/B, mashirnama of the search of the house of the accused at Ex.5/C and mashirnama of recovery of hatchet at Ex.5/D. These mashirnama only bears my LTI. The accused Tekam present in court is same.”

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), 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 recent judgment passed in Cr. M. A. No.68-K of 2021 in Criminal Petition No.182-K of 2021 vide order dated 12.01.2022, the Honourable Supreme Court has held that lack of motive is a recognized ground which attracts the lesser sentence of imprisonment for life. Relevant portion thereof is reproduced hereunder:-

“Lack of motive is a recognized ground which attracts the lesser sentence of imprisonment for life, reference may be made to the case of Amjad Shah v. The State (PLD 2017 Supreme Court 152). In the facts and circumstances of the case, the view taken by the learned Judges was correct and the reason given to reduce sentence in the impugned judgment was not contrary to the precedents of this Court. Therefore, we are not inclined to grant leave to appeal which is accordingly declined, and consequently this petition is dismissed.”

15. The next issue is whether there is sufficient mitigation to justify the reduction in sentence from death to that of life imprisonment which is the alternate sentence under section 302(b) P.P.C the potential resort to

which has been made clear by the Supreme Court in the case of **Ghulam Mohy-Ud-Din v. State (2014 SCMR 1034)**.

16. For the above stated reasons, while respectfully relying upon the above authorities, we have come to the conclusion that prosecution has succeeded to prove its' case against the appellant beyond reasonable doubt but the motive for commission of offence could not be proved at trial and the immediate motive remained shrouded in mystery. The law is settled by now that if the prosecution asserts a motive but fails to prove the same then such failure may react against a sentence of death passed against convict on the charge of murder and reference in this regard can be made to the case of Mst. Nazia Anwar (supra). Moreover, life imprisonment is alternate sentence under section 302(b) PPC, the potential resort to which has been made clear by Honourable Supreme Court in the case of Ghulam Mohy-Ud-Din v. State (2014 SCMR 1034). These are the mitigating circumstances maintaining in the case. Maintaining the death sentence would be unwarranted in peculiar circumstances of this case and imprisonment for life would be an appropriate imprisonment.

17. Thus, on the aforesaid conclusion arrived at, we are in conformity with well merited judgment of the trial court with regard to conviction.

18. For the above stated reasons, instant Criminal Jail Appeal No.D-14 of 2017 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.3,00,000/- (Rupees three lac) 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. 05 of 2017 made by trial Court for

confirmation of death sentence is answered in **NEGATIVE** and death sentence is **NOT CONFIRMED**.

JUDGE

JUDGE

Tufail