

THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA.

Present :

**Mr. Justice Naimatullah Phulpoto.
Mr. Justice Khadim Hussain Tunio.**

CrI. Jail Appeal No.D-49 of 2019
Alongwith CrI. Conf: Case No.D-22 of 2019
CrI. Jail Appeal No.S-36 of 2021.

Appellants Bakht Ali, Rustam Ali, Himat Ali @ Dhole, Raza Muhammad and Saleh through Mr. Imtiaz Ali Panhwar, advocate.

Respondent :The State through Mr. Ali Anwar Kandhro, Additional Prosecutor General.

Date of hearing: 21.09.2022.

J U D G M E N T .

Naimatullah Phulpoto, J- Appellants Bakht Ali, Rustam Ali, Himat Ali @ Dhole and Raza Muhammad all sons of Muhammad Saleh, all by caste Depar, were indicted by the learned Additional Sessions Judge-I (MCTC), Dadu, to face trial for offence under sections 302, 324, 337-H(ii), 114, 504, 147, 148, 149, PPC. After regular trial, they were found guilty and vide judgment dated.21.08.2019, appellant Bakht Ali was convicted under section 302(b), PPC and sentenced to death as tazir. Remaining accused were convicted under section 302(b), PPC and sentenced to imprisonment for life as tazir. All the appellants were directed to pay compensation in terms of section 544-A, Cr.P.C of Rs.400,000/- (Rupees four lac) each to the legal heirs of the deceased. In default thereof, they were ordered to suffer simple imprisonment for six months. Trial Court made reference to this Court for confirmation of death sentence as required under section 374, Cr.P.C. While appellant Saleh son of Karam Khan Depar was arrested during pendency of the

appeal, he was subsequently tried through judgment dated.15.06.2021, he was convicted u/s 302(b), Cr.P.C and sentenced to imprisonment for life. Appellant was directed to pay compensation of Rs.100,000 to the legal heirs of the deceased in terms of Section 544-A, Cr.P.C. Appellants preferred Crl. Jail Appeal No.D-49 of 2019 and Crl. Jail Appeal No.S-36 of 2021.

2. The prosecution story as given in the judgment of trial Court reads as under :

“Brief facts leading to the filing of the appeals are that complainant Mst. Rubina Leghari, lodged FIR at Police Station K.N. Shah on 12.10.2013, alleging therein that his brother Abdul Lateef entered in to relationship with Bakht Ali Depar, by exchange marriages. About 01 or 01 ½ year back her niece Fozia, was married with Bakht Ali Depar and the sister of Bakht Ali, namely, Sonia was married with her brother Abdul Lateef in exchange. She further alleged that about one month prior to the incident, Bakht Ali ousted her niece from his house and then she started living with them in their house, while accused had taken away his sister from their house and filed suit for dissolution of marriage, his brother Abdul Lateef also got filed a suit for dissolution of marriage of his daughter Mst. Fozia, which annoyed the accused who used to say that they would kill them. On 10.10.2013, complainant, her brother Abdul Raheem, sister-in-law Zaib-u-Nisa (wife of Abdul Lateef) aged about 45/46 years and her niece Mst. Fozia aged about 20/21 years and Saima, were present in the house, at that time main gate of the house was opened, it was 7:00 p.m, where accused Saleh with danda, Bakht Ali, Rustam Ali, Himat @ Dhol and Raza Muhammad duly armed with pistols came. Accused Saleh Depar used abusive language and asked the complainant that she filed suit for dissolution of marriage of his daughter-in-law Mst. Fozia, hence they would be seen. Accused Saleh instigated accused Bakht and Himat to kill them, on his instigation, accused Bakht Ali made straight fires from his pistol with intention to commit murder of her brother’s wife Mst. Zaib-u-Nisa, which hit on her chest and legs and she fell down on ground while raising cries. Accused Himat @ Dhole made straight fires from his pistol on her niece Mst. Fozia with intention to commit murder, which hit on her

legs and she also fell down on the ground while raising cries. Then they beseeched the accused in the name of Almighty Allah and thereafter all the accused persons went away while making aerial firing. Then they shifted the injured and obtained letter for medical treatment from Police Station and went to Taluka Hospital K.N.Shah, wherefrom they were referred to Civil Hospital Dadu and when they were on the way, her sister-in-law Mst.Zaib-u-Nisa succumbed to the injuries. Such information was conveyed to police and brought the injured as well as dead body at Civil Hospital Dadu, where K.N. Shah Police came, after conducting necessary proceedings and postmortem, the dead body was handed over to the complainant. After funeral and burial, complainant lodged this case against accused.”

3. After usual investigation, final report was submitted against the appellants under the above referred sections. Trial Court framed charge against the appellants. Appellants pleaded not guilty and claimed to be tried.

4. At the trial, prosecution examined as many as seven witnesses, relevant record was produced. Thereafter, prosecution side was closed.

5. Trial Court recorded statements of the accused under section 342, Cr.P.C in which the appellants denied the prosecution allegations and claimed false implication in this case. Appellants did not lead any evidence in defence and declined to give statement on oath in disproof of the charge. Appellant Saleh Depar filed CrI. Jail Appeal No.S-36 of 2021, arising out of the same incident. Both appeals were ordered to be heard together to avoid conflict of the judgments.

6. Learned advocate for the appellants at the very outset argued that according to prosecution case motive for commission of offence was that appellant Saleh was annoyed with the complainant party as to why his daughter-in-law Mst. Fozia has filed suit for Dissolution of marriage. It is submitted that incriminating piece of

evidence regarding motive has not been put to the accused at the time of recording their statements u/s 342, Cr.P.C. For the sake of convenience, statement of main accused/appellant Bakht Ali scanned is reproduced as under:-

“Q.No.1. You have heard the prosecution evidence, wherein it has come on record against you through the evidence of complainant Mst. Rubina (Ex.29), eye-witnesses Mst. Fozia (Ex.30), that on 10.10.2013, at 0700 hours, at the house of complainant situated in Rehmatullah Colony, Taluka K.N. Shah, District Dadu, where you armed with Pistol along with absconder accused Mohammad Saleh armed with Danda, co-accused Rustam, Himat alias Dholo and Raza Mohammad, all sons of Mohammad Saleh, by caste Depar, duly armed with Pistols, in prosecution of your common object arrived at scene, formed an unlawful assembly, used force and violence against complainant party and made rioting being armed with deadly weapons in order to commit qatl-i-amd of deceased Zaib-u-Nissa and at the abetment of absconder accused Mohammad Saleh, you made fires from pistol upon deceased Zaib-u-Nissa, which hit on her chest and legs and succumbed to injuries on her way to hospital, whereas, co-accused alias Dholo made fire from pistol upon injured Mst. Fozia, which hit on her right leg, then you all went away by making aerial firing and you were well identified by the eye-witnesses in Court. What have you to say?”

Ans. It is false.

Q.No.2. It has also come against you through the evidence of WMO Dr. Zaib-ul-Nisa Panhwar (Ex.45), who conducted postmortem of deceased Zaib-u-Nisa W/o Abdul Latif Leghari and in external examination found injuries as (1) One perforated firearm injury measuring 1.5 cm in diameter on right hypo chondrum with inverted margins blackening by burning present (entrance). (2) One lacerated firearm injury 1.5 cm in diameter on her back just medial to right scapular region (wound of exit). (3) One lacerated firearm injury measuring 2.5 cm x 1 cm on medial aspect of lower 1/3 of right leg with undisplaced fracture of right tibia. (entrance). (4) One lacerated firearm wound measuring 5 cm x 2 cm on antero medial surface of lower 1/3 of right lower leg (wound of exit). (5) One lacerated firearm wound 1.5 cm in diameter on lateral aspect of right knee blackening and burning present (wound of entrance). (6) One lacerated firearm wound 1 cm in diameter on anterior aspect of lower 1/3 of right thigh (wound of exit) and the Doctor given the opinion that death occurred due to firearm resulted damage to the vital organs, hemorrhage and shock. The firearm injuries are antermortem and injury No.1 is sufficient to cause death in ordinary course of life. She identified and confirmed the postmortem report in Court. What have you to say?”

Ans. It is false.

Q.No.3. It has also come against you through the evidence of WMO Dr. Zaib-ul-Nisa Panhwar (Ex.45), who conducted medical examination and treatment of injured Mst. Fozia and found injuries as (1) One lacerated firearm wound measuring 2 cm in diameter on lateral aspect of upper 1/3 of right thigh with inverted margins (Blackening and charring present wound of entrance). (2) One lacerated firearm wound

measuring 3 cm x 2 cm into tissue deep on medial aspect of upper 1/2 of right thigh with averted margins (wound of exit). She identified and confirmed the final MLC of injured Mst.Fozia in Court. What have you to say?

Ans. It is false and there is no provisional medical certificate on record. As per MLO evidence, she has not examined the injured but the injured was referred to Casualty.

Q.No.4. It has also come against you through the evidence of mashir Allah Dino @ Qamaruddin (Ex.41) and I.O/ASI Imtiaz Ali (Ex.39), that ASI Imtiaz Ali inspected place of incident in presence of mashir and co-mashir Abdul Karim, where secured blood stained of deceased and injured, Four empty shells of Pistols and prepared such mashirnama and the dead body of deceased was also seen by ASI before above mashirs and last worn clothes of deceased were also seized before them and Danishtnama was also prepared and the relevant documents/mashirnamas were identified and confirmed by the mashir Allah Dino @ Qamaruddin as well as ASI Imtiaz Ali in their evidence in Court and also identified the case property, which was also shown to you in Court. What have you to say?

Ans. Mashirs and witnesses are interested. Case property has been foisted upon me.

Q.No.5. It has come on record that blood stained earth & last worn clothes of deceased were sent to chemical examiner and such report is on record produced at Ex.39/M, which confirms that the above articles, stained with human blood and report has confirmed by ASI in the Court. What have you to say?

Ans. There is delay in sending the above articles to chemical examiner and the person under whom the property was in custody has not been produced by prosecution as a witness and the report was not produced by concerned I.O.

Q.No.6. It has also come against you through the evidence of Tapedar Adam Khan Jamali (Ex.43), that on 11.12.2013 he prepared the sketch of place of incident showed to him by complainant and has confirmed the relevant sketch before the Court. What have you to say?

Ans. Tapedar was not belong to the same deh. The sketch was not signed and stamped.

Q.No.7. Why the P.Ws have deposed against you?

Ans. Because they are interested.

Q.No.8. Do you want to examine yourself on oath?

Ans. No Sir.

Q.No.9. Do you want to lead any defence?

Ans. No Sir.

Q.No.10. Do you want to say anything else?

Ans. I was falsely implicated in this case due to matrimonial dispute with complainant party and husband of the deceased namely Abdul Lateef has injured Mst. Fozia and killed his wife due to Honour because her character was not good. I am innocent."

7. Learned Addl. P. G concedes that a incriminating piece of evidence regarding motive has not been put to the accused persons at the time of recording their statements under section 342, Cr.P.C for explanation. Impugned judgment shows that trial Court has relied upon this piece of evidence, though it was not put to appellant/accused in his statement for his reply. Now, it is well recognized that all the incriminating pieces of evidence are to be put to the accused at the time of recording their statements under section 342, Cr.P.C, as held in unreported order dated.04.03.2021, passed by the Hon'ble Supreme Court of Pakistan in the case of Jan Muhammad v. The State (Crl. Appeal No.77 of 2020), which is reproduced as under :

"5. It has been observed by us with concern that none of the aforementioned pieces of evidence has been put to the appellant while examining him u/s 342, Code of Criminal Procedure. It has been laid down many a time by this Court that a piece of evidence produced by the prosecution against an accused if not put to accused while examining him u/s 342, Code of Criminal Procedure cannot be used against him. The rationale behind it is that the accused must know and then respond to the evidence brought against him by the prosecution. He (accused) must have firsthand knowledge of all the aspects of the prosecution case being brought against him. It appears that even the learned Judge in chambers of High Court while reappraising evidence available on record did not consider this aspect of the matter. Keeping in view the peculiar circumstances of the case, learned Counsel for the appellant and learned Additional Prosecutor General, Sindh assisted by widow of deceased are in agreement that the matter needs to be remanded to the learned trial Court

for re-recording statement of appellant u/s 342, Code of Criminal Procedure while putting all pieces of prosecution evidence produced during trial to him, giving him an opportunity to know and respond to the same.”

8. For the stated reasons, we have come to the conclusion that this is a fit case for remanding of the case to the trial Court for re-recording the statements of all accused under section 342, Cr.P.C afresh by putting all the incriminating pieces of evidence to the accused/appellants including the motive which is crucial in this case. Thereafter, the trial Court shall provide a fair opportunity to the appellants as well as prosecution and after hearing the arguments afresh judgment shall be passed within two months. For the above stated circumstances, Crl. Jail Appeal No.D-49 of 2019 and Crl. Jail Appeal No.S-36 of 2021 are partly allowed. Convictions and sentences recorded by the trial Court vide judgments dated.21.08.2019 and 15.06.2021, are set aside. The appellants shall be deemed as Under Trail Prisoner during the trial. So far confirmation reference made by the trial Court for appellant Bakht Ali son of Muhammad Saleh Debar is concerned, in the view of above, it is answered in negative. Both appeals as well as reference made by the trial Court are accordingly disposed of in the above terms.

Judge

Judge

M.Y.Panhwar/**