

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Cr. Jail Appeal No.D-124 of 2016
Confirmation Case No. 23 of 2016

Present:

MR. JUSTICE NAIMATULLAH PHULPOTO
MRS. JUSTICE RASHIDA ASAD

Date of hearing: 19.08.2020

Date of Judgment: 09.09.2020

Appellant : Chandar alias Dodo
Through Mr. Mumtaz Alam Laghari, Advocate

Respondent: The State
Through Mr. Shahzado Saleem Nahiyoon
D.P.G.
-.-.-.-.

J U D G M E N T

Rashida Asad J.— Appellant Chandar alias Dodo, after a regular trial, vide judgment dated 17.11.2016 was convicted by the trial Court under section 302(b), P.P.C. and sentenced to death however subject to the confirmation by this Court as required under section 374, Cr.P.C. He was also ordered to pay compensation of Rs.200,000/- each as provided under section 544-A Cr.P.C, to the legal heirs of deceased Ghulam Fareed and Ghulam Murtaza and in case of default, he was ordered to suffer six months' S.I. However, co-accused Dhanji was acquitted of the charge.

2. Prosecution case against the appellant, as divulged from the evidence of complainant Allah Yar alias Bago (P.W-01) is that on 06.07.2011, in the early morning, his son Ghulam Fareed and his wife's nephew along with P.W Shabbir went towards jungle for grazing their cattle. They did not return for the whole night, the complainant and others remained busy in searching them. On the next day, at 10:00 a.m. complainant along with Mir Muhammad and Imam Bux reached near Jeevan More, where some scattered houses were situated, his cousin Shabbir, on hearing noise, came out from one of the house and informed them that yesterday (06.07.2011) when they were grazing their cattle,

accused Chandar came there and when he (P.W Shabbir) went to fetch water from the pond, on hearing cries of Ghulam Fareed and Ghulam Murtaza, he rushed back and saw that accused Chandar was causing hatchet blows to Ghulam Fareed on his neck and when Ghulam Murtaza tried to rescue another accused, with muffled face, apprehended Ghulam Murtaza and accused Chandar also caused hatchet blows to Ghulam Murtaza on his neck and chest. Thereafter, they left the scene of offence, threatening him that he would be killed if disclosed the incident to anyone. He further disclosed that due to fear he was unable to move from the place of occurrence. Complainant party proceeded towards pointed place, saw the dead bodies of both deceased boys, when Ayoob Gurgez came and disclosed that he saw accused Chandar armed with hatchet and a muffled faced person. Complainant lodged FIR at police station Nabisar Road on 07-07-2011 bearing Crime No. 37/2011 for offence under sections 302/34 P.P.C.

3. After usual investigation challan was submitted against the accused under section 302, P.P.C. Accused pleaded not guilty and claimed trial.

4. In order to prove its case, prosecution examined 07 witnesses before trial court and closed its side.

5. Trial court recorded statements of accused under section 342, Cr.P.C. in which they claimed false implication and denied the prosecution allegations. However, neither examined themselves on oath in order to disprove the prosecution allegations nor produced any witness in defence.

6. Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record awarded death sentence to the appellant and acquitted the co-accused as stated above and made confirmation reference to this Court. Hence, this Criminal Jail Appeal. Through this single judgment, we intend to dispose of both the Criminal Jail Appeal filed by the appellant against his conviction and sentence as well as Confirmation Reference made by the learned trial Court.

7. We have carefully heard learned counsel for the parties and scanned the evidence available on record.

8. The evidence of the prosecution witnesses finds an elaborate mention in the judgment of the trial court hence the same is not reproduced hereunder in order to avoid duplication.

9. Mr. Mumtaz Alam Laghari advocate for the appellant after arguing the case at some length does not press this appeal on merits but submits that there are mitigating circumstances in this case for converting death sentence to imprisonment for life. He contended that the motive alleged by the prosecution is very weak; rather the complainant in his FIR and evidence recorded before the trial Court, was not able to substantiate his claim through any independent piece of evidence. Learned advocate for appellant argued that a single mitigating circumstance is sufficient to convert death sentence to imprisonment for life and prayed for reduction of death sentence to imprisonment for life.

10. Mr. Shahzado Salim Nahyoon, D.P.G for the State conceded that prosecution could not prove motive at trial and recorded no objection for converting the death sentence to imprisonment for life.

11. After hearing the learned counsel for the parties, we have carefully perused the entire evidence available on record.

12. The factum of unnatural death of deceased Ghulam Fareed and Ghulam Murtaza is not disputed by the defence. P.W-04 Dr. Om Parkash has deposed that on 07.07.2011, he examined the dead bodies of deceased Ghulam Fareed and Ghulam Murtaza. Post-mortem examinations were conducted. Senior Medical Officer from external as well as internal examination of bodies of deceased persons was of the opinion that cause of death was due to injuries caused by sharp cutting substance e.g hatchet, knife. Sole eye-witness of the incident PW-02 Shabbir Ahmed, deposed that he along with deceased went to jungle for grazing their cattle and at that time accused Chandar also came there with his cattle for grazing. He went to fetch water from a nearby pond where he heard cries and rushed to the place of incident and saw that accused Chandar was causing hatchet blows to Ghulam Fareed on his neck and chest while one unknown person with muffled face was apprehending him and when Ghulam Murtaza tried to escape, the unknown person also apprehended him and accused Chandar also caused hatchet blows to Ghulam Murtaza on his neck and chest. Both the deceased fell down on the ground. Thereafter, accused came to him and

threatened him not to disclose such incident to anyone otherwise he would also be killed. He remained there for whole night, due to fear and met the complainant and others when they reached there and disclosed such incident to them. We have several reasons to believe his evidence. Other PWs have also supported the case of prosecution and implicated the accused in the commission of offence. PWs were cross-examined at length but nothing favourable to the accused came on record. Ocular evidence was corroborated by medical evidence. We have come to the conclusion that prosecution proved its' case against the accused beyond any shadow of doubt. Trial court vide judgment dated 09.08.2010 rightly convicted the appellant.

13. As far as the quantum of sentence is concerned, we have perused the evidence and have found, in that context, that motive set up by the prosecution was quite weak and could not be proved. According to the complainant four days prior to the incident he along with his family was working in the field where accused Chandar came and put his evil eye on his wife and when complainant reprimanded, there was hot exchange of words between them and accused threatened him that he would take revenge of his insult. However, no independent piece of evidence has been produced by the prosecution during trial to substantiate this claim. It is further observed that even no independent evidence available on the record that the grudge against the complainant still continued in the mind of the accused till incident occurred. Prosecution failed to examine wife of complainant. Investigation officer had also failed to interrogate / investigate accused about motive as alleged by prosecution. 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 a capital charge and a reference in this respect may be made to the cases of **Ali Bux and others v. The State (2018 SCMR 354)**, **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).

14. For the above stated reasons, we have decided to exercise caution in the matter of the appellant's sentence of death. As a result of discussion made above, this appeal is dismissed to the extent of appellant's conviction for the offence under section 302(b), P.P.C. but the same is partly allowed to the extent of sentence of death passed against the appellant which sentence is reduced to imprisonment for life on two counts. The order passed by the trial court regarding payment of compensation by the appellant to the legal heirs of both deceased as well as the order in respect of imprisonment in default of payment of compensation is maintained. The benefit of section 382-B, Cr.P.C. shall be extended to the appellant. Reference made by trial court for confirmation of death sentence is answered in negative.

This appeal is disposed of in the above terms.

JUDGE

JUDGE

Ali Haider