

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT AT
HYDERABAD**

Cr. Appeal No.D-12 of 2016
(Confirmation case No.01 of 2016.

Cr. Jail Appeal No.D-14 of 2016
(Confirmation case No.01 of 2016)

Cr. Jail Appeal No.D-74 of 2016

Present:
Mr. JUSTICE NAIMATULLAH PHULPOTO
JUSTICE Mrs. RASHIDA ASAD

Date of hearing: 26.08.2020

Date of decision: 29.09.2020

Appellants: Poonjo and Khamiso through Mr. Bhagwandas Bheel, Advocate.

Respondent: The State through Mr. Shahzado Saleem Nahiyoon, D.P.G.

J U D G M E N T

Rashida Asad, J.- Poonjo and Khamiso, appellants have impugned the judgment dated 25.02.2016, passed by learned Sessions Judge, Umerkot in Sessions Case No.57 of 2015 arising out of Crime No. 14 of 2015, registered at PS Taluka Umerkot for offences under sections 302, 114 and 34, P.P.C., both the appellants were convicted under section 302(b) P.P.C., wherein appellant Poonjo was sentenced to death subject to the confirmation by this Court, whereas appellant Khamiso was sentenced to life imprisonment. They were directed to pay fine of Rs.100000/- (Rupees one lac) each to the legal heirs of deceased, in case of default thereof, to suffer R.I. for six months more, however, appellant Khamiso was extended benefit of section 382-B, Cr.P.C.

2. Brief facts of the prosecution case relevant for the disposal of the present appeals are that on 14.04.2015, complainant Arjan Bheel lodged F.I.R. stating therein he and his brother Taro used to reside in one hedge with their inmates, their sister Chandi was married with accused Poonjo s/o Tulsho Bheel, due to matrimonial dispute, she got divorce through

Court which annoyed accused Poonjo and his brother Khamiso. On 13.04.2015, they after taking dinner went to sleep and at 0145 hours, on hearing of cries of his brother Taro, complainant woke up, in the meantime neighbourers Manthar and Sakhi also came and they saw in the light of bulb accused Khamiso and Poonjo having hatchets standing near the cot of Taro. On the instigation of accused Khamiso, accused Poonjo inflicted hatchet blows to Taro on his cheek, face and left ear, thereafter accused went away. Taro succumbed to his injuries, thereafter, complainant after leaving Manthar and Sakhi over the dead body appeared at PS and lodged F.I.R.

3. After usual investigation, challan was submitted against both the accused before the concerned competent Court of law. Trial Court framed the charge against them at Ex.3, to which they pleaded not guilty and claimed to be tried.

4. At the trial, prosecution examined PW-1 complainant Arjan at EX.4, he produced F.I.R. at Ex.4/A, PW-2 Sakhi at Ex.5, PW-3 Manthar at Ex.6, PW-4 Dr. Muhammad Yakoob at Ex.7, who produced police letter, post mortem report at Ex.7/A & 7/B, PW-5 Tapedar Sardar Singh at Ex.8, he produced letter of Mukhtiarkar and sketch of place of incident at Ex.8/A and 8/B respectively, PW-6 PC Qaimuddin at Ex.9, who produced receipt of dead body and handing over dead body to complainant at Ex.9/A and 9/B respectively, PW-7 Mashir Ahmed at Ex.10, who produced inquest report, mashirnama of place of incident, mashirnama of clothes of deceased, arrest of accused Poonjo, recovery of hatchet at Ex.10/A to 10/E, PW-8 Ali Gohar at Ex.11, who produced daily diary entries and chemical report at Ex.11/A to 11/D respectively. Thereafter prosecution closed the side at Ex.12.

5. Statements of both the accused u/s 342 Cr.P.C. were recorded at Ex.13 and 14 respectively, in which they denied the allegations of prosecution and professed their innocence. However, accused also examined on oath u/s 340(2), Cr.P.C. and they examined D.Ws Ajeem and Gunesh at Ex.17 & 18. Accused Poonjo produced Sanad Islam of one Chandi and certified copies of Cr. Misc. application Taro vs. Muhammad Moosa and others and statement of Chandi recorded in said criminal Misc. application of said Chandi, in which she stated that she

has not accepted Islam with her free will. He also produced certified copy of police report. He also produced compared copy of an application written by one Marvi Sheikh, compared copy of Sanad and newspaper clippings. Lastly, they stated that someone else has committed murder as the complainant and deceased have enmity with Muhammad Moosa.

6. Learned trial court vide its judgment dated 25.02.2016, found both the appellants guilty, hence convicted and sentenced them as mentioned above and also made reference to this court for confirmation of death sentence awarded to accused Poonjo. Hence, these appeals are preferred against the impugned judgment. By this single judgment, we intend to decide above criminal appeals as well as confirmation reference made by the trial Court as the same are bearing a common thread.

7. Learned counsel for the appellants after arguing the appeals at some length did not press the appeal to the extent of appellant Poonjo and prayed for reduction of sentence on the ground that the prosecution has failed to establish motive against the appellant Poonjo, therefore, it is mitigating circumstance warranting reduction of the sentence of death passed against the appellant to imprisonment for life. However, while arguing the case of appellant Khamiso, he submitted that the prosecution has failed to prove the case against the appellant Khamiso as according to mashirnama of inspection of the place of incident, it is clearly mentioned that Investigating Officer only noted foot prints of one person therefore, his presence at the scene of occurrence was doubtful. Even otherwise, only general allegation of instigation has been leveled against the appellant and no overt act has been attributed to him, even no recovery has been effected from the possession of the appellant Khamiso by the police. He therefore, prayed that appellant Khamiso may be acquitted from the charges.

8. Conversely, learned Deputy Prosecutor General has argued that the prosecution has proved its' case against appellant Poonjo however, he conceded that prosecution has failed to establish the motive and therefore, he has not raised objection in case the sentence of death awarded to appellant Poonjo is reduced to life imprisonment.

As regards to the case of appellant Khamiso, he has failed to controvert the submissions made by the learned counsel for appellant Khamiso and has frankly conceded that in view of submissions of learned counsel for appellant Khamiso prosecution has failed to prove its' case against appellant Khamiso.

9. We have heard the learned defence counsel and learned Deputy Prosecutor General for the State and have gone through the material available on record with their able assistance.

10. In order to prove the unnatural death of deceased Taro, prosecution has examined Dr. Muhammad Yaqoob, Senior Medical Officer, DHQ Hospital, Umerkot, who deposed that on 14.04.2015, he was posted as Senior Medical Officer at District Headquarter Hospital Umerkot. On the said date, Umerkot police referred dead body of deceased Taro son of Dahyo Bheel for postmortem. He started postmortem at 10:30 a.m. and finished at 12:30 noon. On external examination, he found the following injuries:

1. One incised wound measuring 8 c.m x 3 c.m extending from left angle of mouth cutting left mandible reaching upto sternomastiod muscle cutting major vessels.
2. One incised vertical wound measuring 14 c.m x 3 c.m x rupturing brain matter on left temporoparietal area.
3. One incised obliquely transverse wound measuring 10 c.m x 3 c.m x bone fractured/ cut extending from left maxillary bone connecting with injury No.2 upto left temporal bone, brain matter visible.

From internal examination of dead body, he found head injuries mentioned in column No.9, genitals organs were healthy intact not circumcised while rest of organs were healthy.

From external as well as internal postmortem examination of dead body of deceased, he was of the opinion that the cause of death was cardio respiratory failure due to head injuries, head injury No. 2 was sufficient enough to cause death.

11. It is clear from medical evidence that deceased Taro Bheel died his unnatural death. No question was raised regarding the efficiency

and integrity of the Doctor, therefore, we are of the view that the deceased died his unnatural death as described by the Medical Officer.

12. The ocular account was furnished by complainant Arjan, P.Ws Sakhi and Manthar. P.W-01 Complainant Arjan deposed that deceased Taro was his brother who was residing with him and P.Ws Sakhi and Manthar were his neighbors. Marriage of his sister Chandi was solemnized with Poonjo 4/5 years back and after four years of marriage, her sister obtained decree of dissolution of marriage on the ground of maltreatment and non-maintenance. He further deposed that after such dissolution, accused Poonjo and his brother Khamiso were antagonized and used to issue threats of dire consequences. On 13.04.2015, complainant along with his brother was sleeping in courtyard, in their common hedge, when at about 1:45 a.m., he woke up on hearing the voice of Taro and saw in the light of blub accused Khamiso and Poonjo, standing near the Cot of Taro, duly armed with hatchets. On the instigation of accused Khamiso, accused Poonjo inflicted hatchet blows to Taro on his left side neck, head, cheek and mouth. On the cries their neighbors P.Ws Manthar and Sakhi also reached at the spot and witnessed the incident. On their hakals accused ran away from the place of incident. Taro died on the spot. Thereafter, complainant went to the police station and lodged the FIR. P.Ws Sakhi and Manthar have also given the same episode of incident in one voice by deposing that in their presence accused Poonjo committed murder of deceased Taro, who succumbed to his injuries at the spot. The ocular evidence furnished by the above three prosecution witnesses has not been shaken with regard to causing hatchet blows by the appellant Poonjo, during the lengthy cross-examination. The ocular evidence has further been corroborated by the medical evidence produced by PW-4 Dr. Muhammad Yaqoob, who opined that the death occurred due to cardio respiratory failure on account of head injuries caused by sharp cutting object. 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. The hatchet used in the commission of the crime was recovered by the police on the pointation of appellant Poonjo. The bloodstained earth, clothes and hatchet were sent to the chemical examiner and according to the

report of the Chemical Examiner the same were stained with human blood. In the instant case, by overwhelming evidence of truthful witnesses coupled with corroborative evidence as mentioned hereinabove, the prosecution has successfully proved its case beyond any reasonable doubt against the appellant Poonjo.

13. Case of appellant Khamiso is distinguishable from the case of main accused Poonjo. We have scanned the material available on record and observed that in the mashirnama of inspection of the place of incident, the I.O has noticed the foot prints of only one person which fact is not denied by the mashir/P.W Ahmed Bheel during his cross-examination. The prosecution alleged presence of the appellant Khamiso at the time of the incident and only general allegation of instigating the appellant Poonjo for committing murder of deceased Taro has been attributed to him. Though it is a case of the prosecution that allegedly the appellant Khamiso was armed with hatchet but no overt act has been attributed to him and even it is not understandable what prevented him from causing hatchet blow to deceased Taro. Prosecution could not bring on record evidence that appellant Khamiso had shared common intention with main accused. In the case reported as **Hassan v. The State (1969 SCMR 454)** Honourable Supreme Court has held that mere presence of accused was not sufficient for conviction, proof of some overt act on the part of each accused in furtherance of common intention is necessary. Relevant portion of the said judgment is reproduced as under:-

"It appears from the observations of the High Court that the High Court was still thinking of the charge of rioting and that mere presence or being a member of the unlawful assembly was sufficient to warrant a conviction. The Sessions Judge had applied section 34 to the case and in order to support a conviction under that section mere presence would not be sufficient, but there must be proof of some overt act on the part of each accused done in furtherance of the common intention. Here the evidence is clear that the appellant was empty handed and he did not assault Suleman as was stated by P. W 3. Neither of the Courts has considered the case of this appellant separately or the evidence against him. He went to the place empty handed and there is no evidence that he assaulted anybody or that in the circumstances he could have intended to cause a grievous hurt to, anybody. Judged by the standard applied by both the High Court and the Sessions Judge to the case of the three acquitted persons, the case of the appellant stands on a much more favourable ground and we see

no justification for upholding his conviction. The appeal is, therefore, allowed and the conviction and sentence on the appellant are set aside and he is acquitted."

14. We have already held that no overt act had been attributed to appellant Khamiso. Prosecution has failed to establish its' case against him. By way of abundant caution, appellant Khamiso is acquitted of the charges. He shall be released forthwith, if not required in any other case.

15. As far as quantum of sentence in view of the submission of learned counsel for the appellant Poonjo that prosecution has failed to prove motive of the incident by adducing any independent piece of evidence during trial is concerned, we observe that motive in a criminal case has been held to be corroboratory evidence however, in some rare cases the same assumes considerable importance like the present one. In the present case Mst. Chandi, sister of complainant and deceased, who had obtained decree of dissolution of marriage against appellant Poonjo has not been examined by the prosecution. No reasonable much less plausible cause, has been given for withholding the lady from the Court of Law when her testimony was very important, having a decisive role to play because it was on account of such dissolution of marriage, according to the prosecution version, that the deceased was done to death, therefore, it can be safely held that motive set up by the prosecution was quite vague and unspecific and admittedly no independent evidence worth its name had been brought on the record in support of the asserted motive. It is settled law 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. Reliance is placed upon the case reported as **Nawab Ali vs. The State (2019 SCMR 2009)**, wherein the Honourable Supreme Court has held as under:

"It is settled law 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).”

16. Resultantly, for the above stated reasons, we have decided to exercise caution in the matter of the appellant Poonjo’s sentence of death. As a result of discussion made above, the appeal filed 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. The sentence of fine passed by the learned trial Court against the appellant Poonjo shall be treated as an order regarding payment of compensation by the appellant Poonjo to the heirs of deceased Taro and in case of failure of the appellant to pay the same he shall suffer simple imprisonment for six months instead of rigorous imprisonment for six months ordered by the learned trial Court. The benefit of section 382-B, Cr.P.C. shall be extended to the appellant Poonjo. Reference made by trial court for confirmation of death sentence is answered in negative.

17. All the appeals stand disposed of in the above terms.

JUDGE

JUDGE

