

HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.129 of 2011

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Present: Sajjad Ali Shah, J.

Naimatullah Phuploto, J.

Appellants: Ghulam Hyder Mallah and Gulam alias Ghulam Hussain Mallah, through Mr. Muhammad Ashraf Kazi, Advocate.

Respondent: The State through Mr. Khadim Hussain Khoonharo, Deputy Prosecutor General Sindh.

Complainant: Rasheed Ahmad Mallah through Mr. Amir Mansoob Qureshi.

Date of hearing: 15.01.2013

JUDGMENT

Naimatullah Phulpoto, J:- Appellants Gullan alias Ghulam Hussain and Ghulam Hyder, both sons of Nabi Bux Mallah, were tried by the learned Additional Sessions Judge Kotri for the offences under sections 302/504/34 PPC, who awarded death sentence to Appellant Ghulam Hyder vide Judgment dated 10.11.2010. There is also a Murder Reference before us for confirmation of his death sentence. Appellant Gullan was also convicted under section 302 PPC and sentenced to imprisonment for life and he was further convicted under section 504 PPC and sentenced to two years R.I. He was extended benefit of section 382-B Cr.PC. We will dispose of appeals as well as Murder Reference by this judgment.

2. This regrettable episode occurred on 31.03.2001. Prosecution story as disclosed by the complainant in FIR is that he alongwith his brothers Muhammad Rafiq and Abdul Majeed as well as uncle Jan Muhammad were going to Sehwan Town, when they reached near post office. Three accused persons, namely, appellants Ghulam Hyder armed with pistol, Ghulam Hussain alias Gullan armed with double barrel gun and Ghulam Qadir armed with hatchet appeared there. It is alleged that appellant Ghulam Hyder fired from his pistol to Muhammad Rafiq, which hit him, who fell down after receiving fire arm injury. PWs raised cries, above named accused succeeded in running away by abusing. Injured Muhammad Rafiq was found bleeding. Injured was taken to hospital in rickshaw, where he succumbed to the injuries. Thereafter, complainant went to the police station and lodged his report against the accused. Motive as shown in the FIR was old matrimonial dispute over the hand of Mst. Afroz, sister of the Complainant and wife of Ghulam Hyder Mallah, who had at previous occasion also caused injuries to Muhammad Rafiq and Muhammad Jurial, father of the Complainant.

3. After registration of the FIR, investigating officer visited the place of wardat, prepared the inquest report, recorded 161 CrPC statements of the PWs, arrested accused/appellant Gullan alias Ghulam Hussain on 15.04.2001. Accused Ghulam Qadir was arrested on 20.04.2001. He was released during investigation and his name was placed in column No.2 of challan. After investigation challan was submitted against the accused in which appellant Ghulam Hyder was shown as absconder. The case was sent up to stand trial. Appellant Ghulam Hyder was subsequently arrested on 11.02.2007.

4. Trial Court framed charge against the appellants to which they pleaded not guilty and claimed trial. At the trial, prosecution has examined the witnesses, namely, PW-1 Rasheed Ahmad, PW-2 Abdul Majeed, PW-3 Jan Muhammad, PW-4 Shahid Ali, PW-5 Nazir Ahmad, Senior Medical Officer, Taluka Hospital Sehwan, PW-6 WHC Nawab Ali and PW-7 Waheed.

5. Appellants in their statements recorded under section 342 CrPC have denied the case of the prosecution and raised plea that PWs have deposed against them due to enmity and pleaded innocence. On the assessment of evidence available on record learned Additional Sessions Judge Kotri found both the appellants guilty and convicted them accordingly.

6. We have heard Mr. Muhammad Ashraf Kazi, Advocate for the Appellants and Mr. Khadim Hussain, Deputy Prosecutor General, who was assisted by Mr. Amir Mansoob Qureshi, Advocate for the Complainant.

7. The facts that deceased died his unnatural death after sustaining fire arm injuries is not in dispute. Dr. Nazir Ahmad, who conducted autopsy of the dead body of Muhammad Rafiq found the following injuries:

- (i) Heart ruptured, left lung ruptured. Thoracic cavity with full of blood.
- (ii) Middle lobe of right lung ruptured. Right thoracic cavity containing blood.

On internal examination medical officer found damages to the dead body as follows:

1. Nine penetrating wound without blackening (wound of entrance). Each wound was about $\frac{3}{4}$ cm x $\frac{3}{4}$ cm x cavity deep on the back of the chest at thoracic region of vertebral column.
2. four penetrating wounds each wound was about $\frac{3}{4}$ cm x $\frac{3}{4}$ cm x cavity deep at second and third thoracic vertebrae of vertebral column.
3. Four penetrating wounds each wound $\frac{3}{4}$ cm x $\frac{3}{4}$ cm cavity deep on left side of second and third thoracic vertebrae of vertebral column.
4. One penetrating wound measuring about $\frac{3}{4}$ cm x $\frac{3}{4}$ cm vertebrae of vertebral column.

According to Medical Officer, injuries were caused by fire arm.

8. Record shows that complainant Rasheed Ahmad, who is brother of deceased Muhammad Rafiq has deposed that on 31.03.2001 at 07:00 p.m. he alongwith deceased Muhammd Rafiq, PWs Abdul Majeed and uncle Jan Muhammad left home and reached near post office, they saw the appellant Ghulam Hyder armed with pistol,

he fired upon his brother Muhammad Rafiq, which hit him at his backside and he fell down. Appellant Gullan armed with gun, instigated co-accused Ghulam Hyder not to spare the complainant party. Cries were raised, the accused/appellants succeeded to run away. Complainant brought his brother Muhammad Rafiq in the rickshaw to the Taluka Hospital Sehwan where he died. Complainant went to police station and lodged FIR. In the cross-examination the complainant denied the suggestion that he had tried to dissolve the marriage of his sister Mst. Afroz with appellant Ghulam Hyder. He also denied the suggestion for lodging false case against the appellants.

9. PW Abdul Majeed, is the brother of the deceased, he also deposed that on 31.03.2001, he along with complainant, deceased Muhammad and uncle Jan Muhammad left home, when reached near post office Sehwan it was 07:00 p.m. where appellant Ghulam Hyder armed with country made pistol appeared and fired upon his brother Muhammad Rafiq, the fire hit him and he fell down. Co-accused appellant Gullan armed with double barrel gun instigated to appellant Ghulam Hyder not to leave the deceased. He has further deposed that Ghulam Qadir was also armed with hatchet at the time of incident. Muhammad Rafiq died in the hospital. In the cross-examination he has denied the suggestion that false FIR has been registered against the appellants due to matrimonial dispute over Mst. Afroz.

10. PW Jan Muhammad was also eye witness of the incident. He has also categorically stated that at the time of incident appellant Ghulam Hyder fired from his country made pistol at Muhammad Rafiq, which hit him. The appellant Gullan was armed with double barrel gun and Ghulam Qadir was armed with hatchet. After the

incident accused succeeded in running away. He also denied the suggestion for deposing falsely against the appellants at the instance of the complainant.

11. Trial Court could not record the evidence of Investigation Officer PW Inspector Muhammad Bashir Gujar as he retired from service and his whereabouts were not known. Prosecution examined WHC Nawab Ali being well conversant with the signatures and handwriting of Inspector Muhammad Bashir Gujar, who verified the signatures of the said inspector on all the investigation papers. Mashir Wahid has stated that appellant was arrested by police in his presence on 11.02.2007.

12. Mr. Muhammad Ashraf Kazi, learned counsel for the Appellants mainly contended that prosecution witnesses are related *inter se* having motive for false implication of the accused over the matrimonial affairs. It is contended that evidence has not been appreciated by the trial Court in its true prospective, which resulted in serious miscarriage of justice. It is contended that prosecution story is neither probable nor plausible and revolves around motive, which has not been proved. Learned defence counsel has also referred to the medical evidence to show that there is contradiction between ocular evidence and medical evidence. According to ocular evidence fire was made from pistol whereas nine penetrating wounds were found on the deceased as per medical evidence. He has further submitted that appellant Gullan had not caused any injury to the complainant party though he was armed with double barrel gun and his false implication cannot be ruled out. It is also contended that on similar role co-accused Ghulam Qadir was found innocent by the police and his name was placed in column No.2 of the challan. Mr. Kazi, after having argued the matter at

some length, submitted that in this case motive has not been proved at the trial, death sentence may be converted to that of life imprisonment. In support of his submission he has placed reliance upon the judgment of Honourable Supreme Court of Pakistan in Criminal Appeal No.536 of 2005 in the case of Kamran Ahmad Farooqui and other Vs. the State wherein it has been observed as under:

“In this regard it would be noted that although the exact age of the Appellants has not come on the record but per the Prosecution itself they were young boys at the time of incident viz on 27.09.1997 which means their ages were not more than 18 to 20 years. It would also be seen that neither in the FIR nor in the deposition of the Prosecution witnesses have they alleged that the Appellants belonged to a sectarian organization or that it was a result of their sectarian views that they had murdered the Deceased. In this view of the matter we are of the opinion that indeed the motive has not been established by the Prosecution at all. Finally it would be seen that Appellants have remained behind the bars since 12.03.1998 when they were arrested in this case. In these circumstances we are of the opinion that it would be in the interest of justice to convert the death sentence imposed upon the Appellants under Section 302 PPC to that of life imprisonment. Order accordingly. The other sentences imposed by the learned High Court are upheld. The benefit of remissions, if any, would be available to both the Appellants and their sentences would run concurrently. So also the benefit of Section 382-B Cr.PC shall be extended to them.”

13. Mr. Khadim Hussain, Deputy Prosecutor General assisted by advocate for the complainant, supported the impugned judgment of trial Court for the reasons enumerated therein with further submission that prosecution has proved the guilt to the hilt by producing ocular evidence, corroborated by medical evidence. Lastly it is contended that prosecution witnesses cannot be labeled as interested witnesses merely on account of relationship *inter se*. They stood firm to lest of lengthy cross-examination and have rightly been believed by trial Court. Mr. Amir Mansoob

Qureshi, advocate for the complainant argued that there is no contradiction between the medical and ocular evidence. He referred to mashirnama of the place of wardat, which indicated that empty cartridge of SG, 12 bore was secured from the place of wardat. Reference has also been made to the contents of FIR to show that fire was made upon the deceased from the country made pistol. It is also argued that deceased received nine penetrating wounds by pellets. As regards to the motive for commission of offence is concerned it is argued that motive has been established. He made reference to the evidence of PWs particularly of PW-3 Jan Muhammad. In support of his submissions Mr. Qureshi has rightly placed reliance on the following cases:

- (i) Sheeraz Asghar Vs. the State (1995 SCMR 1365)
- (ii) Imam Ali Vs. the State (2011 PCrLJ 1398 [Karachi])
- (iii) Muhammad Latif Vs. the State (PLD 2008 SC 503)
- (iv) Safdar Abbas, Etc. Vs. the State 2009 SD 253

In the case of Sheeraz Asghar (supra) relied upon by Mr. Amir Mansoob Qureshi, learned counsel for the complainant it has been held as under:

“In his first information report complainant has said that the Petitioner and his brother were armed with pistols. Only Petitioner opened burst at the deceased which proved fatal. The complainant has used the word pistol twice in F.I.R. Pellets were found from the wounds of the deceased. Latter the complainant and eye-witness Muzaffar Hussain have averred that the assailants were armed with carbines. The Petitioner fired with carbine at back of deceased. The medical evidence reveals that deceased might had received injury at a distance of beyond ten feet. The witness says that deceased was fired at very close range. The wound in such range ordinarily should have traced blackening and contained wads. It is not uncommon with people of rural area to give mis-description in regards to small arms. In colloquial language sometimes they call

it pistol, sometimes revolver, sometimes carbine. Besides, mistaken identity of arms in the instant case is natural as the assailants rushed from the backs of the witnesses and attached the deceased within seconds at their backs to the witnesses. In such event even giving exact distance between the assailants and the victim would not be possible. The medical evidence thus does not conflict with the ocular version. It can neither be said an improvement nor sinister effort on the part of two eye witnesses to bring their evidence in accord with medical evidence. Even otherwise in the position as the victim, the assailants and the witnesses were eye witnesses had a very short glimpse of the occurrence, such contradictions cannot be given much weight but ignored lightly.”

In the case of Imam Ali (supra) relied upon by the learned counsel for the complainant it has been held as under:

“The murder was committed in the broad-daylight and the ocular evidence is fully corroborated by medical evidence. The report of Chemical Examiner in respect of blood stained earth and hatchet is also positive. Everything is so matching and coupled to make obvious that the probability of the eye witnesses’ presence at the place of incident cannot be ruled out or discarded.

The superior courts have time and again observed that if a case is proved against the culprit beyond reasonable shadow of doubt and offence under section 302 PPC is established the normal penalty of death should be awarded and leniency in any case should not be shown except where strong mitigating circumstances for lesser sentence could be gathered from the evidence available on record. In the event of proof of charge of Qatl-e-amd normal penalty under the law is death and exceptional circumstances must be shown for taking a lenient view and for the award of lesser penalty which do not appear on the face of record. Nothing has been pointed out which may have a propensity to discard the testimony of eye witnesses who have corroborated each other on each material point without any significant contradiction. In fact the testimony of eye witnesses is trustworthy, inspiring-confidence and also consistent with the medical evidence.

In the light of what has been stated above, we have no hesitation to hold that the prosecution had proved the case beyond any reasonable doubt, therefore, it can be safely concluded that the conclusion arrived at by the learned trial Court is unexceptionable and hardly require any interference. Consequently, the Jail Appeal is dismissed and death sentence awarded to the Appellant Imam Ali under section 302(b) PPC is maintained. The confirmation reference is accepted and the sentence of death is confirmed.”

In the case of Muhammad Latif (supra) it has been held as under:

“13. All the above segments of evidence have led to one important conclusion that it was the act of Appellant-accused, who had committed heinous crime of murder of innocent baby and ladies. It was a tyrannous and callous actions of accused who had not only cut the throats of two hapless ladies but also a four months baby. Therefore, the events and the circumstantial evidence had proved that the Appellant is the person who had committed this cold-hearted offence of murder

to deprive a soul from his berth is the most sinful act;

to take the life of a human being is the most reprehensible, satanic act;

as the death of on human is the death of whole of the Humanity;

life of human being is a precious gift of Almighty Allah. The Creator of Universe;

no can be allowed to snatch it away through his vicious act.

14. Accordingly, we have found no merit in the appeal of the Appellant and dismiss the same.”

In the case of Safdar Abbas (supra) relied upon by Mr. Qureshi, it has been observed as under:

“Admittedly, the motive laid with Muhammad Amjad convict-Appellant, the ocular account is fully corroborated by medical evidence, so we are satisfied in our mind that the prosecution has been succeeded in proving its case against him beyond any reasonable doubt. There is no mitigating circumstances in his favour as he fired the fatal shot, which caused the death of Iftikhar Ahmad deceased. In these circumstances, the conviction and sentence recorded against Muhammad Amjad, convict by the Trial Court is maintained *in toto*. His death sentence is confirmed and Murder Reference to his extent is replied in the Affirmative.”

14. We have examined/scrutinized the prosecution case based upon ocular testimony furnished by complainant Rasheed Ahmad Mallah, PWs Abdul Majeed and Jan Muhammad. Evidence of the eye witnesses is trustworthy and reliable, who had highlighted each and every aspect of tragic incident without making any glaring contradiction, omission or concealment in their statements. All of them have categorically deposed that appellant Ghulam Hyder fired the fatal shot, which caused death of deceased Muhammad Rafiq. As regards to the contention of learned defence counsel that medical evidence is contradictory to the ocular evidence, there is no force in such contention for the reasons that from perusal of medical evidence it transpired that deceased had received nine penetrating wounds. Four penetrating wounds, each wound was about $\frac{3}{4}$ cm x $\frac{3}{4}$ cm x cavity deep at second and third thoracic vertebrae of vertebral column. Four penetrating wounds each wound $\frac{3}{4}$ cm x $\frac{3}{4}$ cm cavity deep on left side of second and third thoracic vertebrae of vertebral column. One penetrating wound measuring about $\frac{3}{4}$ cm x $\frac{3}{4}$ cm vertebrae of vertebral column, same type of wounds could only be caused by pallets. From the place of wardat one

empty of 12 bore cartridge of SG also was recovered. It is not uncommon with people of rural area to give mis-description in regard to small arms. Sometime they call it pistol and sometimes revolver as the fire was from country made pistol in which cartridge is used. Medical evidence thus does not conflict with the ocular version. As regards motive matrimonial dispute over Mst. Afroz wife of appellant Ghulam Haider has been established by cogent evidence. Prosecution evidence on the point of dispute over Mst. Afroz has gone unchallenged and un-rebutted in cross-examination. Legally this piece of evidence shall be deemed to have been accepted. Appellant Ghulam Hyder after commission of the offence absconded away for about 6 years, without explanation, which is also an incriminating piece of evidence against him. At the trial prosecution witnesses were subjected to lengthy cross-examination but nothing favourable to appellants came on record. Simple plea has been raised that prosecution witnesses are related inter se and inimical to the appellants. We failed to understand that how a plea, which is not acceptable on the face of it, is being put forward repeatedly. The statement of the witnesses on account of being interested witnesses can only be discarded if it is proved that an interested witness has ulterior motive on account of enmity or any other consideration. Essentially, this proposition has been considered in the number of cases and Apex Court has declined to give weight to it in absence of any reason to show that for some ulterior motive or on account of enmity false evidence has been given. There is no rule that evidence of the interested witnesses cannot be taken into consideration without corroboration and even uncorroborated version can be relied upon if supported by surrounding circumstances. In this case there is huge ocular evidence corroborated by medical evidence, strong motive and long abscondence of appellant Ghulam Hyder. We have no reason to disbelieve the same.

15. Learned trial Court has rightly appreciated the prosecution evidence in its true prospective as murder of an innocent person has been committed by appellant Ghulam Hyder due to old enmity on account of admitted matrimonial dispute. Honourable Apex Court has time and again observed that if a charge of Qatl-e-Amd is proved against the culprit, normal penalty of death should be awarded and leniency in any case should not be shown except where strong mitigating circumstances for lesser sentence are brought on record. In the case of appellant, no mitigating circumstance has been pointed out. Case law relied upon by learned defence counsel is quite distinguishable from facts and circumstances of this case. In Criminal Appeal No.536/2005 Honourable Supreme Court observed that appellants were aged about 18 to 20 years and converted death sentence to that of life imprisonment but appellant in the present case is not only fully matured but previous convict also. Case of appellant falls within the category of “rarest of rare” cases. Therefore, the circumstances of the case disentitle the appellant Ghulam Hyder to any leniency in sentence. He, therefore, deserves the normal penalty of death, which was rightly awarded to him by the learned Additional Sessions Judge Kotri.

16. We, therefore, for above stated reasons maintain the conviction and sentence awarded to the appellant Ghulam Hyder and confirm the death sentence awarded to him and reference made by the trial Court is accepted and his appeal is dismissed. However, case of appellant Gullan is distinguishable from the case of appellant Ghulam Hyder, particularly in the circumstances, when the appellant Gullan was armed with double barrel gun but he did not cause any injury to the deceased or PWs. Even no overt act is attributed to him. Complainant Rasheed Ahmad in his FIR has assigned no role to Appellant Gulan but at the trial deposed that co-accused Gulan instigated appellant Ghulam Haider not to leave the complainant party. Law does not

recognize such type of improvement in evidence at the trial without any legal justification. There is background of enmity between parties and appellant Gullan is brother of main accused Ghulam Hyder. Therefore, his false implication cannot be ruled out. The circumstance that appellant Gullan was armed with gun, but did not use it in commission of offence, has created reasonable doubt about his involvement in case, therefore, by way of abundant caution, while extending benefit of doubt, appellant Gullan alias Ghulam Hussain is acquitted of the charge. His bail bond stands cancelled and surety is hereby discharged and the appeal to his extent is allowed.

JUDGE

JUDGE

Karachi, dated

Jan. ____, 2013