2019 P Cr. L J 1042

[Sindh (Hyderabad Bench))]

Before Naimatullah Phulpoto andShamsuddin Abbasi, JJ

YASEEN KHAN---Appellant

Versus

The STATE---Respondent

Criminal Jail Appeal No. D-303 and Confirmation Case No. 16 of 2010, decided on 29th May, 2018.

Penal Code (XLV of 1860)---

----S. 302(b)---Criminal Procedure Code (V of 1898), Ss. 464 & 465---Constitution of Pakistan, Art. 10-A---Qatl-i-amd---Appreciation of evidence---Motive, failure to prove---Mitigating circumstances---Due process of law---Accused was deaf and dumb by birth who was convicted by Trial Court under S. 302(b), P.P.C. and was sentenced to death---Accused assailed his sentence only, on the plea of mitigating circumstances---Validity---No independent evidence was available on record that accused had grudge against deceased till the incident occurred---If prosecution asserted a motive but failed to prove the same then such failure on part of prosecution could have reacted against sentence of death passed against a convict of capital charge---Accused was born deaf and dumb and was not capable to understand judicial proceedings as reflected from orders of Trial Court---Services of interpreter were provided to accused up to the stage of framing of charge only---Services of counsel on State expenses were provided to accused and there was nothing on record that counsel who was appointed on State expenses was able to get instructions from the accused who was deaf and dumb---Accused was incapable of making his defense and Trial Court did not act according to provisions of Ss. 464 & 465, Cr.P.C.---Trial Court also failed to conduct trial in terms of Art. 10-A of Constitution---High Court converted death sentence of accused into imprisonment for life---Appeal was allowed accordingly.

Ghulam Mohy-ud-Din alias Haji Babu and others v. The State 2014 SCMR 1034; Liaquat Ali v. The State 2009 SCMR 91; Irfan Ali v. The State 2015 SCMR 840; Zahoor alias Bholi v. The State 2018 MLD 246 and Karamat Hussain v. State through Advocate-General, Azad Jammu and Kashmir, Muzaffarabad and another 2018 YLR 685 ref.

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 rel.

Syed Muhammad Waseem Shah for Appellant.

Shahzado Saleem Nahiyoon, D.P.G. for the State.

Date of hearing: 24th May, 2018.

JUDGMENT

NAIMATULLAH PHULPOTO, J.---Yaseen Khan appellant was tried by Mr. Ghulam Mustafa A. Memon, Sessions Judge, Umerkot in Sessions Case No. 43 of 2010. After full-dressed trial, vide judgment dated 09.08.2010, appellant was convicted under section 302(b), P.P.C. and sentenced to death. He was also ordered to pay the compensation of Rs.100,000/- to be paid to the legal heirs of the deceased Mst. Ghulam Sughran under section 544-A, Cr.P.C. In default in payment of compensation, convict was ordered to suffer RI for 06 months. Trial court made reference to this court for confirmation of death sentence as required under section 374, Cr.P.C.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 21.05.2010 at 1-30 p.m. in the Quarter No.16/A situated at Military Chhor Cantt. Taluka and District Umerkot, present appellant strangulated Ghulam Sughran wife of his brother namely Muhammad Anwer. Complainant was not present in the house at the time of incident. Complainant lodged FIR against accused at police station Chhor on 22.05.2010 vide crime No.10 of 2010 for offence under section 302, P.P.C.

3. After usual investigation challan was submitted against the appellant/accused under section 302, P.P.C. Accused was unable to engage the advocate of his choice, services of advocate were provided to him by trial court on State expenses.

4. Trial Court in the case diary dated 26.10.2010 has mentioned that accused is deaf and dumb. Charge was framed against accused while providing him the facility of interpreter. Accused pleaded not guilty and claimed to be tried. A note of the trial court at the time of framing charge is reproduced hereunder:-

> "The accused is reported to be dumb and deaf therefore, charge was read over to the accused through interpreter Shahzad son of Noor Rehman Pathan resident of Ward No.315 Pathan Mohalla Umerkot town appointed by this court and so also answers given by the accused were interpreted and conveyed to the court by interpreter. The accused can only know through gesture."

5. In order to prove its case, prosecution examined 06 witnesses in this case. Thereafter, prosecution side was closed.

6. Statement of accused was recorded under section 342, Cr.P.C. in which he claimed false implication in this case and denied the prosecution allegations.

7. Learned trial court after hearing the learned counsel for the parties and examining the evidence available on record awarded death sentence to the appellant as stated above. Hence, this appeal is filed.

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

9. Facts of this case and evidence find an elaborate mention in the judgment of the trial court hence there is no need to repeat it.

10. Syed Muhammad Waseem Shah, advocate for the appellant 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. It is argued that complainant and appellant are brothers inter se. Motive was weak and it has not been proved at trial. It is further argued that appellant is deaf and dumb, no fair trial was conducted as provided under Article 10-A of Constitution of Islamic Republic of Pakistan, 1973. Lastly, it is argued that death sentence awarded to the appellant may be converted into imprisonment for life. In support of his contentions, learned counsel has placed reliance on the cases reported as Ghulam Mohy-ud-Din alias Haji Babu and others v. The State (2014 SCMR 1034), Liaquat Ali v. The State (2009 SCMR 91), Irfan Ali v. The State (2015 SCMR 840), Zahoor alias Bholi v. The State (2018 MLD 246) and Karamat Hussain v. State through Advocate-General, Azad Jammu and Kashmir, Muzaffarabad and another (2018 YLR 685).

11. Mr. Shahzado Saleem Nahiyoon, D.P.G. for the State conceded to the contentions raised by the counsel for the appellant and recorded no objection for converting the death sentence into imprisonment for life.

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

13. It is not disputed that the deceased Mst. Ghulam Sughran died her un-natural death for the reasons that PW-4 Dr. Leela Pardeep has deposed that on 22.05.2010 she examined the dead body of Mst. Ghulam Sughran. Post-mortem examination was conducted. WMO from external as well as internal examination of body of deceased was of the opinion that cause of death was strangulation. Sole eye-witness of the incident was PW-2 Ms Marya, daughter of the deceased who deposed that incident had occurred on Friday, it was Jumma prayer time. Accused jumped over the wall and entered into the house. He caught hold of her mother from her neck on a cot. She intervened but accused did not leave her mother. She raised cries which attracted Mst. Yasmeen, Laila and Samina. Further it is stated that accused committed the murder of Mst. Ghulam Sughran. Ms. Marya was natural witness, incident took place inside the house. Ms. Marya is daughter of deceased, but she had no motive to falsely implicate the accused. We have several reasons to believe her 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.

14. 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 it had not even been proved. According to the prosecution case

oftenly there was quarrel between the appellant and deceased in the house but no untoward incident had taken place between the parties. There is no independent evidence available on the record that the grudge against the deceased still continued in the mind of the accused till incident occurred. 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).

15. Moreover, appellant is born deaf and dumb. Appellant was not capable to understand the judicial proceedings as reflected from the orders of the trial court and services of interpreter were provided to him up to the stage of framing of charge only. Thereafter, services of the counsel on State expenses were provided to him. There is nothing on the record that counsel who was appointed on State expenses was able to get instructions from the appellant who was deaf and dumb. In our considered view, appellant was incapable of making his defence. Trial court did not act according to provisions of sections 464 and 465, Cr.P.C. Moreover, Trial court failed to conduct fair trial in terms of Article 10-A of Constitution of Islamic Republic of Pakistan, 1973, which reads as under:-

> "10A. Right to fair trial:- For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process."

16. Learned advocate for the appellant rightly contended that in presence of mitigating circumstances it was not safe to award death sentence. Rightly reliance is placed upon the above cited authorities.

17. For all the reasons recorded above, 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. The order passed by the trial court regarding payment of compensation by the appellant to the legal heirs of deceased as well as the order in respect of imprisonment in default of payment of compensation are however maintained with slight Modification that in case of non-payment of compensation, appellant shall suffer SI for 06 months instead of RI for 06 months. The benefit of section 332-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 these terms.

MH/Y-5/Sindh Order accordingly.

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