

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO. 44-P OF 2002

1. HAROON RASHID SON OF SHER ALI KHAN,
2. AFTAB RASHID SON OF SHER ALI KHAN
3. MST.FATIMA DAUGHTER OF SHER ALI KHAN
4. MST.ZAINAB DAUGHTER OF SHER ALI KHAN
5. MST.MALKIAT DAUGHTER OF SHER ALI KHAN ,
(ALL MINORS,) RESIDENTS OF GUJARABAD, AMANKOT,
POLICE STATION RAHIMABAD, SWAT.

THROUGH

PAINDA MAND SON OF ALIF KHAN(UNCLE OF THE MINORS AND
BROTHER OF THE DECEASED) AS GUARDIAN OF THE MINORS,
RESIDENT OF BILAL COLONY, AMANKOT, P.S. RAHIMABAD,
MINGORA

.....

APPELLANTS

VERSUS

1. MUHAMMAD YOUSAF AFRIDI SON OF ADAM KHAN,
RESIDENT OF DARA ADAM KHEL,
PRESENTLY RESIDING AT RAHIM ABAD, DISTRICT SWAT
2. MST.BAKHT VESALA DAUGHTER OF HAFIZ MUHAMMAD JAN,
RESIDENT OF RAHIM ABAD, MINGORA, SWAT,
3. SHARIF ALIAS KABALAY SON OF MIR ALAM, RESIDENT OF
GUJARABAD, RAHIMABAD, MINORA, SWAT.
4. THE STATE

... RESPONDENTS

FOR THE APPELLANTS ... NEMO.

FOR RESPONDENTS NO.1 TO 3 NEMO

FOR THE RESPONDENT NO.4 ... MR.ARSHAD AHMED,
ADDITIONAL
ADVOCATE GENERAL,
KPK

NO.& DATE OF FIR ... NO.370,DATED
POLICE STATION 30.8.2001
POLICE STATION
RAHIMABAD, SWAT

DATE OF THE JUDGMENT OF THE TRIAL COURT	...	02.11.2002
DATE OF INSTITUTION OF APPEAL IN THIS COURT	...	10.12.2002
DATE OF HEARINGS	...	01.04.2019
DATE OF DECISION	...	01.04.2019

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- Through this Criminal Appeal bearing No.44-P of 2002 filed by legal heirs of deceased Sher Ali Khan being minors through their paternal uncle Painsa Mand have assailed the judgment dated 2nd of November, 2002 ("Impugned Judgment") authored by learned Additional Sessions Judge-II/Izafi Zila Qazi Swat ("Trial Court"), whereby acquittal of respondents namely Muhammad Yousaf Afridi, Mst.Bakht Vesala and Sharif alias Kabalay has been recorded.

2. On 9th of January, 2003 the captioned appeal was admitted for regular hearing and notice was issued to the respondents, but since then uptill date despite hectic efforts the attendance of the respondents could not be procured for the reasons depicting from various orders made by this Court. During pendency of the appeal Mst. Bakht Vesala (Respondent No.2) died, as per available report and order dated 13th of February, 2018, therefore, proceedings against her stood abated. It also transpires from the record that neither the appellants nor their uncle Painsa Mand, through whom instant appeal against acquittal was filed, ever appeared after admission except an uncle Azeem Khan made appearance on behalf of the appellants and undertook to engage counsel, who was afforded several opportunities but neither he procured the attendance of the counsel to represent the appellants nor himself appeared to intimate or persue the appeal. This being an old matter, pending since last almost 17 (seventeen) years, and as such we decided to

hear Mr.Arshad Ahmad, learned Additional Advocate General, KPK on behalf of the State and adjudicate upon the matter as further delay shall amount to abuse of process of law.

2. As per prosecution version, on 30th August, 2001 at about 1.30 a.m Mst.Bakht Vesala (respondent No.2) lodged an FIR bearing No.370 of 2001 (Ex.PA) with police station Rahimabad, District Swat, contending therein that at about 1.30 a.m, while she along with her husband and daughters were asleep, she heard shrieks of her husband, woke up and saw a person standing with the cot who made fire upon her husband, subsequently, which resulted into his demise, witnessed by his son Haroon-ur-Rashid as well.

Mst.Bakht Vesala (respondent No.2) maintained that she has enmity with none, thus reported against unknown perpetrators.

3. Javed Khan, SHO (P.W.4) Police Station Rahimabad got the investigation, who soon thereafter suspected the story of the FIR. He visited the crime scene and secured a torn shirt of the culprit, a "shalwar", a towel both stained with semen, blood stained soil, and a valet containing Rs.525/- through recovery memo (Ex.PW.4/2) and a .30 bore pistol and two empties through recovery memo (Ex.PW.4/3).

Proceedings ahead with the investigation, he arrested respondents, amongst whom Mst.Bakht Vesala (Respondent No.2) and Sharif alias Kabalay (Respondent No.3) got recorded their confessional statements before Mr.Riaz Ali Khan, Judicial Magistrate/Area Qazi (P.W.2) confessing their guilt of committing 'zina' but committing murder of deceased Sher Ali Khan was attributed to Muhammad Yousaf Afridi(Respondent No.1). According to Investigating Officer Javed Khan(P.W.4), he recorded the statement of prosecution witnesses under section 161 as well as got recorded the statement of some witnesses under section

164 of the Code of Criminal Procedure ("The Code") by Area Qazi Riaz Ali Khan (P.W.2).

On conclusion of the investigation Muhammad Yousaf Afridi (Respondent No.1), Mst.Bakht Vesala Respondent No.2) and Sharif alias Kabalay were challaned before the Trial Court.

4. After compliance of codal formalities the respondents were formally charged under section 302/34 of Pakistan Penal Code ("Penal Code") and sections 5/10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 ("Hudood Ordinance") and in order to prove the culpability the prosecution produced as many as ten(10) witnesses.

The respondents in their respective statements recorded under section 342 of The Code denied the allegations put forth to them pleading their false implication. None of them opted to record their statement on oath and produce defence witness.

5. At conclusion of the trial, the respondents were not found guilty of the charges, thus Trial Court on 2nd of November, 2002 recorded their acquittal.

6. Mr.Arshad Ahmad, learned Additional Advocate General, KPK, appearing on behalf of the State at the very outset urged to support the Impugned Judgment and contended that the findings recorded on the basis of the evidence available on record has rightly been appreciated by the learned trial court, thus, does not call for interference as the impugned judgment does not suffer from any illegality or perversity.

7. We have delved deep into the evidence available on record in view of the Impugned Judgment with the able assistance of the learned Additional Advocate General KPK.

8. Conscious of the legal proposition that the apex court has always appreciated the decision after hearing both the sides, but in such like cases where

despite hectic efforts, either side is reluctant to appear and pursue the matter, we cannot keep it for an indefinite period as it amounts to abuses of process law. Help can be sought from the case of HAYAT BAKHSH AND OTHERS VERSUS THE STATE (PLD 1981 SC 265), wherein the Hon'ble Supreme Court of Pakistan was confronted with the similar situation to decide as to whether after acquittal of the accused, the appeal against acquittal can be heard in his absence or otherwise. The Court observed, which follows as under for ready reference:

“It would not be possible at all to adjourn an appeal against acquittal even against a single acquitted accused/absconding respondents for an indefinite period, although the office of the Court would make efforts to ensure his surrender/arrest in obedience to the process of the Court, for a reasonable period before fixing the appeal for hearing; and if he remains fugitive, the Court would proceed to determine the appeal in his absence. If after the examination of the case the acquittal merits to be reversed, there would be no impediment to decide the appeal accordingly, but in case the judgment of acquittal merits to be maintained, the same would not be reversed on account of the abscondence of the accused/respondent. This would apply to both the situations whether the appeal is against one acquitted or more.”

(Emphasis supplied)

The apex court has categorically laid down dictum that in case of acquittal or conviction, if appellant or respondents are reluctant to surrender or appear, loses right of audience and the appeal can be determined in absence of either. Hon'ble Supreme Court of Pakistan further reasserted such principles in the case of NAZAR HUSSAIN VERSUS THE STATE (1985 SCMR 614) and IKRAMULLAH AND OTHERS VERSUS THE STATE (2015 SCMR 1002). In such view of the matter, while following the dictum referred herein above, we have heard the instant appeal in their absence.

9. Prior to re-appraisal of the evidence, it may indeed be observed that while adjudicating upon an appeal against acquittal of respondents, we have certain constraints as settled by the Hon'ble Supreme Court of Pakistan, which are to be followed by this Court as well as Hon'ble High Courts.

The yardstick for interference in a judgment of acquittal is entirely different, which cannot be interfered merely on the premises that other view was also possible, keeping in view the evidence adduced by the prosecution. The judgment of acquittal can only be interfered, if the conclusion drawn and reasons assigned by the trial court are speculative, artificial, arbitrary or a result of mis-reading and non-reading of evidence. Reference can be made upon the ratio expounded in the cases of MST.ANWAR BEGUM VERSUS AKHTAR ALIAS KAKA AND TWO OTHERS (2017 SCMR 1710), AZHAR MEHMOOD AND OTHERS VERSUS THE STATE (2017 SCMR 135), ZEESHAN AFZAL ALIAS SHANI AND ANOTHER VERSUS THE STATE AND ANOTHER (2013 SCMR 1602), THE STATE AND OTHERS VERSUS ABDUL KHALIQ AND OTHERS (PLD 2011 SC 554) NAZAR HUSSAIN VS.THE STATE (PLD 1985 SC 11).

10. The case of the prosecution imperatively rests upon the testimony of Haroon-ur-Rasheed (P.W.1), who stated to have seen the murder of his father Sher Ali Khan, at the hands Muhammad Yousaf Afridi (respondent No.1), the confessional statement of Mst.Bakht Vesala (respondent No.2), and Sharif alias Kabalay (respondent No.3) coupled with the recovery of .30 bore pistol having a positive Forensic Science Laboratory (FSL) (Ex.PW.4/3) report and a torn shirt of Muhammad Yousaf Afridi (respondent No.1) as well as medical evidence.

Being a star witness we would first like to reappraise the testimony of Haroon-ur-Rasheed (P.W.1). On the fateful night, the age of Haroon-ur-Rasheed(P.W.1)was about 12/13 years. The occurrence took place on 30th of August 2001, whereas the statement of Haroon-ur-Rasheed (P.W.1) as per statement of investigating officer Javed Khan (P.W.4) was recorded on 7th of September, 2001 under section 161 of The Code and under section 164 of The Code on 8th of September, 2001, through an application (Ex.PW.4/9) made before Area Qazi Mr.Riaz Ali Khan (P.W.2). There is absolutely no explanation offered either by

(P.W.1) himself or any other witness to justify the delay in recording his statement, despite the fact that he was very much available but even then the police failed to get record his statement at the earliest, making his statement doubtful and afterthought. Haroon-ur-Rasheed(P.W.1) in his statement before the court, while narrating the facts of the occurrence disclosed that his mother Mst.Bakht Vesala in the evening sent him to call Muhammad Yousaf Afridi(Respondent No.1) and Sharif alias Kabalay (Respondent No.3), whereupon he called them while they being present at the "Dera". In the evening, both the respondents came in their house, had a cup of tea, chanted and also had dinner together. According to him, in the evening on arrival of his father(deceased) his mother hid both of them in a bath room, whereafter his mother served dinner to his brothers and sisters and father, whereafter all of them slept.

He added that he woke up on hearing the shrieks of his father and fire shots made by Muhammad Yousaf Afridi (Respondent No.1) and that he saw his father being scuffled with Muhammad Yousaf Afridi (Respondent No.1), however, he (Respondent No.1) succeeded to run away, who was chased by his father but he fell down near the door, whereupon his mother called his 'punjabi' neighbor whose door was locked from the outside with a red colour "Azarband" string of "shalwar" which was opened by the said "Punjabi" (neighbor) through his knife and subsequently called the workers of Mill, who informed the police. He also stated that his father was taken to hospital and a pistol left by Muhammad Yousaf Afridi(respondent No.1) and a shirt were taken into possession by the police.

In-depth analysis of testimony of the Haroon-ur-Rasheed(P.W.1) suggests that he himself did not see respondent making fire as he was asleep and woke up after hearing the fire shots. Thus with no certainty, it can be concluded

that either Muhammad Yousaf Afridi (Respondent No.1) directly made fire or otherwise.

As Haroon ur Rasheed (P.W.1) was a tender age boy who was taken by his uncles namely Painda Mand and Azeem Khan with him after the occurrence and not produced before police to get his statement recorded at the earliest, suggesting that he (P.W.1) must have been tutored after recording of the confessional statements of (Respondents No.2 and 3), thus it would not be safe to rely upon his testimony, as false implication in the peculiar circumstances of the instant case cannot be ruled out, which aspect has properly been discussed and dealt with by the trial court, by disbelieving Haroon ur Rasheed(P.W.1) .

The neighbours referred by Haroon Rasheed (P.W.1) as "Punjabi" neighbours and Mill workers could have strengthened the case of the prosecution; but none of them were cited and produced before the Court to corroborate the deposition of (P.W.1), which has adversely effected the prosecution version, because it is now settled law that by not producing material witnesses, an inference will be drawn that had they stepped into the witness box, they would have not supported the prosecution case.

11. The respondents were charged mainly on two counts, primarily under section 302/34 of the Penal Code for committing murder and secondly, under section 10(5) of the Hudood Ordinance for committing 'zina' by Muhammad Yousaf Afridi (respondent No.1) with Mst.Bakht Vesala with consent, thus we have anxiously scanned the judicial confessions with regard to each crime separately.

12. Coming to the confessional statements, we have undertaken the exercise of looking the same from various aspects, such as its legality and admissibility based on voluntariness and truthfulness within the parameters drawn by the apex court.

The confessional statement has always been considered as a material incriminating evidence, it found consistent with the other corroborative pieces of evidence. The Hon'ble Supreme Court of Pakistan in the cases of HASHIM QASIM AND ANOTHER VERSUS THE STATE (2017 SCMR 986), MUHAMMAD ISMAIL AND OTHERS VERSUS THE STATE (2017 SCMR 898), AZEEM KHAN AND ANOTHER VERSUS MUJAHID KHAN AND OTHERS (2016 SCMR 274) and ASIF MEHMOOD VERSUS THE STATE (2005 SCMR 515) has laid down a criteria for recording and appreciating a confessional statement, which condensely follows:

- i) the recording Magistrate of a confession must satisfy `himself with regard to the voluntariness of the confessional statement ,
- ii) the accused must be given warning as enunciated in the High Court's Rules and Orders for recording confessional statement by extending sufficient time of reflection with intervals;
- iii) assuring the maker, while recording his confession that either he record or does not record his confessional statement, he would not be handed over to the police;
- iv) no police official or if possible even no clerk should be present during the course of recording a confessional statement including a Naib Court;
- (v) the maker shall not be handed over to any official of police and must be remanded to judicial custody with no intervention of the police contingent who brought him;
- (vi) the confession must be true and voluntary made, contradictory in no manner with the persecution case;
- (vii) the certificate as required under section 364 of The Code must be signed with the seal of the Court in the hand writing of the recording Magistrate. If the maker of the confessional statement only understand his mother language, then confessional statement must be got translated in his native language, which he fully understands and such fact must be incorporated in the certificate so reduced at the bottom of the confessional statement."

13. Perusal of confessional statement of Mst.Bakht Vesala (Respondent No.2), suggests that on the night of occurrence, she committed sexual intercourse with Muhammad Sharif (Respondent No.3) first, who left away, where-after she satisfied her lust with Muhammad Yousaf Afridi (Respondent No.1) and that while he was leaving, her husband caught hold of him, following a chase at the main entrance of the house, where Muhammad Yousaf Afridi(Respondent No.1) fired at

her husband, and then succeeded to flee away, leaving his torn shirt and pistol in their house. Similarly, Sharif alias Kabalay (Respondent No.3) on his confessional statement admitted to have committed sexual intercourse with Mst.Bakht Vesala (Respondent No.2), but clarified to have left before the murder of deceased Sher Ali Khan. He added that in the late hours, Muhammad Yousaf Afridi (Respondent No.1) came to the "Dera" without shirt, revealing that he (Respondent No.1) committed murder of deceased Sher Ali Khan.

Both of them, while making confession have categorically exonerated themselves from the murder of deceased Sher Ali Khan or even having any intent to do so and have shifted the burden of crime of murder upon Muhammad Yousaf Afridi (Respondent No.1), who despite all efforts by police, when produced before the recording Magistrate refused to get record his confessional statement.

The said confessional statement under consideration are ex-culpatory to the extent of murder, which cannot be used against Muhammad Yousaf (Respondent No.1), even invoking Article 43 of the Qanaun-e-Shahadat Order, 1984 ("Order of 1984") as a circumstantial evidence, as guided by the law expounded by the Hon'ble Supreme Court of Pakistan in the case of MUSHTAQ HUSSAIN VERSUS THE STATE (2012 SCMR 109).

14. The incriminating part of both the said confessional statements regarding commission of "Zina" by Muhammad Yousaf Afridi (Respondent No.1) cannot at all be made basis for proving the culpability of Muhammad Yousaf Afridi (Respondent No.1) particularly in absence of any medical and forensic evidence, related to and connecting him with crime of "Zina".

There is no cavil with the proposition that the confessional statement got recorded by the Respondent Nos.2 and 3, can be used against them, but again for that purpose impeccable corroboratory evidence is required, such as Forensic and Medical evidence, which is obviously lacking in the instant case as neither any

of the respondent has medically been examined for that purpose nor any semen grouping report has been procured thereof. Haroon ur Rasheed (P.W.1) being the star witness also did not say a word regarding "zina" committed by respondents.

15. Admissibility of the confessional statement of the respondents No.2 and 3, in view of the statement of Area Qazi (Magistrate) Mr.Riaz Ali Khan (P.W.2), while adhering to the prescribed procedure, stipulated in the Peshawar High Court's Rules and Orders as well as procedure directed by the apex court in the referred cases (supra), found not to have been complied with.

Mr.Riaz Ali Khan (P.W.2), who recorded the confessional statements admitted did not provide sufficient time of reflection with intervals to the makers. He admitted that Mst.Bakht Vesala (Respondent No.2) after recording confession was handed over to lady police constable Taj Zareen accompanied by Naib Court. Similarly, after recording confession of Sharif alias Kabaly (Respondent No.3) was handed over to Naib Court in uniform, which offends the entire Procedure, Rules and Law, particularly when the certificate thereon has not been reduced in hand writing of recording Magistrate (P.W.2). Moreover, the certificate regarding the mother tongue of the makers is silent, which puts a question mark upon the voluntariness of the said confessional statements. The Trial Court has rightly discarded the confessional statements for the reasons assigned in the Impugned Judgment .

We firmly believe that the confessional statements under scrutiny have not been recorded voluntarily, offending the Rules and dictum as laid down in the case referred herein before in the preceding para (supra) and as such have no evidentiary value.

16. The recovery of .30 bore pistol, since has not been made on the pointation of Muhammad Yousaf Afridi (Respondent No.1), therefore, such recovery from the house of deceased itself, even with the positive report can add

nothing to the case of prosecution. Similarly, the recovery of torn shirt having the tag of Momin Tailor could have been considered relevant, if Tailor Momin Khan, had come in the witness box and testified that he had sued and tailored the torn shirt in question on the order planned by Muhammad Yousaf (Respondent No.1), but presently at add nothing to the case of prosecution.

17. As the unnatural death of the deceased by fire arm has not been questioned and challenged to have taken place otherwise, therefore, the medical evidence to such extent need not be brought under scrutiny as it affirms the unnatural death by a fire arm. Obviously, it cannot be taken into account as a corroborative piece of evidence.

18. For what has been discussed above, irresistibly, we have arrived at the conclusion that the Impugned Judgment does not suffer from any perversity or illegality, warranting interference by this Court rather the findings of the Trial Court are based upon proper appreciation of the evidence and applicability of law.

Henceforth, the appeal in hand being devoid of merits is dismissed.

SHAUKAT ALI RAKHSHANI
JUDGE

SYED MUHAMMD FAROOQ SHAH
JUDGE

Peshawar, 1st of April, 2019/
M.Akram/