Cr.A.No.302/L/2006
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IN THE FEDERAL SHARIAT COURT.

(*Appellate Jurisdiction*)

PRESENT:

MR.JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE.
MR. JUSTICE SALAHUDDIN MIRZA.
MR. JUSTICE MUHAMMAD ZAFAR YASIN.

CRIMINAL APPEAL NO.302/L of 2006

Muhammad Shafique alias Chuma son of

Muhammad Siddique ..... Appellant.

Versus

The State ..... Respondent

CRIMINAL APPEAL NO.303/L of 2006

Nazir Ahmed son of

Ghulam Muhammad ..... Appellant.

Versus

The State ..... Respondent

Counsel for the Appellants	...	Mr. Rehan Zafar, Advocate.
Counsel for the State	...	Mr. Asjad Javed Ghural, D.P.G.
FIR No. date and Police Station.	...	86/2006 dated 19-03-2006 P.S. Saddar Haroonabad.
Date of Judgment of Trial Court.	...	27-11-2006
Date of Institution	...	08-12-2006
Date of hearing	....	07-03-2008
Date of decision:	....	10-04-2008

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JUSTICE HAZIQUL KHAIRI, C.J. By this Judgment, we will dispose of two appeals bearing No.302/L of 2006 filed by Muhammad Shafiq and bearing No.303/L of 2006 filed by Nazir Ahmed. Both the appellants were convicted under section 302 (b) PPC and sentenced to death also to pay Rs.50,000/- as compensation under section 544.A, Cr.P.C. to the legal heirs of deceased, in default thereof each of them would undergo S.I. for a period of 6 months. Both the appellants were further convicted under section 377/34 PPC and sentenced to 6 years R.I. with a fine of Rs.25,000/= and in default thereof each would undergo S.I. for a period of 3 months.

2. The brief facts of the case as borne out from F.I.R. lodged by complainant Allah Baskhsh a cultivator by profession is that on 17.3.2006 at about 3.30 p.m. his nephew Muhammad Usman aged 10/11 years went out side the home for playing but he did not turn up after a considerable time. He looked for him and met Liaquat Ali and Umer Khatab PWs who told him that they had seen Muhammad

Usman going on a bicycle with Muhammad Shafique and Nazir Ahmed the appellants towards south, whereupon he along with Liaquat Ali and Umer Khatab went for the search of his nephew and when they reached at the land of Syed Muhammad Azeem Shah they met Zulifqar and Javed Iqbal who told them that they had seen his nephew Usman in the company of the appellants while eating Berry fruits at about 4:00 p.m. They looked for Muhammad Usman around the berry trees but could not find him. He therefore lodged the complaint suspecting the appellants of abducting, committing sodomy and murdering his nephew.

3. The appellants were charged by the learned trial Court but they denied the charge and claimed trial.

4. After lodging the FIR Muhammad Abid Inspector PW-12 along with his subordinates proceeded to Chak No.157/3-L where he recorded the statements of PWs U/S 161 Cr.P.C., raided the houses of appellants for their arrest and on the receipt of spy information

arrested them at Head 7-R Canal. During the investigation appellants made disclosure of dead body of Usman and led the police party to the place where the dead body was buried. The dead body of Muhammad Usman was dug out in the presence of PWs. He prepared injury statement and inquest report and sent the dead body to the mortuary for postmortem examination, recovered bicycle, prepared recovery memo, recorded the statements of the PWs U/S 161 Cr.P.C., prepared site plan of the place of recovery of dead body and other matters connected with the investigation.

5. PW-1 Allah Bakhsh complainant repeated what was narrated by him in his written complaint. PW-2 Liaquat Ali deposed that about 3-1/2 months back at about 3:30 P.M. he and Umer Khatab PW were coming towards Chak No.157/3-L. They saw appellants Muhammad Shafique and Nazir Ahmed along with Muhammad Usman, deceased on a bicycle. After some times, Allah Bakhsh complainant met him who was searching for Usman and they told him that they had seen

the deceased Muhammad Usman in the company of the accused persons. Thereafter, they along with complainant went to the land of Syed Azeem Shah where Javed and Zulifiqar Ali PWs met them. On inquiry, they told them that they had seen the deceased in the company of appellants at 3:30 p.m. having berry fruit under a berry tree.

6. PW-3 Zulifiqar Ali testified that about 3 months back at about 4:00 P.M. he along with Javed Iqbal P.W.4 had seen Muhammad Usman in the company of Muhammad Shafique and Nazir Ahmed accused persons in the fields of Syed Muhammad Azeem Shah while eating berry fruits. They met Liaquat Ali and Allah Bakhsh PWs who inquired from them about Muhammad Usman. Afterwards they accompanied them to the berry trees in search of the deceased. On 19.3.2006 at about 8 A.M. he was present in the Bethak of Javed Iqbal PW.4 when appellant Shafiq came there and told Javed Iqbal that he had committed murder of Muhammad Usman after committing

sodomy with him. In cross-examination he stated that he got recorded the confession of Muhammad Shafiq with police. He also did not try to apprehend him after he made extra-judicial confession.

7. PW.4 Javed Iqbal also testified in line with the statement of PW-3 and stated that appellant Shafiq had made confession of his crime to him in the presence of PW.3 Zulifiqar Ali.

8. PW.5 Ali Ahmed a cultivator joined the investigation team testified that on receipt of spy information the appellants were arrested in his presence and at their pointation dead body of Muhammad Usman was recovered by them by digging the land so also on their pointation bicycle in the wheat crop was recovered. He was also a witness to last worn clothes of the deceased, three sealed envelops, two sealed phials, four containers of plastic and an other sealed phial and a small plastic container. In cross-examination he stated that almost the whole villagers were present when the dead body was recovered.

9. PW.6 Bashir Ahmed identified dead body of Muhammad Usman at the time of postmortem examination.

10. PW.7 Dr. Muhammad Aslam Tahir, M.O. THQ Hospital Haroonabad conducted the postmortem examination on the dead body aged about 10/11 years and in his opinion the cause of death of the deceased and he stated as under:

> "The cause of death in this case was asphyxia due to strangulation by ligature, ligature marks were anti mortem, which was sufficient to cause death in ordinary course of nature. Hyoid bone was sent to hestopethologist. According to the report of hestopethologist death was occurred due to fracture of hyoid bone which was anti-mortem in nature. He had also gone through the report of Chemical Examiner. He was of the opinion that carnal inter course had taken place with the deceased prior to commission of murder. Triangular tear present at posterior part of anus. The probable time between

injury and death and between death and post mortem was within 72 hours. After the post mortem examination, he handed dead body, last worn clothes, post mortem report, police papers, sealed envelopes and jars to Abdul Majeed (PW.10)."

11. PW.8 Dr. Rao Muhammad Mukarram, Medical Officer THQ Hospital, Haroonabad examined appellants Nazir Ahmed and Muhammad Shafique accused regarding their potency and found both of them potent.

12. PW. 12 Muhammad Abid, Inspector/SHO was performing on 19.3.2006 the duties at P.S. Sadar Haroonabad as SHO. He drafted FIR on the basis of an application from the complainant. Thereafter he along with his subordinates proceeded to the chak No.157/3-L. Many persons of the locality were already gathered there before his arrival. He recorded the statements of the PWs under section 161 Cr.P.C. He raided houses of the accused persons for their arrest but in vain. However later on receipt of spy information he arrested the appellants.

During investigation they made disclosure that they would recover the dead body of the deceased and led to the place where they had buried the dead body in presence of the PWs. They dug out the earth with their hands and got recovered the dead body of Muhammad Usman. They also led to the recovery of bicycle lying in the wheat crop upon which they had abducted the deceased which was taken into possession. He recorded the statements of the PWs under section 161 Cr.P.C. In cross-examination he stated that 10 private persons were with him at the time of arrest of the accused persons. Dead body was lying buried at depth of 1-1/2 feet. Appellants dug out the earth with their hands. Dead body was directly shifted to the hospital from the place from where it was recovered. He did not prepare recovery memo of the dead body. He recorded the statements of the PWs on their dictation without any omission or addition on his part. PWs had not stated before him that appellant Muhammad Shafiq had confessed his guilt before them. He admitted that when the dead body of Muhammad Usman deceased was recovered by him at that time

Sajjad Hussain, Basher Ahmed, Ali Ahmed and Allah Ditta PWs of this case were present there with him. He did not prepared recovery memo of the dead body of Usman deceased in spite of the fact that all the above mentioned respectable of the village were present at that time. It was in his knowledge that DNA test was necessary in cases of Zina/sodomy particularly when the accused are more than one it is must that DNA test should be arranged. As there was evidence regarding sodomy with the deceased, therefore, he did not feel necessary to get the DNA test of the accused persons with the swabs taken from the anus of Muhammad Usman deceased by the doctor.

13. PW.9 Muhammad Iftikhar, PW.10 Abdul Majeed, PW.11 Shabir Ahmed, PW.12 Muhammad Abid Inspector/SHO, PW.13 Farzand Ali ASI, PW.14 Muhammad Sarwar patwari were formal witnesses of the case.

14. Statements of the appellant under section 342, Cr.P.C. were recorded. They opted not to appear under section 340(2) Cr.P.C. nor

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produced any defence evidence. To a question put to appellant Nazir Ahmed as to what else he has to say he replied the following plea:

"I am innocent. In fact the dead body of Muhammad Usman deceased was discovered by wild animals and that the father of the deceased as well as any of the other relatives had not made any report of his dis-appearance at the police station nor they made any efforts for his search after the discovery of dead body. Lumberdar of the village informed the I.O. who visited the place of occurrence, secured the dead body and took the same to police station along with Allah Bakhsh complainant and other relatives of the deceased where they concocted the story and prepared written application on behalf of Allah Baksh complainant as the father of the deceased namely Khuda Bakhsh was not prepared to support the concocted and false story given in written application Exh.PA. I had no concern what so ever with Muhammad Usman deceased nor I

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accompanied him out side the village nor I accompanied him to the berry trees as alleged by the prosecution. The above said false circumstantial evidence was created in order to strengthen the prosecution case against me. I did not discover the dead body nor the recovery of bicycle was pointed out by me. The recovery memo of bicycle was prepared by the I.O. in connivance with the complainant in order to strengthen the prosecution case against me and my co-accused. I am innocent.

15. Similarly Muhammad Shafiq in reply to a question "have you anything else to say" replied as follows:

"I have been involved in this case falsely due to the fact that I was personal servant of the father of the deceased and the complainant and his other relatives were not willing and they were opposing whereas the mother of the deceased insisted to keep me as a personal servant, that is why the father of the deceased was not made complainant neither he was cited as a

prosecution witness in this case. He was kept away from whole the investigation proceedings. Wild animals discovered the dead body of the deceased and Lumberdar of the village informed the police about the presence of the dead body. The police after reaching the spot and preliminary investigation arrested me from the house of father of the deceased. I have no concern whatsoever with the alleged offence. I neither took away the deceased nor committed any sodomy nor dead body was recovered on my pointation. The complainant party in connivance with the police has fabricated the whole story in order to take revenge from me. I am innocent."

16. The prosecution case revolves around circumstantial evidence and extra judicial confession made by appellant Shafiq. According to the learned counsel for the appellant Mr. Rehman Zafar the so-called extra judicial confession made by appellant Shafiq has no evidentiary value against him and more so against appellant Nazir. It was urged by him that the conduct of both the PWs 3 & 4 was unnatural as they

made no attempt to apprehend appellant Shafiq and take him to police station. It was further contended that PW.12 Muhammad Abid inspector/SHO in his statement had stated that PW.3 and PW.4 did not mention about extra judicial confession to him. Even if it is so, the extra judicial confession made by appellant Shafiq to sodomy and murder of Usman whereby he had also implicated appellant Nazir may be over looked, still no reasonable inference could be drawn except commission of crime by both of them on the basis of last seen evidence adduced by the prosecution through PW.3 and 4 and unimpeachable evidence establishing recoveries of the dead body of the deceased his last worn clothes and the bicycle all at the pointation of appellants in the presence of above-named PWs.

17 However as regards commission of sodomy on the deceased there is again unimpeachable medical evidence but there was neither any DNA test nor grouping of semen/ swabs to establish whether both the appellants or one of them had committed the sodomy. Due to this uncertain position, the benefit of doubt would go to both the appellants and a case of sodomy is not established against them.

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18. As a result while accepting the appeal of the appellants for sodomy, we do hereby set aside their conviction and sentence under section 377/34 PPC but dismiss their appeal for murder and convert their death penalty to imprisonment for life while maintaining compensation amount of Rs.50,000/- payable by both of them under section 544-A Cr.P.C. to the legal heirs of the deceased and in default thereof to undergo S.I. for a period of 3 months. Appellants are entitled to the benefit of section 382-B Cr.P.C.

19. Murder Reference No.6/L of 2006 in both appeals is replied in negative.

JUSTICE HAZIQUL KHAIRI
CHIEF JUSTICE.

JUSTICE SALAHUDDIN MIRZA

M. Z. Yasin

JUSTICE MUHAMMAD ZAFAR YASIN.

Announced on 10-04-2008

at Karachi
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Approved for reporting