

Cr.Appeal No.10/I of 2012 L.W.
Cr.Appeal No.11/I of 2012

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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE DR.FIDA MUHAMMAD KHAN
MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO. 10/I OF 2012 L.W.

1. Sher Dil s/o Khushdil r/o Rajjar Sheikhabad .. Appellants
Tehsil and District Charsadda
2. Khushdil s/o Wazir Muhammad r/o Rajjar
Sheikhabad Tehsil and District Charshadda

Versus

1. The State
2. Nabi Gul

...

Respondents

CRIMINAL APPEAL No.11/I OF 2012.

Javaid s/o Khushdil r/o Rajjar Sheikhabad Appellant
Tehsil and District Charsadda

Versus

1.The State
2. Nabi Gul

.... Respondents

Counsel for the appellant s ... Mr. Abdul Ghani Channa,
Advocate

Counsel for the State ... Syed Feroz Shah, Advocate on
behalf of KPK for State

FIR No. Date and ... No.594/09, dated 10.11.2009,
Police Station Sardehri District Charsadda

Date of judgment of ... 30.06.2011
trial Court

Date of Institution ... 2.4.2012
of appeals in FSC

Date of hearing ... 17.4.2013

Date of decision ... 29.4.2013

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JUDGMENT

RIZWAN ALI DODANI, Judge:- The following appeals are directed

against the judgments dated 30.6.2011 passed in Hadd Case No.06 delivered by the

learned Additional Sessions Judge-II, Charsadda and case No. 03/JJSO delivered by

the learned Additional Sessions Judge-II/Judge Juvenile Court, Charsadda

1. Cr.A.No.10/I of 2012 Sher Dil and Khushdil Vs. The State and others
U/s. 396 PPC convicted and sentenced to life imprisonment fine of Rs.50,000/- each or 6 months S.I. each
2. Cr.A.No.11/I of 2012 Javid Vs. The State
U/s. 396 PPC convicted and sentenced to life imprisonment fine of Rs.50,000/- or 6 months S.I.

Benefit of under section 382-B Cr.P.C. is extended to the accused/appellants.

2. Brief facts of the case arising out of FIR No.594/09 dated 10.11.2009 lodged

on basis of murasila at Police Station Sardehri District Charsadda are that

complainant/ASI Fazal Wahab received information about the presence of a dead body

lying in the fields of Ghulam Muhammad Khan on 29.09.2009 at about 1720 hours.

He, therefore, rushed to the spot where he found the dead body of an unknown person

which was completely decomposed. He prepared injury sheet Ex.PW.11 and inquest

report Ex.PW.1/2 and dispatched the dead body to Charsadda Hospital. In this regard

he made a report in shape of Naqal Mad No.36 dated 29.9.2009 and sent the same to

the police station. An inquiry under section 174 Cr.P.C. was then initiated and after

getting the post mortem report, FIR Ex.PA was lodged against unknown accused



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under section 302 PPC but later on after the arrest of accused, section of law was substituted and as such accused were charged u/s 17(4) Harraba r/w section 412 PPC.

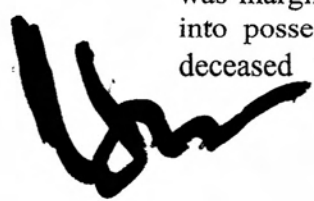
The police arrested some accused persons in another case FIR No.1437 dated 08.11.2009 and NIC of deceased was recovered from the accused. Therefore accused were charged by the father of deceased and the accused were accordingly arrested in the instant case. During investigation, police also got confessional statements of accused Khushdil, Sherdil and Javed recorded by Judicial Magistrate on 16.11.2009. Finally police submitted challan against accused Khushdil, Sherdil, Javed, Arshad, Wisal and Asghar.

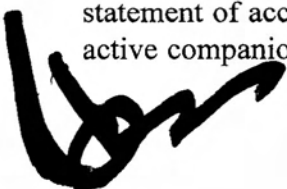
3. That after conclusion of the Investigation, the local police submitted in the Court report under section 173 of the Code of Criminal Procedure requiring the accused to face trial. Thereafter charge was framed against the accused vide charge sheets dated 5-5-2010 and 17.1.2011 under section 17(4) of the Offence Against Property (Enforcement of Hudood) Ordinance, 1979 and 412 PPC.

4. The prosecution in order to prove its case examined 14 witnesses.

i. PW-1 is Fazal Wahab, ASI. As per his statement, he received information in respect of a dead body lying in the fields of Ghulam Muhammad Khan. He therefore, rushed to the spot where he found the dead body of an unknown person being completely decomposed and was just like skeleton. He prepared the injury sheet and inquest report and dispatched the dead body to Charsadda Hospital. In this respect he made a report in shape of Naqal Mad No.36 dated 29.9.2009 and sent the same to the Police Station.

ii. PW-2 Ameer Muhammad, ASI deposed in court to the effect that he was marginal witness to the recovery memo vide which the I.O. took into possession copy of Identify Card in the name of Noor Habib deceased produced by Moharrir investigation of Police Station,



- Charsadda. He was also marginal witness to pointation memo vide which accused made pointation of their house and places inside the house and thereafter accused Javaid and Khushdil led the police party at a distance of one furlong of their house and made pointation of deceased, their places, points and the place of accused Asghar. He was also marginal witness to the recovery memo vide which the I.O. took into possession iron body of Suzuki Jangla No.CJ 4658 Karachi on the pointation of accused Wisal from his hujra. He was also marginal witness to the pointation memo vide which the accused Asghar led the police party to the house of accused Khushdil and made pointation of the room where they had confined deceased Noor Habib and then led the police party to the sugarcane field at a distance of 2/3 furlong where he made pointation of that place where Noor Habib was done to death.
- iii. PW-3 is Fazal Bacha, ASI. He was marginal witness to the recovery memo vide which the I.O took into possession the clothes of the deceased Noor Habib produced by the Moharrir sent by the doctor and identified by Nabi Gul father of deceased.
- iv. PW-4 is Nabi Gul father of deceased. As per his statement his deceased son Noor Habib used to ply Suzuki pick up as taxi for earning his livelihood. In the year 2009 on the following day of Eid-ul-Fitar his son left his house but did not return back till evening therefore, his search was made and in this respect a report was made in police station Mardan. He received information from Charsadda police after 20/30 days of the occurrence. He came to the P.S. where accused Javaid and Wisal told him that they had hired taxi of his son for shifting their mother to Hospital and they snatched the vehicle and committed murder of his son. He alongwith accused visited the house of accused where accused pointed out to the local police in his presence their house and led the police party to the sugarcane field where his son was done to death. That Suzuki was also recovered from the accused which had been sold to accused Wisal. That National Identity Card of his son was also recovered by the local police he therefore, charged the accused for the commission of offence.
- v. PW-5 is Sajjad Ali, ASI. Investigation of the instant case was entrusted to him. He was also handed over the inquiry papers for investigation. As per his statement he was informed by then local police of P.S.Charsadda about the arrest of accused facing trial except accused Asghar in case FIR No.1437 dated 9.11.2009 registered at P.S.Charsadda u/s 17(4) Harraba. The local police had also recovered NIC of deceased Noor Habib so he came to P.S. Charsadda where Moharrir investigation Shah Jehan produced him copy of National Identity Card in the name of Noor Habib, which was taken into possession. On the same date i.e. 11.11.2009 dead body of deceased which had been buried was handed over to the legal heirs. He then recorded statement of father of deceased and owner of the vehicle. He took into possession clothes of deceased, produced father of deceased before court for recording his statement u/s. 164 Cr.P.C. wherein accused were charged. He arrested accused Khushdil, Sherdil, Javaid and Arsihad, produced them before the court and later on interrogated them. They made pointation and in this regard pointation memo was prepared. He also prepared site plan and also made addition with red ink in the site plan already prepared by the operation staff during investigation of the inquiry u/s. 174 Cr.P.C. He also recorded statement of accused where they disclosed the name of Asghar as their active companion and also disclosed the factum of sale of the snatched
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Suzuki to one Wisal. He therefore, made them accused in this case for knowingly purchasing the stolen property. He produced the accused before the court for recording their confessional statement and accordingly accused Khushdil, Sherdil and Javaid recorded their confessional statements. He also recovered body/jangla of Suzuki from hujra of Wisal on his pointation. He recorded the statement of accused Wisal, who also disclosed that Suzuki in question was taken by the local police of Nowshera from his possession so he visited police station Nowshera where Suzuki was parked and as per pointation of owner of Suzuki he took the name into possession. He also submitted interim challan against accused and complied with all the formalities in shape of section 204 and 87 Cr.P.C. against accused Asghar. He also sent the clothes of the deceased to FSL but was returned that FSL has got no proper arrangement for the analysis of clothes as they were stained with rotten flesh of the deceased. He also submitted challan within the meaning of section 512 Cr.P.C. against accused Asghar. He recorded the statements of PWs U/s. 161 Cr.P.C.

- vi. PW-6 is Ameer Hussain, SHO who had submitted interim challan against all the accused and then complete challan against accused Khushdil, Sherdil, Javaid, Arshad and Wisal and challan u/s. 512 Cr.P.C. against accused Asghar.
- vii. PW-7 is the statement of Miss.Nusrat Yasmeen,ASJ, Charsadda who had recorded confessional statement of accused Khushdil, Sherdil and Javaid.
- viii. PW-8 is statement of Dr.Hakeem Khan who conducted autopsy on the dead body of an unknown make deceased and found the following :
External Appearance:
 - 1) Mark of ligature on neck and dissection etc.....Nil
 - 2) 'Condition of subject- stout emaciated, decomposed, etc clothing: A man of lean built wearing grey colour shalwar qamees stained with brownish black putrefactive fluids. The dead body is in black in colour and is extremely foul smelling. The putrefaction has advanced to the stage that skin slip and partial degloving is present. The eye socket is empty and the facial muscle both upper lip and lower lip are missing to the extent that the face is skeletonized. The teeth are 32 in number. The body is flooded with maggots.
Wound, Bruises, Position, Size, Nature:
 - 1) A firearm entry wound on right side of the skull temporal region measuring 2 x 2 cm in size. 10 cm from mid line and 3 cm from above right ear. Phenomenon of beveling observed.
 - 2) A firearm exit wound is situated on left side of skull measuring 1.5 x 1 cm in size. 0.5 cm back and behind left ear. The phenomenon of beveling observed with punched out margin on the outer table of skull.

Thorax: All organs were found Putrefied.

Abdomen: All organs were found Putrefied.

Remarks: In his opinion the deceased died due to injury to the brain due to firearm. Dead body alongwith P.M. documents, police papers and garments of the deceased are handed over to police.

Probable time between injury and death : Immediate

Between death and P.M. : 2 to 6 days

The P.M report Ex.P.M. Consisting of six sheets alongwith pictorial were admitted to be in his hand writing and bears his signature. The injury sheet and inquest report were also endorsed by him which are Ex.PM/1 and Ex.PM/2 respectively.

- ix. PW-9 is Tauheed Kha,SI/OII. He interrogated accused Asghar. He produced him before the court for grant of custody which was accordingly granted. On pointation of accused Asghar he prepared the pointation memo, recorded the statement of accused and PWs.
- x. PW-10 is Hairan Shah,DFC. He was entrusted with warrant u/s. 204 and proclamation notices u/s. 87 Cr.P.C. against accused Asghar, who complied with all the legal formalities.
- xi. PW-11 is Farid Shah,ASI. On the receipt of Post Mortem report he incorporated the contents of Mad No.36 into FIR Ex.PA.
- xii. PW-12 is Niaz Ali Shah, SI. As per his statement, on receipt of written report from Fazal Wahab ASI he entered the contents of report in shape of Mad No.36 dated 29.9.2009. He was marginal witness to pointation memo Ex.PW.1/2 vide which accused Khushdil and Javaid led police party to the house of Khushdil and made pointation and thereafter accused led the police party to the place of occurrence and pointed out various places to the I.O.
- xiii. PW-13 is Shah Jehan Moharrir of Police Station Charsadda. As per his statement Bakht Zamin Khan Inspector during investigation of case FIR No.437 dated 8.11.2009 registered u/s. 17(4) Harraba had handed over to him various NICs which were taken into possession. During the investigation of above mentioned case on 11.11.2009 he produced those NICs to Sajjad Khan,SI, who took into possession the NIC of Noor Habib in presence of marginal witnesses. NIC of Noor Habib is Ex.P4, the parcel was desealed on the request of learned counsel for accused and the NIC was found to be that of Noor Habib.
- xiv. PW-14 is Asmatullah. He was owner of Suzuki bearing No.4658/CJ Karachi, which was being driven by deceased Noor Habib. On second day of Eid-ul-Fittar in year 2009 the deceased took the vehicle but did not return, his search was made and in the meanwhile local police of P.S. Charsadda informed legal heirs of deceased Noor Habib. He alongwith the legal heirs came to police station Charsadda. He was marginal witness to pointation memo vide which accused Khushdil and Javaid led the police party to his house and pointed out the place where they kept the deceased, thereafter they led the police party to the place where they had killed the deceased. He was marginal witness to the recovery memo Ex.PW.1/3 vide which the I.O. took into possession jangla of Suzuki from the hujra of Wisal on his pointation. The I.O. prepared the recovery memo which was signed by him. The Suzuki was in possession of police station Nowhera Kalan, so he alongwith local police of P.S. Sardheri went to P.S. Nowshera where he identified the Suzuki there which was parked there. The vehicle was then returned to him by the Court at Charsadda as well as from the court of Nowshera on superdari.

5. After close of prosecution evidence on 22-2-2011, the statements of accused under section 342 Cr.P.C. were recorded given them an opportunity to explain their position with regard to facts brought on record against them involving them in the instant case. They reiterated their innocence and wished neither to be examined on oath nor to produce defence.

6. We have heard learned counsel for the parties and perused the relevant record and proceedings of the case and scanned the impugned judgment.

7. The relevant arguments which need to be examined out of lengthy arguments from both the sides are that according to the learned counsel for the appellants, the case is based upon the circumstantial evidence and that links of chain of circumstantial evidence are missing which cast doubts on prosecution case and that benefit of which should have been extended to the appellants/accused. According to the learned counsel, the confessional statements of appellants are doubtful as it was recorded jointly and that the confession before the Magistrate in cases of Hadd is not competent and considerable as it was only competent to be recorded before the trial Court in view of section 7 of Offence Against Property (Enforcement of Hudood) Ordinance, 1979.

That the alleged recovery of identity card of deceased from the possession of one of the accused persons is even otherwise not sufficient to connect appellants/accused



with the crime and as such the learned trial Court erred in finding the appellants/accused as guilty of the crime.

8. On the other hand learned counsel on behalf of Advocate General KPK appearing for the State argued that the impugned judgment does not suffer from any impropriety or illegality and the judgment is based on well founded reasoning. He submitted that no element of enmity is on record inasmuch as if it was so the complainant would have mentioned the names of appellants at the first instance i.e. at the time of lodging FIR and submitted that the confessional statements of the accused/appellants do not suffer from any illegality hence liable to be relied upon and could be made sole basis for the conviction. Further his submission was that the recovery of identity card of the deceased from the possession of appellant/accused Sher Dil, Khushdil and Javaid is a pivotal part of evidence and could not be discarded from the consideration

9. As regards the confessional statements made by the appellants/accused the record shows that it was recorded by the Magistrate separately and therefore the submission of learned counsel for the appellants that it was recorded jointly has no substance. So far as the submission regarding competence of confessional statements before the Magistrate in Hadd cases, first of all we would like to appreciate the reasoning of learned trial Court given in this regard as being wise and correct. That



section 7 of the relevant Ordinance envisaged the proof of theft/Harraba liable to Hadd and one of them is that if accused pleads guilty of the commission of theft/Harraba he would be liable to Hadd punishment. So, firstly it relates to punishment of Hadd, secondly if an accused made confession of his guilt before the Magistrate even then there was stage later to it in procedure of criminal law that it was asked by the trial Court after framing of charge whether he pleads guilty or not, as criminal procedure code was made applicable to the relevant Ordinance i.e. Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and in the instant case this opportunity was afforded to the accused who did not plead guilty and claimed to be tried. Moreover, if proof of Harraba liable to Hadd is not available to the trial Court in any of the required forms including that of pleading guilty of an accused before trial Court then the accused could be punished as Tazir and in this regard the trial Court could inter-alia consider a confessional statement of an accused, if any made before the Magistrate under section 164 Cr.P.C. with due care. Therefore, the confession if recorded before the Magistrate in Hudood cases is not in any way inadmissible and incompetent. Further it has come on record that all the appellants/accused are related to each other except Wisal and there exist no enmity between them and the complainant. That out of six accused persons three have got recorded their confessional statements before the Magistrate and the two who did not confess their guilt have been acquitted by the trial



Court. The perusal of the confessional statements of the appellants/accused persons reveal that there is no infirmity or illegality committed by the Magistrate while recording the same and the statements of the accused persons narrate the same facts as mentioned in the FIR and the statement of the complainant. The Magistrate was also appeared before the trial court and was subjected to cross-examination and nothing considerable came out of it which could make the confessional statements non-voluntary and untrue. That the factum of recovery of identity card is also worthy of credence as the testimony of PW-4 Sajjad Ali, SI who narrated in his testimony that the identity card of deceased was handed over to him by Shah Jehan, Moharrir of P.S. Charsadda by whom appellants/accused were arrested in another case and the copy of deceased identity card amongst other recovered from the appellants/accused by the said police station. The said Moharrir namely Shah Jehan of Police Station, Charsadda was also produced before the trial court as PW-12 who deposed similar facts as given by the PW-4 Sajjad Ali, SI and made this piece of evidence more credible. It has also come on record that the accused persons pointed out the house where the deceased was detained and also pointed out the place where the deceased was murdered in the presence of deceased's father/ complainant PW-3 as deposed by the latter in his testimony.

10. The complainant and the accused were not previously known to each other and there found no enmity between them inasmuch as the accused persons did not claim


enmity any where at the trial nor in their statements under section 342 Cr.P.C. as such, there seems no reason with the complainant to falsely implicate the accused persons in the case or substitute for unknown culprit. Perusal of impugned judgment does not suggest any legal and factual infirmity in examining of evidence by the trial Court.

11. The retracted confessional statements if found independent and voluntary and where no reasonable procedural defect was found in recording the same by the Magistrate and the same is corroborated by other reasonably confidence inspiring and consistent evidence on record, then the confessional statements can safely be relied upon for awarding conviction.

12. We have also gone through the case law cited by the counsel for the appellants and found them distinguishable to the facts of the case in hand.

13. In view of the above discussion we are of the considered view that the prosecution has reasonably made out the case against the appellants for the offences they have charged with and as such, the impugned judgment does not call for any interference by this appellate Court and the same is hereby maintained.

14. Consequently Cr.Appeal No.10/I of 2012 and Cr.Appeal No.11/I of 2012 are dismissed. The conviction and sentences awarded by the trial Court are maintained.



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The benefit of section 382-B Cr.P.C. extended by the learned trial Court shall also remain intact.

These are reasons for our short order dated 17-04-2013.



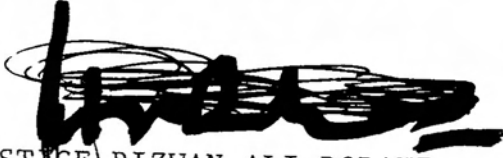
JUSTICE RIZWAN ALI DODANI



JUSTICE DR.FIDA MUHAMMAD KHAN

Islamabad, the
29th April, 2013
Abdul Majeed

Approved for Reporting



JUSTICE RIZWAN ALI DODANI