

Criminal Appeal No.38/I of 2014 L/w
Criminal Murder Ref. No.01/I of 2014

1

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SHEIKH NAJAM-UL-HASAN
MR. JUSTICE RIAZ AHMAD KHAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI

CRIMINAL APPEAL NO.38/I OF 2014 L/W

1. Fayyaz Rasool alias Pappu son of Umaid Ali, Appellant
caste Rajput aged 25 years,
resident of Chak No.22/11.L, Police Station
Saddar Chichawatni, Tehsil Chichawatni,
District Sahiwal.

VERSUS

The State Respondent

CRIMINAL MURDER REFERENCE NO.01/I OF 2014

The State Appellant

VERSUS

Fayyaz Rasool alias Pappu son of Umaid Ali, Respondent
caste Rajput aged 25 years,
resident of Chak No.22/11.L, Police Station
Saddar Chichawatni, Tehsil Chichawatni,
District Sahiwal.

Advocate for the appellant in : Mr. Aftab Ahmed Khan
Cr.A.No.38/I/2014 and respondent Advocate
in Cr. Murder. Ref. No.01/I/2014.

Advocate for the State : Ch. Zubair Ahmed Farooq,
Additional Prosecutor General
Punjab for State.

FIR No. and date & PS : 171/2006, dated 19.04.2006,
P.S. Saddar Chichawatni, Tehsil
Chichawatni, District Sahiwal.

Date of impugned Judgment : 20.05.2009
of learned trial Court

Date of Institution of Cr.A. : 25.11.2014
No.38/I/2006 in FSC

h.

Criminal Appeal No.38/I of 2014 L/w
Criminal Murder Ref. No.01/I of 2014

2

Date of Institution of Cr. : 25.11.2014
Murder Ref. No.
01/I/2014 in FSC

Date of hearing : 22.01.2015

h. Date of announcement of : 30.01.2015
judgment

JUDGMENT

Riaz Ahmad Khan, J:- Fayyaz Rasool son of

Umaid Ali appellant/accused herein was charged in case FIR No.171/2006, dated 19.04.2006 under section 302-B PPC, Police Station Saddar Chichawatni, District Sahiwal. Afterwards, section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 as well as section 377 PPC were also added. After the trial, the accused/appellant was convicted by learned Additional Sessions Judge, Chichawatni vide judgment dated 20.05.2009 and sentenced as follows:-

Under Section 377 PPC 10 years rigorous imprisonment with a fine of Rs.25,000/-, in case of default, he had to undergo six months simple imprisonment.

Under Section 302-B PPC Death penalty was awarded to the accused/appellant.

He was also directed to pay an amount of Rs.200,000/- as

compensation to the legal heirs of the deceased Muhammad Tariq

under section 544-A Cr.P.C. and in default to further undergo six

h.

months simple imprisonment. Death penalty was awarded subject to confirmation by the Hon'ble High Court. Benefit under section 382-B Cr.P.C. was awarded to the convict/appellant. He was however, acquitted under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979.

2. Brief facts of the case are that on 19.04.2006, complainant Maqbool Ahmed son of Abdullah at about 05.00 p.m. was present in his house alongwith his son Abid Hussain and brother-in-law Muhammad Yousaf. During this period, Muhammad Tariq deceased son of the complainant aged about 14/15 years and student of 9th Class came to the house and brought vegetables. Muhammad Tariq deceased left the house telling his father and maternal uncle that he would come back soon. For quite sometime, the deceased did not return and as a result, the complainant alongwith his second son Abid Hussain and brother-in-law Muhammad Yousaf went out in search of Muhammad Tariq deceased. Outside the house, they came to know that Muhammad Tariq deceased was seen going alongwith Fayyaz

h.

Rasool alias Pappu accused/appellant on motorcycle towards adda (Bus stop). At about, 06.30 p.m., while searching for the deceased Muhammad Tariq, they came to know that near kacha road in the area of Suleman Gujar, they saw a motorcycle parked over there. The accused/appellant Fayyaz Rasool son of Umaid Ali was inflicting churri blows/injuries on the face and neck of Muhammad Tariq, who was making hue and cry. The complainant, his brother-in-law and his son Abid Hussain ran towards him but the accused/appellant on seeing them decamped from the spot. The occurrence was witnessed by the complainant, his son Abid Hussain and Muhammad Yousaf brother-in-law of the complainant. The deceased then injured succumbed to his injuries on the spot. The motive for the offence was that the accused/appellant used to ask the deceased to leave study and start working in his workshop. The complainant had many times asked his relative to tell the appellant to leave his son as he was destroying the deceased (*خراب کر رہا ہے*). During this period, the police was informed, so the police came to the spot and the

n.

report was lodged in the shape of murasla Ex.PG by Rasheed Ahmed, Inspector/SHO PW12, who was in the company of other police constables and PW.11 Muhammad Sawar Khan, S.I. Complaint Ex.PG was drafted by Rasheed Ahmed, Inspector/SHO PW.12. On the basis of said murasla FIR No.171/2006 (Ex.PG/1) was registered by PW.8 Maqbool Hussain, S.I. Muhammad Sawar Khan, S.I. PW.11 prepared injuries sheet of Muhammad Tariq deceased Ex.PD/2, inquest report Ex.PE and sent dead body to the mortuary under the escort of Muhammad Yasin PW.4 at THQ Hospital Chichawatni for autopsy. Muhammad Sawar Khan S.I. PW.11 also collected blood stained earth from the place of occurrence, which was sealed into parcel and taken into possession vide recovery memo Ex.PH. He also took into possession motorcycle P.4 vide recovery memo Ex.PJ. The recovery memo were witnessed by Muhammad Yousaf PW.9 and Abid Hussain (given up). Muhammad Sawar Khan S.I. PW.11 also prepared site plan Ex.PL and recorded the statements of PWs under section 161 Cr.P.C. On the next day i.e. 20.04.2006 Muhammad

h.

Yaseen constable PW.4 brought last worn clothes of the deceased i.e. Qameez P-1, Shalwar P-2 (blood stained) alongwith string. One sealed envelope containing swabs, which were taken into possession, vide recovery memo Ex.PB. On 21.04.2006, scaled site plans Ex.PA, Ex.PA/1 and Ex.PA/2 were prepared by PW.3. All the information and facts were narrated by Muhammad Sawar Khan, S.I in his statement before the Court as PW.11. Thereafter, Muhammad Aslam, S.I. PW.13 was posted at Police Station, Saddar Chichawatni and the investigation of the case was entrusted to him. On 10.05.2006, he arrested Fayyaz Rasool accused/appellant. On 17.05.2006, Fayyaz Rasool accused/appellant, while in custody of police disclosed about the weapon of offence and on his pointation churri P.3 blood stained was recovered from his workshop situated at adda Ghaziabad, which was sealed into parcel vide recovery memo Ex.PK. The churri P-3 was handed over to the Moharrir for keeping the same in Malkhana and onward transmission. All these facts were narrated by Muhammad Aslam, S.I. in his statement before the Court as PW.13. Rasheed

h.


Ahmed, Inspector/SHO PW.12 on completion of investigation submitted complete challan of the case in the Court. The report of chemical examiner regarding blood stained earth Ex.PN, report of serologist Ex.PP, report of chemical examiner of blood stained churri Ex.PQ and report of serologist of churri Ex.PR were produced before the Court by DDPP.

3. The accused/appellant was summoned by the Court and charge was framed on 05.03.2007. The accused/appellant was charged under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, section 377 PPC and under section 302 PPC. The accused/appellant did not plead guilty to the charge and claimed trial.

4. The complainant Maqbool Ahmed appeared as PW.10 and stated the same facts as narrated in the FIR. The only addition in the statement was that the accused/appellant prior to committing murder had committed sodomy with his son. However, it was also stated that the accused/appellant used to force his son to work in his

h.

workshop. The second eye-witness produced before the Court was Muhammad Yousaf, maternal uncle of deceased Muhammad Tariq and brother-in-law of the complainant. He appeared as PW.9 before the Court. He completely supported the version given by the complainant. Absolutely, there is not difference between the statements of complainant and the eyewitness. The second eye-witness Abid Hussain was however given up being un-necessary. Doctor Zubair Tariq, Senior Medical Officer, appeared as PW.7, in his statement before the Court, he submitted that on 20.04.2006 at about .9.45 a.m. the dead body of Muhammad Tariq deceased aged about 15/16 years was brought to the hospital and he conducted the autopsy of the dead body. At that time, the Rigor Mortis was present, postmortem staining was present on the back. The injuries received by the deceased Muhammad Tariq were as follows:-

- Injury No.1** Incised would 4 cm X 0.5 cm X skin deep on right side of the face, just above upper lip 2 cm below right nostril 3 cm above right mandible.
- Injury No.2** Incised would 1.5 cm X 1 CM X going deep on front and upper part of left side of neck, 3 cm below angle of left mandible, 8 cm above left clavicle.
- 

- Injury No.3** Incised wound 3 cm X 1 cm X skin deep between right shoulder and neck, 3 cm above right clavicle.
- Injury No.4** Incised wound 1 cm X 0.5 cm X skin deep on front and upper part of neck, 4 cm below the chin.
- Injury No.5** Incised wound 1 cm X ¼ cm X skin deep on right shoulder.

According to the opinion of the doctor, the death was caused due to shock and haemorrhage under injury No.2, which was fatal and sufficient to cause death in ordinary course of nature. The time between injury and death was immediate, while the time between death and postmortem was within 24 hours. The postmortem report Ex.PD, pictorial diagram Ex.PD/1, application for postmortem examination Ex.PD/2 were signed by the doctor. It was further submitted that he had attested inquest report Ex.PE. The doctor also stated that in the light of report of chemical examiner Multan Ex.PF, the swabs were stained with semen and sodomy was committed with the deceased. The doctor also admitted that anal swabs were taken by him and also sent to the chemical examiner for detection of semen.

h.

5. On completion of prosecution evidence, the statement of accused/appellant was recorded under section 342 Cr.P.C. The accused/appellant did not wish to produce defence evidence. However, he did not record his statement under section 340 (2) Cr.P.C.

6. After hearing the parties, the accused/appellant was convicted and sentenced as stated earlier.

7. Feeling aggrieved of the said judgment, the accused/appellant filed appeal before the Hon'ble Lahore High Court, Multan Bench Multan, but since the charge also included section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979, so the appeal as well as murder reference was not maintainable before the Hon'ble Lahore High Court, Multan Bench. For that reason, the appeal was returned by the Hon'ble Lahore High Court, Multan Bench, vide order dated 10.11.2014 and thereafter, the present appeal was filed before this Court.



8. Learned counsel for the appellant submitted that it was an un-seen occurrence. The complainant as well as the eyewitness were interested witnesses and their statements could not be relied upon. The FIR was in conflict with the ocular evidence. PW.9, who was related to the deceased was marginal witness to all the recovery memoos and therefore the recoveries could not be accepted as correct.

9. On the other hand, learned Additional Prosecutor General Punjab for State submitted that it was a day time occurrence, the murder was committed in presence of the witnesses. The record shows that sodomy was committed prior to the death of deceased. The deceased was young minor boy, who was brutally murdered. The accused/appellant do not deserve any mercy and leniency, therefore, the conviction and sentences are proper and lawful.

10. We have heard learned counsel for the parties and have also perused the record.

11. The evidence on record shows that the occurrence took place at 06.30 p.m. on 19.04.2006. It was the month of April and



obviously, the occurrence had taken place one hour prior to the sunset at 06.30 p.m. It obviously means that the occurrence had taken place in day light. The occurrence was witnessed by three persons, complainant PW.10, Muhammad Yousaf PW.9 and Abid Hussain, who was not produced being unnecessary. The two witnesses produced in the Court gave the same version of the occurrence, which was not shattered in the cross-examination. Both the witnesses said that the victim received injuries on his face and neck. This version was supported by medical evidence and the doctor, PW.7 Dr. Zubair Tariq in his statement confirmed the same through postmortem report Ex.PD. In the FIR, it was stated that the deceased had gone along with the accused/appellant on a motorcycle and the said motorcycle was recovered from the spot. Report was made on the spot and therefore, there could be no question of delay. On the production of the accused/appellant the weapon of offence i.e. blood stained churri was recovered from his workshop. Blood stained earth was taken in possession from the place of occurrence through Ex.PH and the report

h.

of Serologist Ex.PP proved that it was human blood. This fact also cannot be ignored that only one accused is charged and there is absolutely no reason for false implication. In addition to that if it is presumed that the accused was falsely implicated it would mean that the complainant has saved the actual culprit but there is nothing on record to show that the complainant in order to save the actual culprit implicated the accused falsely. Keeping in view these facts it becomes clear that the accused Fayyaz Rasool had committed the murder of deceased Muhammad Tariq.

12. As far as sodomy is concerned, anal swabs were obtained by the doctor at the time of postmortem and were sent to the chemical examiner. The report of the chemical examiner Ex.PF is available on file, which shows that the swabs were stained with semen. The oral/ocular evidence is supported by medical evidence. According to the evidence available on record, the deceased Muhammad Tariq, aged 15/16 years had left his house at about 05.00 p.m. and he was seen going alongwith the accused on motorcycle and by 06.30 p.m. he

h.

was murdered. It obviously means that it was only the accused, who committed the act of sodomy with the deceased and no body else. In judgment reported as 2007 SCMR P.698 (Shariat Appellate Jurisdiction), the Hon'ble Supreme Court of Pakistan had maintained the conviction simply on the basis of medico legal report, as such it stands proved that the accused was guilty of the act of sodomy with the deceased.

13. The case of the prosecution is that the deceased was seen going with the accused on a motorcycle, so at the most probable presumption would be that the deceased was a willing partner. Though it would be a presumption, yet the willingness of the victim would not make any difference. In judgment titled as Munsab Ali Versus Riasat 1988 SCMR 1614, it was held that

”غیر فطری جنسی فعل خواہ مفعول کی مرضی کے ساتھ ہو یا بغیر مرضی کے، ہر صورت میں جرم قرار پائے گا۔“

14. In these circumstances, the accused/appellant was rightly convicted for the act of sodomy with the deceased Muhammad Tariq.

h.

Since the deceased/victim had not been abducted by the accused, therefore, the accused could not be convicted under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. He was rightly acquitted by the learned trial Court under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979. We are, therefore, of the opinion that the accused was rightly convicted under section 302-B PPC as well as under section 377 PPC. However, in our opinion, the sentence under section 302-B PPC was not properly awarded to the accused/appellant. Sentence under section 302-B PPC was slightly harsh.

15. The case of the prosecution is that the deceased had gone alongwith the accused on motorcycle, which obviously means that the deceased had willingly gone with the accused/appellant. At the time of occurrence when the witnesses saw the deceased he was putting on shalwar, which means that the offence of sodomy had already been committed. The motive shown by the complainant in the FIR was that the accused/appellant used to compel the deceased to work in his

h.

workshop, in the statement before the Court, it was however, added that the accused/appellant had committed sodomy with the deceased.

So, if it is presumed that the motive for the offence was to commit sodomy then the same had already been committed. Therefore, there was no reason for the accused/appellant to commit murder of the deceased. It is not known as to what happened at the particular time, which resulted in the murder of deceased. Taking churri by the accused to the place of occurrence could be taken as a circumstances that the accused had plans to kill the deceased but that would be a presumption as there could be other reasons for taking churri to the place of occurrence. The circumstance shows that at the time of occurrence some incident had taken place, which resulted in the murder of the deceased. There could be many reasons for committing murder but those reasons would be based on presumption. In simple word, it could be said that the motive for the offence is shrouded in mystery. Thus giving the

h.

benefit of doubt while awarding sentence to the accused/appellant, we feel that the accused/appellant is entitled to a lesser punishment.

16. Accordingly, modifying the judgment of learned Additional Sessions Judge, Chichawatni, we accept the appeal and convert the death sentence into life imprisonment and maintain the remaining sentence including the one awarded under section 377 PPC. All the sentences shall run concurrently. Benefit of section 382-B Cr.P.C. is however, given to the accused/appellant.

18. The Criminal Murder Reference No.01/I of 2014 filed by the State against the respondent Fayyaz Rasool alias Pappu is not confirmed and is answered in negative.


MR. JUSTICE RIAZ AHMAD KHAN


MR. JUSTICE SHEIKH NAJAM-UL-HASAN


MR. JUSTICE ZAHOR AHMED SHEHWANI

Dated Islamabad the
30.01.2015
Hummayun/-

Approved for reporting.

MR. JUSTICE RIAZ AHMAD KHAN