

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTICE SYED AFZAL HAIDER

CRIMINAL Appeal NO.135/L/2006

Nasir Hussain son of Sadiq Hussain, Caste Rajput
resident of Chak No.17/J.B. Tehsil Chak Jhumra,
District Faisalabad.

..... Appellant

Versus

The State.

..... Respondent

Counsel for the appellant	...	Syed Zahid Hussain Bukhari, Advocate
Counsel for the State	...	Mr. Arif Karim, Deputy Prosecutor General
No.& Date of F.I.R Police Station, district	F.I.R No.524/05 dt. 10.06.2005 Chak Jhumra, District Faisalabad.
Date of Judgment of trial Court	...	20.05.2006
Date of Institution	...	03.06.2006
Date of hearing	02.01.2009
Date of decision	02.01.2009

JUDGMENT:

Justice Syed Afzal Haider, Judge: This appeal is directed against the judgment dated 20.05.2006 passed by Additional Sessions Judge, Faisalabad whereby Nsir Hussain appellant has been convicted under Section 302(b) of Pakistan Penal Code and sentenced to life imprisonment with direction to pay compensation of Rs.50,000/- to the legal heirs of the deceased and in default thereof to undergo further six months simple imprisonment. He has further been convicted under Section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to ten years rigorous imprisonment with fine of Rs.10,000/- or in default whereof to further undergo six months simple imprisonment. Both the sentences were ordered to run consecutively with benefit of Section 382-B of the Code of Criminal Procedure.

2. The prosecution story as unfolded from the complaint Ex.PF submitted by complainant Muhammad Yousaf, PW.6, is

that on 10.06.2005 at about 7.00 a.m, his son Qaiser Abbas aged 7/8 years went out of his house for playing but did not return till 9.00 a.m, upon which the complainant got worried and started his search alongwith Zafar Iqbal and Bashir Ahmad PWs. At about 4.15 p.m, they reached in the sugar-cane crop of one Abdul Ghani Ghumman where they found the dead body of Qaiser Abbas in naked condition and his shalwar and shirt were lying nearby. Foam was coming from his mouth, bluish marks were present on his neck while blood and stool was found out of the anus. The complainant further alleged that some unknown accused after committing sodomy, murdered his son by strangulating.

3. As a consequence of this incident, Crime Report bearing number 524/2005 was got registered on 10.06.2005 with Police Station Chak Jhumra, District Faisalabad under Section 302/377 of the Pakistan Penal Code and under Section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

Police investigation ensued thereafter. PW.11 Muhammad Khalid S.I./I.O investigated the case. He recorded the statement of complainant Ex.PF on the basis of which F.I.R Ex.PF/1 was registered. He inspected the place of occurrence, examined the dead body, prepared injury statement Ex.PB and inquest report Ex.PC of the deceased. He prepared rough site plan of the place of occurrence Ex.PK. He dispatched the dead body for post-mortem examination to Civil Hospital, Chak Jhumra under the escort of Muhammad Idris Constable. He did not take into possession any thing from the place of occurrence. He recorded the statements of the PWs under Section 161 of the Code of Criminal Procedure. He got prepared scaled site plan in duplicate Ex.PD and Ex.PD/1 from Patwari Halqa. He took into possession the last worn clothes i.e. shalwar P.1 and Qameez P.2 of the deceased at the spot through recovery memo Ex.PE. He prepared Fard identification of the place of occurrence Ex.PJ. The accused was arrested on 27.06.2005. On 30.06.2005

silver ring P.3 was recovered from the accused on his pointation which was taken into possession by the I.O. through recovery memo Ex.PA. He prepared Fard Shanakhat Ex.PH of said silver ring. He prepared rough site plan of place of occurrence Ex.PM. On 17.06.2005 he recorded the statements of Mujahid and Said PWs regarding the extra judicial confession of the accused. On 11.06.2005 Idris Constable handed over to him the copy of post-mortem report and sealed envelope containing swabs and he handed over the said sealed envelope of swabs to the Moharrer on the same day. The I.O recorded the statements of PWs under Section 161 of the Code of Criminal Procedure. The S.H.O submitted report under Section 173 of the Code of Criminal Procedure in the trial Court on 06.07.2005 requiring the accused to face trial. The learned trial Court framed charge against the accused on 07.03.2006 under Section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, under Sections 377, 302 and 412 of the Pakistan Penal Code.

4. The prosecution in support of its case produced 11 witnesses. The gist of the prosecution witnesses is as under:-

(i) PW.1 Doctor Liaqat Ali had conducted post-mortem examination on the dead body of Qaiser Abbas deceased and observed the following injures:-

1. A contusion mark 3 cm x ½ cm on right side of neck middle part.
2. A contusion 1½ cm x ½ cm on right side of neck middle part.
3. An abrasion ¼ cm x ¼ cm below left side of chin outer to injury No.2.
4. A contusion 9 cm x 1 cm on left side of neck starting from angle of left jaw obliquely outwards and downwards upto supra-clavicular region.
5. A contusion 4 cm x ½ cm on left cheek starting from lobule of left ear towards middle of left cheek.
6. An abrasion 2 cm x ½ cm on peripheral part of pinna of left ear middle part.
7. Swelling of pinna left ear was present.

Faecal material was coming out of anal sphincter which was lax. Tin head abrasion all around the anal sphincter were present which was congested and mild degree anal prolapse was present. Three swabs (perianal, anal, and rectal) were taken, sealed in a phial, signed, stamped and handed over to above mentioned police constable for Chemical Examiner Punjab, Lahore.

The doctor gave his opinion as under:

“The cause of death in this case was asphyxia due to pressure on air passages (Trachea) and blood vessels of neck by injuries of neck No.1, 2 and 4 which were sufficient to cause death in an ordinary course of nature. Injuries Nos. 3, 5, 6 and 7 were Shujjah Khafeefa. Three swabs (Prianal, anal and rectal) were taken, sealed in a phial, signed, stamped alongwith shirt and shalwar which were also sealed in an envelope, signed, stamped and handed over to above mentioned police constable for Chemical Examiner Punjab and Serologist Government of Punjab Lahore for semen analysis and grouping.

The probable time that elapsed between injuries and death was within a few minutes or so

- and between death and post-mortem was within 48 hours.”
- (ii) PW.2 Muhammad Tahir Patwari Halqa deposed about preparation of scaled site plans in duplicate of the place of occurrence Ex.PD and Ex.PD/1.
- (iii) PW.3 Muhammad Idris Constable deposed that on 11.06.2005 he escorted the dead body of Qaiser Abbas to the mortuary of T.H.Q. Hospital Chak Jhumra. He stated that after the post mortem examination the Medical Officer handed over to him the last worn clothes i.e. Shalwar P.1 and Qameez P.2 of the deceased, a sealed phial P.3, envelope P.4 and a sealed tin which he produced before the I.O. who took the same into possession through memo Ex.PE.
- (iv) PW.4 Liaqat Ali constable deposed that on 26.06.2005 Zulfiqar Moharrir handed him over the last worn clothes of the deceased Qaiser, an envelope and a parcel which he delivered intact in the officer of the Chemical Examiner, Lahore on 28.06.2005.
- (v) PW.5 Zulfiqar Ali Moharrer/Constable deposed that on 11.06.2005 the I.O. handed him over one sealed envelope and last worn clothes of the deceased for placement in Malkhana and on

26.06.2005 he handed over the parcel to Liaqat Ali Constable for its delivery in the Office of Chemical Examiner, Lahore.

- (vi) PW.6 Muhammad Yousaf complainant reiterated the story as narrated by him in complaint Ex.PF.
- (vii) PW.7 Zafar Iqbal, brother of Qaiser Abbas deceased, supported the version of complainant PW.6.
- (viii) PW.8 Ghulam Shabbir is the witness of last seen evidence. He deposed that on 10.06.2005 at about 7/7.30 a.m, Nasir accused alongwith Qaiser Abbas deceased came to his shop and purchased PAUPER for Rs.5/-.
- (ix) PW.9 Allah Ditta deposed that he accompanied the dead body to the mortuary and identified the dead body of Qaiser Abbas before the postmortem on 11.06.2005.
- (x) PW.10 Said Ahmad deposed that Nasir Hussain accused confessed before him that he took Qaisar Abbas deceased to Sugarcane crop, where he committed sodomy with him and thereafter strangulated him.
- (xi) PW.11 Muhammad Khalid, Sub Inspector, had investigated the case, whose role has already been referred to Paragraph 3 of this judgment.

5. The prosecution closed its case on 20.05.2006, whereafter, statement of Nasir Hussain accused was recorded under Section 342 of the Code of Criminal Procedure. The accused denied the allegations leveled against him and stated in answer to question No.10 as follows:

“The case is false. I have been falsely implicated in this case by the police in connivance with the complainant party due to suspicion. There is no eye-witness of the occurrence and the I.O has fabricated the evidence of Extra Judicial Confession in order to strengthen the prosecution case, Initially four other boys namely Muhammad Zaman, Amer and Muhammad Akram etc. but for the reasons best known to the I.O and the complainant party all the said suspect persons except myself were let off by the I.O. The PWs are close related to the deceased. They have deposed falsely being closely related to the deceased and the complainant.”

6. We have seen the record of this case and also perused the deposition of the witnesses. During the process of scanning the evidence the following obstinate questions assailed the mind:-

- (i) PW.10, Said Ahmed is a witness before whom the extra judicial confession was made by the appellant. Said Ahmed is neither a Lamberdar nor a Chowkidar of the village; he is neither an elected Nazim of the locality nor an elected representative of the village; he is neither head of the clan nor even a landlord of consequence. He is no body in the sense that he could be helpful to the appellant either to soften the reaction of bereaved family or be in a position to influence Investigating Officer. Why should the appellant select this witness for extra judicial confession? In cross-examination the witness stated that his statement was recorded the day the extra judicial confession was made before him and he claims to have "got recorded in my statement that Qaisar Abbas deceased was with him and they purchased Poppers". He was confronted with his previous statement Ex.DC wherein it was not so recorded. This witness according to his own showing is closely related to the complainant.
- (ii) The other intriguing aspect of this extra judicial confession is that it was made in the Baithak of Mujahid, of course when Mujahid was also present because the witness stated that the "accused told

us". This person, apparently an independent witness, has neither joined police investigation nor he came forward to take the Court in confidence. We do not know whether such a person exists at all. We confronted learned Counsel for the State whether the uncorroborated weak evidence of extra judicial confession, not divulged by the witness during police investigation could be relied upon to sustain sentence of life imprisonment? But we did not receive any convincing explanation.

- (iii) Is it fair to accept the testimony of PW.8 Ghulam Shabbir on the question of the deceased being last seen with the appellant? This witness stated that "on 10.06.2005 Nasir accused present in Court at the shop at about 7/7.30 a.m. and purchased PAUPER for Rs.5/-. I saw Qaisar Abbas with him. Later on police called me and I told the police that accused Nasir has purchased PAUPER from my shop and he was accompanied by the deceased". But when this witness was confronted with his previous statement Ex.DA it was found that it was not so recorded. Such contrivances by way of extra judicial confession and the episode of last seen may be placed on file by the prosecution but it is not possible for us to ever consider this type of

stratagem. Last seen evidence has to be accepted with great care and caution. It must be incompatible with the innocence of the accused. The chain of events should be convincing and leading to the irresistible inference that the accused was really involved in the crime. All other possibilities should be excluded except the conclusion of guilt. In the case under consideration the Investigating Officer PW.11 stated that no one told him that deceased was seen accompanied the accused.

- (iv) We told the learned Counsel for the State that the best possible evidence to clinch the case was semen grouping. Three swabs, (Perianal, anal and rectal) were taken by the doctor, PW.1 on 11.06.2005 and handed over to police for examination, analysis and grouping by the Chemical Examiner, as noted on the first page of the Post Mortem Report. The appellant was arrested on 27.06.2005 i.e. eleven days after the contaminated swabs were sent for examination. Why has not the result of grouping of semen found on the swabs under question and the group of semen of the appellant been produced in Court?

- The learned State Counsel was not able to answer this question either.
- (v) The medical expert, PW.1, after examining the dead body, its condition and external appearance stated that "the probable time that elapsed between injuries and death was within a few minutes or so and between death and postmortem was within 48 hours". The post mortem was conducted on 11.06.2005 at 8.00 a.m. It, therefore, means that the death took place on 09.06.2005 at about 8.00 a.m. or thereafter. The prosecution case is that the boy left the house at 7.00 a.m. on 10.06.2005. There is a marked difference of 24 hours between what is stated orally and what is established by unimpeachable evidence of the medical doctor produced by prosecution itself. Human being may suppress the truth but the dead body does not tell lies. The laws of decomposition process etc. give a sufficiently accurate picture of the duration. The learned Counsel for the State has not able to give satisfactory reply to this glaring contradiction between the two sources of prosecution story. In fact the oral testimony of complainant is not corroborated by medical evidence. The prosecution did not opt to challenge medical evidence.

7. The learned Counsel for the State however maintained that a young boy of tender age has been murdered after being subjected to sodomy. We are conscious of this fact but that does not mean that the life of a juvenile suspect be wasted without proof. The tradition of the Holy Prophet (Peace be upon Him) is very clear in such a situation. The judges are required to stop the moment doubts creep in. The nature of the evidence produced by the prosecution does not at all inspire confidence. Principle governing the assessment of circumstantial evidence is that it must be of a nature which does not admit any conclusion other than that of guilt. If the circumstances are capable of some other explanation then they cannot form the basis of conviction. This is an age old and time honoured principle and has stood the test of time.

8. In this view of the matter it is not safe to maintain conviction and sentence awarded to the appellant. The appellant, as a consequence of the nature of evidence produced

by the prosecution party, has justifiably earned benefit of doubt.

As a result of what has been stated above we accept the Criminal Appeal No.135/L/2006 filed by the appellant and thereby set aside the judgment recorded by learned Additional Sessions Judge, Faisalabad, on 20.05.2006, in Sessions Case No.48-7 of 2005 and Sessions Trial No.7-7 of 2006 convicting the appellant under Section 302 (b) of Pakistan Penal Code and Section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 and sentencing him to various punishments, as indicated in the opening paragraph of this judgment. The appellant shall be set at liberty unless required in any other case.

Sanaida

Justice Syed Afzal Haider

M. Z. Yasin

Justice Muhammad Zafar Yasin

Dated Lahore the
2nd January, 2009
M. Imran Bhatti/*

Fit for reporting

Sanaida

Justice Syed Afzal Haider