

IN THE FEDERAL SHARIAT COURT
(Appellate jurisdiction)

Present

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
MR. JUSTICE ALLAMA DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SALAHUDDIN MIRZA

CRIMINAL APPEAL NO.269/I OF 2005
CRIMINAL M. R. NO.13/I OF 2005

Abid Mahmood son of Sher Ahmad,
Caste Rajpoot, Resident of Mohallah Tariq Abad,
Village Mirza, District Attock. Appellant.

Versus

The State. Respondent.

For the appellant Malik Rab Nawaz Noon, Advocate.

For the complainant Mr. M. Bashir Peracha, Advocate.

For the State Ms. Rukhsana Malik, Additional
Prosecutor General

No. & Date of FIR/PS No.199, 25-11-2004, P.S. Saddar
District Attock.

Date of judgment of trial Court 24-10-2005

Date of filing appeals 29-10-2005

Date of hearing 22-01-2009

Date of decision 27.2.2009.

JUDGMENT:

HAZIQUL KHAIRI, CHIEF JUSTICE.- Appellant Abid Mahmood was convicted and sentenced under sections 377/511 PPC for 5 years R.I. and fine of Rs.10,000/- or 2 months' imprisonment in default of payment and under section 302 (b) PPC for death penalty and compensation in the sum of Rs.200,000/- (Two Lacs) to the legal heirs of the deceased under section 544-A Cr.P.C. or 6 months' imprisonment.

2. As per FIR dated 25.11.2004, lodged by Muhammad Safdar, father of deceased Jamshed, is that his son used to receive religious education from the appellant Abid Mehmood. In the evening of 24.11.2004, the appellant called the deceased from his house and took him away. When the deceased did not return till 11.00 p.m., the complainant alongwith Muhammad Ali (not produced) and Feroz Khan (not produced) started his search. He met Tariq Nawaz (PW.9) and Muhammad Yaqoob (not produced) who told the complainant that they had seen the deceased in the company of the appellant while they were going towards Sawan Wali Bun at night. The complainant reached the land of one Abdul Malik in the aforesaid area where in torch light he saw the dead body of his son lying in a deserted well. They took out the dead body from the well and saw a noose around the neck and blood oozing from the mouth and nose of the dead body. The shalwar of the deceased had been partly removed and there were bruises on the body. The complainant got the case registered against the appellant after a few hours.

3. A formal charge under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, and under sections 377,

302, and 201 PPC was framed on 18.1.2005 to which the appellant pleaded not guilty and claimed trial. The prosecution examined as many as 11 witnesses in support of its case.

The conviction of the appellant revolves around the depositions of PW. 10 Muhammad Safdar (complainant), PW. 9 Tariq Nawaz, PW. 7 Dr. Muhammad Afzaal, Medical Officer and PW.11 Muhammad Usman, ASI and Investigating Officer. Other witnesses are formal or marginal and were either not cross-examined or even if cross-examined, their depositions remained unscratched and hence not discussed.

4. PW. 10 Muhammad Safdar is the father and complainant. In his testimony he had stated that the appellant called his son from his house and took the deceased with him. As against this in his FIR he had stated that at the appellant's instance (Bulwa-kar Lay Gaye (بلوآرے لے گئے)) the deceased was taken away by him. He admitted that his second statement was recorded on 25.11.2004 after the dead body was found in the well. It was not within his knowledge that there were announcements in the mosque regarding recovery of the dead body of his son. His house is at a distance of 25/30 paces from the mosque.

5. PW. 7 Dr. Muhammad Afzaal, CMO, DHQ Hospital Attock, conducted post-mortem examination on the dead body of Muhammad Jamshed on 25.11.2004 at 6.00 a.m. His observations among others were as follows:-

“It was a dead body of young male, aged about 12 to 18 years clad in badami colour shalwar qameez, white bunyan which were mud and blood stained. Rigor mortis was fully developed.

Post mortem staining was present on the dependent part i.e. posterior of legs, buttocks and back. Eyes were close. Blood present in the nostril and half tongue is protruded from mouth and blood stained. Face was swollen. Eye lids were swollen. Ligature was found around the neck which was complete with mark on right side of the neck. Ligature mark was horizontal. Ligature size was roughly 1 cm and with spiral marks. On the area of ligature mark skin was dry yellowish brown. In my opinion cause of the death was asphyxia due to strangulation. All the injuries were ante mortem and homicide in nature. Probable time between injuries and death was immediate within few minutes while between death and post mortem was between 8 to 12 hours.”

6. PW. 9 Tariq Nawaz testified that on 24.11.2004, he alongwith Muhammad Yaqoob (not produced) was present near the house of one Muhammad Iqbal, where Muhammad Safdar, (complainant), Muhammad Ali and Feroz Khan, approached them in search of Jamshed deceased. They told them that they saw Jamshed alongwith Abid Mahmood appellant, present in the Court, going towards Sawan Wali Ban. Later on, they came to know that the dead body of Jamshed was lying in the well owned by Abdul Malik Lumberdar. He was President of Masjid Ghafooria Tariq Abad Mirza whereas Ghulam Nawaz was its General Secretary on this date. The appellant had remained as Pesh Imam/Khateeb of the mosque. On 28.11.2004 he was in the mosque alongwith Ghulam Nawaz, when the appellant Hafiz Abid Mahmood came in the mosque and disclosed to them that on 24.11.2004 he had taken Jamshed alongwith him on the pretext to attend a shabina in the house of one Feroz in Mohallah Sikandarpura. Instead he took the deceased to the well of Malik Lumberdar and detained him there till late night. It was there that devil had

overpowered him. He removed the shalwar of the deceased for committing unnatural offence but discharged outside during the attempt. The deceased started weeping and threatened the appellant that he would inform his family members about the incident. The appellant had a white string in his pocket so he put a noose around the deceased's neck and pulled it with force due to which blood started coming out of his nostril. He removed a gold locket from the neck of the deceased and then threw the dead body of the deceased in the nearby well. He kept the locket in the almirah of his house. After disclosure of his crime, the appellant asked PW.9 and Ghulam Nawaz to produce him before the police with request to save him from the physical torture of police. They took the appellant to the Police Station Saddar Attock before the Investigating Officer. In cross-examination, P.W.9 stated that he was an illiterate person. In 1999/2000 he had become the president of said mosque. He could not say whether the occurrence took place in the month of Ramzan or not. He did not remember as to whether PW Safdar, Yaqoob and Muhammad Ali met him in the mosque at the time of Isha prayer or not. It was early in the morning on 25.11.2004 at about 4.00 or 4.15 a.m., when he went to the well where dead body of the deceased was found. He had gone there alone. Volunteered that all people of Mohallah had reached there. He had gone to the place where dead body was recovered after announcement in the mosque. The police had arrived afterwards. He could not say whether Yaqoob was present there or not. When he reached there, the dead body was lying outside the well. He did not remember if there was moonlight or not. Yaqoob is his friend. The appellant had remained as Imam of their mosque for

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a year and used to impart religious education to the children of the vicinity. It was incorrect to suggest that they forced him to leave the mosque. It was correct that he belonged to Brailvi sect but it was incorrect to suggest that the appellant belonged to Devbandi sect. Volunteered that if he had been Devbandi, they would not have employed him as Imam. There had been a dispute on the arrival of Tablighee Jamaat in their mosque prior to the registration of the mosque. Volunteered that the dispute had been created by the appellant with Tablighi Jamaat. The appellant had stopped coming to the mosque after the said incident. Ghulam Nawaz and Muhammad Ali are his friends. When the appellant approached him in the mosque, they (he and Yaqoob) did not call PW Safdar nor PW Muhammad Ali, nor any other resident of the locality. He did not join in the investigation proceedings with the police before 28.11.2004. The police did not conduct any raid in the house of appellant in his presence nor he knew about it. The recovery of locket from the house of appellant was not made in his presence.

7. PW. 11 Muhammad Usman, ASI, Police Station Saddar Attock deposed that on 25.11.2004 he was working as ASI/Duty Officer at Police Station Saddar Attock. On the same day at about 3.15 a.m. Muhammad Safdar, complainant appeared before him and made statement regarding the occurrence as in FIR. He went to the place where the dead body of deceased Jamshed was lying outside the well. He prepared inquest report, and also application for post mortem examination and entrusted the dead body to Muhammad Sarwar Constable for taking to hospital. He inspected the spot and prepared rough site plan of place of occurrence and all the notes and drawings

therein were in his hand and signed by him. He recorded the statements of the PWs. On 28.11.2004, he arrested Abid Mahmood appellant and got recovered Rs.70/- and Chaddar during his personal search which were taken into possession vide memo Ex.PG. On 30.11.2004 appellant Abid Mahmood during interrogation made disclosure of his crime and led to the recovery of locket P-4 and chain P-5 from his baithak, which were taken into possession vide memo Ex.PF in presence of PWS. Muhammad Ali and Muhammad Zubair. In cross-examination he stated that he had not mentioned in the case diary that he recorded the statement of Muhammad Safdar under section 161 Cr.P.C. regarding locket. He had not sealed the locket or chain in a parcel.

8. After closure of the prosecution case, the appellant was examined by the learned Sessions Judge ~~Attock~~ under section 342 Cr.P.C. In reply to questions put to him, the appellant replied:-

“The witnesses had deposed against him falsely due to enmity. He was employed as Imam of the mosque of which Tariq Nawaz was President and Ghulam Nawaz was Secretary of Masjid Committee. There had been a dispute between him and said PWs and they expelled him from the mosque due to which they had fabricated this false story. He never made any extra judicial confession before them and nor he was on visiting terms with them. The complainant Tariq Nawaz and Ghulam Nawaz, Muhammad Ali, Yaqoob and Zubair, PWs belonged to the same group. He was not even on speaking terms with them and they in connivance with the complainant and the police fabricated a false story of last seen and extra judicial confession and the recovery.”

9. The reasons which prevailed upon the learned trial judge to convict the appellant in his own words were as under:

“In the instant case the prosecution has not only based its case on last seen evidence and extra-judicial confession but the same is coupled with recovery of the locket and chain of the deceased from the accused at his own pointation from his house. The enmity between the accused and PW.-9 Tariq Nawaz is self assumed. No such serious animosity is proved on the record. Even if for a moment the evidence of PW-9 Tariq Nawaz is not considered there was absolutely no reason to discard the evidence of PW.10 Muhammad Safdar complainant/father of the deceased who clearly deposed that the accused had taken away the deceased with him from his house in the evening of 24.11.2004. The complainant had neither any enmity with the accused nor he had any motive to falsely implicate the accused in this case”

10. Learned counsel for the appellant Malik Rab Nawaz Noon contended before us that the impugned judgment suffers from surmises and conjectures and based upon misreading and non-reading of evidence as well. He drew our attention firstly to F.I.R. according to which the victim was called from his house by the appellant who took him along with him (Bulwa-Kar). The expression ‘Bulwa-kar’ connotes a message through a third person or agency which has not been disclosed. The complainant had improved his version in his testimony but there too he had stated that the appellant called his son from his house and took the deceased with him. It was argued by learned counsel that in any case it had to be established by the prosecution that the complainant had in fact saw the deceased going with the appellant otherwise the case would not fall within the ambit of ‘last seen evidence’. As far as PW.9 Tariq Nawaz is concerned, he is an illiterate person. He was the President of Masjid-e-Ghafooria Committee whereas Ghulam Nawaz, bearing surname of ‘Nawaz’ as well was the Secretary of the Committee. The appellant used to impart

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religious education to the children of the vicinity and remained Imam of the mosque for a year. According to him dispute had been created by the appellant on the arrival of Tablighi Jamaat whereafter the appellant had stopped coming to the mosque. The appellant has taken the plea of enmity with PW.9 and stated that he was Pesh Imam of the mosque and was dismissed from service by the Masjid Committee of which PW.9 was the President.

11. With this backdrop, the learned counsel for the appellant, Malik Rab Nawaz Noon, submitted that the entire case of the prosecution rests upon the testimony of PW.9 Tariq Nawaz, who had last seen the deceased with the appellant and before him the appellant had made extrajudicial confession. He referred to us a number of decisions of the superior courts on 'last seen evidence' and 'extra judicial confession' some of which are as under:

In Sh. Muhammad Amjad Vs. The State PLD 2003 S.C. 704, it was held that "last seen evidence for basing conviction thereon, the circumstantial evidence must be incompatible with innocence of the accused and should be accepted with great caution and to be scrutinized minutely for reaching a conclusion that no plausible conclusion could be drawn therefrom excepting guilt of the accused. Chain of facts be such that no reasonable inference could be drawn except that accused had committed offence after victim was last seen in his company. The evidence in the first instance be fully established and the circumstances so established should be consistent only with the hypothesis of the guilt of the accused, that is, the circumstances should be of such a nature as to reasonably exclude every hypothesis

of the guilt of the accused". Similar views were held earlier in PLD 1977 SC 515, 2000 SCMR 1784, 1996 MLD 627, 1989 P.Cr.L.J.39.

On extra-judicial confession, the Supreme Court of Pakistan in the case of Sajid Mumtaz v. Basharat (2006 SCMR 231) had held: "Another most important and natural purpose of making extra-judicial confession is to seek help from a third person. Help is sought, firstly, when a person is sufficiently trapped and, secondly, from one who is authoritative, socially or officially. The witnesses in hand before whom the confessions are said to have been made are of no social or official status." AND further "As observed by the Federal Court, we would reiterate especially referring to this part of the country that extra-judicial confessions have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confessions. Such confessions by now have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all is the position or authority held by the witness".

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12. If we go through the depositions of prosecution witnesses and read between the lines, it will not be difficult to hold that it was all a cock and bull story fabricated by the prosecution. The complainant's own version was that he searched for his son alongwith Muhammad Ali and Feroz Khan, when on the way they met the star witnesses, PW.9 Tariq Nawaz and Yaqoob, who had last seen the deceased in the company of the appellant. As against this, according to PW.9, he was sitting in the house of one Muhammad Iqbal when the complainant came there alongwith Muhammad Ali and Feroz Khan and inquired about his son. It is also significant to note that on 25.11.2004 at about 4:00 or 4:15 a.m., PW.9 went to the well and found the dead body and all the Mohallah people there but he did not remember whether there was moon light or not or whether it was the month of Ramzan or not. He was also not sure if his friend Yaqoob was present at the well to see the dead body of the deceased boy.

13. As far as extra judicial confession of the appellant is concerned, the version of the appellant was that he was an employee of the Masjid Committee of which PW.9 was the President. He had dispute with those belonging to Tablighee Jamat, whereafter he was removed by the Committee. Since then, the members of the committee became his enemies and he was not even on talking terms with them. PW.9 himself had accused the appellant of quarreling with Tablighee Jamat when he was Pesh Imam of the mosque and P.W.9 was the Chairman of the Committee. Further on the request of the appellant he and Ghulam Nawaz took the appellant to Police Station on 24.11.2004, whereas per the testimony of P.W.11, Muhammad Usman, A.S.I. he arrested the appellant on 28.11.2004. There is, thus, contradiction as

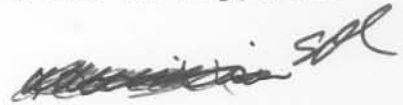
to the date of arrest of the appellant between the testimony of P.W.9 and P.W.11

14. Tariq Nawaz (P.W.9) is an illiterate person and had no official or high social status to influence the police in any manner. The appellant had strained relations with him and it would be inconceivable that he would approach the appellant with the sole object to take him to Police Station to surrender himself before the police authorities and save him from the physical torture of police. As far as recoveries are concerned, on the arrest of the appellant on 28-11-2004, Rs.70/- and a chaddar were recovered from him on personal search and on 30-11-2004, the appellant led the police party where recoveries of locket and a chain were made. There was nothing in the first F.I.R. dated 25-1-2004 about money and other articles referred to above, however, the same was mentioned in the second statement of the complainant (PW.10) of 25-1-2004. Although PW.9 has stated that on 28-11-2004, he joined the police party in its investigation, he had no knowledge of the raid of the police on the house of the appellant. It is also an admitted position that no private person whatsoever was made a witness to the recoveries for which no explanation has been offered. The articles namely the locket and the chain were not sealed as per Investigating Officer Muhammad Usman (PW.11).

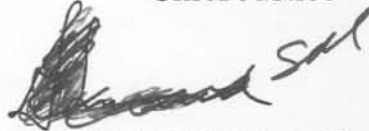
15. It may be stated here that the prosecution has failed to produce Muhammad Ali, Feroz Khan and Yaqoob, who were material witnesses, for which no plausible explanation was offered by the prosecution. It was held in *Besant Singh-Vs-The Emperor AIR 1927*

Lah 541 followed by 1989 P.Cr.L.J.391 that if the evidence of extra-judicial confession and last seen is disbelieved, recoveries alone could not prove the guilt of the appellant.

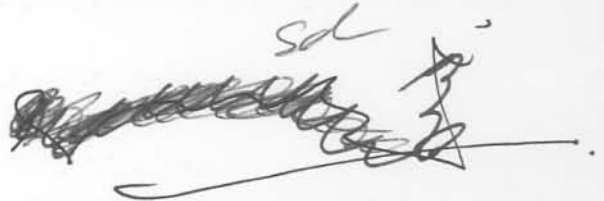
16. In view of the foregoing reasons, we accept the appeal and set aside the impugned judgment with direction to the jail authorities to release the appellant forthwith unless he is required in some other case. Crl.M.Ref.No.13/I/2005 is replied in negative.



JUSTICE HAZIQUL KHAIRI
Chief Justice




JUSTICE DR.FIDA MUHAMMAD KHAN



JUSTICE SALAHUDDIN MIRZA

Announced on 27.2.09
at Islamabad
M.Khalil

Approved by

M.Khalil