

Jail Criminal Appeal No.13/K of 2015

1

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional/Original Jurisdiction)

PRESENT:

JUSTICE MR. RIAZ AHMAD KHAN, CHIEF JUSTICE
JUSTICE MRS. ASHRAF JAHAN

JAIL CRIMINAL APPEAL NO.13/K OF 2015

Salamat Ali son of Farzand Ali, Appellant
by caste Jat,
resident of village Deh 349-A,
Taluka Kot Ghulam Muhammad.
(Confined in Central Prison, Hyderabad).

Versus

The State.

Respondent

Learned counsel for the : Mr. Agha Zafir Ali, Advocate
appellant

Learned counsel for the State : Mr. Ali Haider Saleem,
Assistant Prosecutor General
Sindh for State.

FIR No. and date : 61/2004, dated 26.09.2004,
P.S. Kot Ghulam Muhammad,
District Mirpurkhas.

Date of impugned : 28.07.2009
Judgment of Trial
Court

Date of Institution of : 02.04.2015
appeal in FSC

Date of hearing in FSC : 30.11.2016

Date of announcement : 16.12.2016
of Judgment

JUDGMENT

Justice Mrs. Ashraf Jahan: By way of present Criminal Jail Appeal, the appellant has called in question judgment dated 28.07.2009 passed by the learned Sessions Judge, Mirpurkhas in crime No.61/2004 of Police Station, Kot Ghulam Muhammad, under section 302, 364-A PPC read with section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, by virtue of which the accused/appellant was convicted under section 302 (b) PPC and sentenced to imprisonment for life and to pay fine of Rs.50,000/- and in case of default in payment of fine to suffer simple imprisonment for six months more. Benefit of section 382-B Cr.P.C. was, however, extended to the appellant.

2. Brief facts of the case as stated in the FIR lodged by the complainant Sanaullah on 26.09.2004 are that he used to reside alongwith his brother Salamat Ali in one house. His brother Salamat Ali had one daughter Misbah aged about 04 years and she was also residing with him alongwith other children. On 25.09.2004, he alongwith his brother Salamat Ali and other inmates of the house went to sleep in the courtyard, baby Misbah was sleeping on a cot alongwith her brother Sanwal Jat aged about seven years. On 26.09.2004 the complainant awakened at about 0500 hours, and found that his niece was not in the cot, he searched for her but could not found any clue. Thereafter, he narrated such facts to his brother

Salamat Ali and others. They followed the footprints but due to hard ground no footprint marks were visible. Later on at about 1400 hours they found the dead body of baby Misbah in sugarcane field having injuries on her neck, caused by a sharp substance. Hence, such FIR was lodged at Police Station, Kot Ghulam Muhammad.

3. Police during investigation arrested the present accused on 30.09.2004 and after completion of investigation submitted challan against him before the court of law. On 13.09.2005, charge was framed against him under section 302, 364-A PPC read with section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to which he pleaded not guilty and claimed trial.

4. In support of its case, prosecution examined following witnesses:

- PW-1 Complainant Sanaullah is examined as Ex/4, who produced the FIR as Ex/4-A and supported its contents.
- PW-2 Muhammad Arshad examined as Ex/5, who also supported the case of prosecution.
- PW-3 Noor Ahmed examined as Ex/7, he was made mashir by the police but he did not support the case of prosecution, therefore, was declared hostile.
- PW-4 Dr. Sikander Lal examined as Ex/9, he had medically examined the accused and issued such medico legal certificates. He produced the letter of

Jail Criminal Appeal No.13/K of 2015

4

police as Ex/9-A, provisional medico legal certificate as Ex/9-B and final medical certificate as Ex/9-C.

- PW-5 Ateh Singh was examined as Ex/10. He visited the place of incident and prepared its sketch and produced the same on record as Ex/10-A.
- PW-6 Ashraf examined as Ex/11 has partly supported the case of prosecution to the extent of arrest of the accused but did not support the case of prosecution regarding recovery of hatchet and clothes from the accused.
- PW-7 Sub-Inspector Photomal is examined as Ex/12. He had lodged the FIR as per facts narrated by the complainant Sanaullah and supported the case of prosecution to that extent.
- PW-8 Dr. Hameeda Leghari examined as Ex/14 she had conducted the post-mortem of baby Misbah on 26.09.2004 and found the following injuries on her person:-

“INJURY NO.1 :-

An incised wound 25 c.m x 5 c.m muscle deep involving thoracic vertebrae T 3 with body cut ribs and 3/4th of right scapula.

INJURY NO.2 :-

Incised wound 15 c.m x 4 c.m extending from left side of nape of the neck to the end of other side of the neck at the level of 7th cervical vertebrae with complete cut of spinal cord.

Jail Criminal Appeal No.13/K of 2015

5

INJURY NO.3 :-

Incised wound extending from below the nape of neck to right shoulder 15 x 8 c.m muscle deep.

INJURY NO.4 :-

Incised wound extending from lateral bral of right scapula muscle deep involving upper 1/3 rd of head of right humeras with complete cut 15 x 5 c.m.

INJURY NO.5 :-

Incised wound of about 9 x 2 c.m on left side of neck involving all major vessels.

The rigor mortis was present in the lower limb.

From internal examination I found as under:

1. Walls : Normal and pale.
2. Peritoneum : Normal and pale.
3. Mouth : Pharynx and Oesophagus: Pale and normal.
4. Diaphragm : Normal and pale.
5. Stomach and its contents : Normal distend with gases.
6. Pancreas : Normal.
7. Small intestines and their contents. Distended with gases with its contents.
8. Large intestine and their contents. Distended with gases.

Liver, Spleen, were normal.

Kidneys : Pale and normal.

Bladder was empty.

Organs of Generation : Normal and pale.

Scalp, Skull and Vertebrae: Scalp Skull normal. 7th cervical and 2nd and 3rd thorae vertebra.

Membranes and Brain were normal

Walls of Thorax, Ribs and Cartilage : Upper Thoracic vertebrae and, 3rd, 1st 2i ribs incised.

Pleurae Normal and pale.

Larynx and Trachea Normal entait pale.

Lungs : Normal

Pericardium and Heart : Normal , heart empty.

Blood vessles. Normal, all vessle of left side of neck normal. Examination of

Jail Criminal Appeal No.13/K of 2015

6

anus. Anus dilated with tear 2 c.m in size in post part.

After complete examination of deceased Misba there were signs of unnatural sexual intercourse (sodomy) seen.

and death of deceased occurred due to irreversible haemorrhage and shock.”

She produced the letter of police for conducting post-mortem as Ex/14-A and post-mortem report as Ex/14-B. She also sent the swabs taken from the dead body to the chemical examiner and such letter is produced as Ex/14-C.

- PW-9 Ghulam Nabi, Civil Judge and Judicial Magistrate-I, Kot Ghulam Muhammad examined as Ex/15. As per his statement on 30.09.2004, SIP Alji Sodho of Police Station, Kot Ghulam Muhammad has produced accused Salamat Ali alongwith letter for recording his confessional statement. His confessional statement was recorded after fulfilling the legal formalities. He has produced the letter of police as Ex/16, confessional statement in original as Ex/17.
- PW-10 SHO Alji Sodho examined as Ex/18. He had conducted the investigation of this crime and arrested the accused. As per his statement after receipt of postmortem report and chemical examiner report he moved application to the

judicial magistrate for grant of permission for adding section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 he produced it as Ex/18-A and the chemical examiner report as Ex/18-B on record.

5. After completion of prosecution evidence, its side was closed vide statement dated 27.05.2008.

6. Statement of accused under section 342 Cr.P.C. was recorded as Ex/20 wherein he denied the case of prosecution. During his statement he stated that he was suffering from some mental disease and was also referred to the doctor by the Court and produced applications as Annexures A to I. But at the same time he neither examined himself on oath nor produced any witness in his defence.

7. The trial Court after hearing both the sides convicted the appellant vide judgment referred above, which was challenged in appeal before the Hon'ble High Court of Sindh. Subsequently, vide order dated 24.03.2015, Hon'ble High Court of Sindh on the point of jurisdiction transferred it before this Court.

8. We have heard learned counsel for the appellant as well as Assistant Prosecutor General Sindh appearing for the State. It is submitted by the learned counsel for the appellant that in the present case there is no direct evidence against the appellant. It is further argued that the appellant was not mentally fit, therefore police, with malafide intention involved him in this crime. Further the mashirs of recovery had not supported the case of prosecution. The magistrate,

while recording confession had failed to fulfill the legal formalities as required under section 364 Cr.P.C. In such circumstances, only confession is not sufficient to prove the guilt, therefore, the judgment of the trial Court is liable to be set aside. In support of his contentions, he relied upon the following case law:-

- (i). Asif Mahmood Versus The State,
2005 SCMR 515
- (ii). Zafar Ali and another Versus The State,
1994 PCr.LJ 956

9. Conversely, it is argued by learned State counsel that the confessional statement of accused coupled with recovery of crime weapon at his pointation are sufficient to connect him with the commission of crime. He further submitted that it is not the case of appellant that he was insane, therefore, the trial Court has rightly convicted him. In support of his contention, he relied upon the following case law:-

- (i). Anwar Shamim and another Versus The State,
2010 SCMR 1791
- (ii). Jamshed Khan Versus Muhammad Saeed and others,
2010 SCMR 1796
- (iii). Muhammad Amin Versus The State,
PLD 2006 Supreme Court 219
- (iv). Zakir Khan and others Versus The State,
1995 SCMR 1793
- (v). Mian Ranjha Versus The State,
1995 SCMR 1806
- (vi). Sh. Muhammad Amjad Versus The State,
PLD 2003 Supreme Court 704

10. We have considered the arguments advanced before us and have perused the case recorded minutely.

11. As per the facts of this case, it is apparent that it was an unseen occurrence and during the course of this crime murder of a small baby aged about four years was committed in a very brutal manner. The death of deceased baby Misbah is not denied by either sides. Initially F.I.R was lodged u/s 302 & 364-A PPC but after receipt of postmortem report section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was added. The perusal of post-mortem report clearly reveals that she received five injuries on her person and majority of injuries were on her neck, chest and shoulder area. Apart from it, as per the opinion of Doctor Hameeda Leghari (PW-8), there were signs of unnatural sexual intercourse (sodomy) whereas the cause of death was disclosed as irreversible haemorrhage shock. In this case swabs taken from rectum and vagina were sent for chemical analysis. When we see the report of the chemical examiner Ex/18-B, it reveals that the result regarding rectal swab discloses that human sperms were detected in the above article, but its group could not be determined due to insufficient quantity; besides, human blood was detected in Articles No.6 and 7 (vaginal swab in syringe and rectal swab in syringe). As the human sperm could not be matched with the sample taken from the accused (article 8), therefore, it appears that the trial Court has rightly held that the offence of section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance VII of 1979 could not be proved against the present appellant.

12. The moot point for us now is to see as to whether the offence of murder, on the basis of evidence produced by the prosecution connects the present appellant with the commission of crime? In this regard, the most important piece of evidence is the confessional statement of appellant, wherein, he in clear words confessed about the commission of crime before the magistrate. It is important to note that the accused was arrested in the earlier hours of 30.09.2004 at about 0100 hours, thereafter, he produced from the room of his house blood stained hatchet used in the crime at about 0630 hours and on the same day at about 12.00 noon he was produced before the magistrate as he was willing to confess his guilt and accordingly the magistrate recorded his confessional statement in Sindhi (native language) after fulfilling all the legal requirements. For sake of ready reference English translation of his confession is reproduced as under:-

“About 10 years ago, I was married with Mst. Rukhsana. My father-in-law is residing in village 39 District Sanghar. I have two sons and one daughter deceased Misbah. My wife Mst. Rukhsana went to the house of her father for visiting purpose and at that time my wife was with menses and when she returned back she was pregnant and on such pregnancy Misbah born. Thereafter, differences started in between me and my wife. I was under suspicion that my daughter Misbah is not my legitimate child. Due to which, I was mentally disturbed since long time. I also informed my mother that I want to divorce my wife but my mother forbidden me to pronounce Talaq. In the meanwhile deceased Misbah became 3¹/₂ years old. Due to said anxiety and fear of dishonor I brought deceased Misbah in the sugarcane crop, near my house in the night time when she was sleeping and committed murder by causing hatchet injuries to her. I have not committed Zina with my daughter Misbah and I have committed her murder by causing only hatchet injuries.”

13. It will be not out of place to mention here that in the present case the complainant is real brother of appellant, who has supported the case of prosecution completely. There appears no reason as to why prosecution witnesses would implicate the accused falsely. No doubt that the mashir Noor Ahmed did not support the case of prosecution in respect of arrest of accused and recovery of hatchet but the co-mashir Ashraf supported the case of prosecution to the extent of arrest of accused.

14. As mentioned earlier, during the course of arguments, learned counsel for the appellant argued that the accused was suffering from some mental disease, therefore, the police in malafide manner implicated him in this crime. The perusal of statement of accused also reveals that during his statement recorded under section 342 Cr.P.C. he took the plea that he was not mentally fit and in support of his stance he also produced certain copies of some applications as Annexures A to I. When these annexures are examined, these are different applications which were moved by the counsel for the accused before the trial Court during the proceedings stating therein that the accused does not appear to be normal; therefore, he may be referred to the mental hospital for examination. Upon receipt of such applications, the learned trial Court called report from the central jail. Such report was received on 06.03.2005 where in the Chief Medical Officer, Central Jail, Hyderabad disclosed that there was no major illness but the accused was under treatment of visiting Psychiatrist of Sir C. J. Institute of Psychiatry, Hyderabad. Again vide order dated 16.04.2005, the learned Sessions

Jail Criminal Appeal No.13/K of 2015

12

Judge referred the accused to the Sir C. J. Institute of Psychiatry, Hyderabad for examination and report to the effect that as to whether he can understand the court proceedings or otherwise. In compliance of the orders of the Court, he was shifted from Central Prison, Hyderabad to Sir C. J. Institute of Psychiatry, Hyderabad. He remained there up till 06.07.2005, as patient of Psychosis and not fit to understand the proceedings of the Court. The perusal of the record further reveals that vide letter dated 10.08.2005, the Registrar/Incharge of Sir C. J. Institute of Psychiatry, Hyderabad issued certificate declaring that accused/UTP Salamat Ali to be fit to understand the proceedings of the Court and requested that he may be ordered to be shifted back to the Central Prison, Hyderabad. The charge in the case was framed on 13.09.2005, when he was already declared mentally fit to understand the proceedings of the Court and thereafter the case has proceeded further and ultimately ended in the conviction of present appellant.

15. Reverting back to the statement of accused/appellant it is noticeable that in reply to question No.8 when he was confronted with the confession made by him before the judicial magistrate, he replied that he had not made any confession before the magistrate but the SHO has arranged such confession and in those days he was not mentally well. Though he had taken this plea that he was mentally sick but he has not produced any medical record or witness to this effect. Therefore, it appears to be an after thought. Furthermore as discussed earlier as per opinion of the doctor vide letter dated

10.08.2005 he was found mentally fit to understand proceedings of the Court. Thus, the arguments of the learned counsel for the appellant have no force.

16. So far as the veracity of confessional statement is concerned, it is important that in order to ascertain the genuineness of the confessional statement the circumstances under which it was recorded are to be examined carefully. It is established legal position that for placing reliance on confessional statement it is to be seen that it is not only true, voluntarily and believable but should be without fear or any inducement. As far as the present confessional statement is concerned, it is the case of prosecution that the accused was arrested at 01.00 a.m. on 30.09.2004, and on the same day his confessional statement was recorded at 12.00 noon. Learned magistrate before recording the confessional statement had given him two hours times to ponder, all relevant necessary questions and codal formalities were completed, therefore, it appears that the above confessional statement was voluntary and the trial Court has rightly believed it. There is sufficient law on the point that capital punishment can be awarded on the basis of retracted confessional statement, if it is concluded that the same was voluntary. In this regard reliance can be placed to the cases of Muhammad Amin Versus The State PLD 2006 SC 219, Nizam-ud-Din Versus Riaz 2010 SCMR 457 and Muslim Shah Versus The State PLD 2005 SC 168.

17. For the foregoing reasons, we are of the view that the judgment of the trial Court is based on sound reasons and does not require any interference. Accordingly, the present appeal is dismissed.

JUSTICE MRS. ASHRAF JAHAN

**MR. JUSTICE RIAZ AHMAD KHAN
CHIEF JUSTICE**

Announced at Islamabad,
on 16.12.2016
Hummayun/-