

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

Present

HON.MR.JUSTICE SHAHZADO SHAIKH
HON.MR.JUSTICE DR.FIDA MUHAMMAD KHAN
HON.MR.JUSTICE RIZWAN ALI DODANI

JAIL CRIMINAL APPEAL NO.26/I OF 2009.L.W.

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| Muhammad Bashir son of Muhammad Amir caste Pathan r/o Village Lakan Afghanistan. | | Appellant |
| | Versus | |
| The State | | Respondent |

CRIMINAL REVISION NO.4/I OF 2009 L.W.

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| Ch.Muhammad Iqbal son of Mehr Noor Din r/o House No.308/30, Jan ColonyTench Bhatta,Rawalpindi | | Petitioner |
| | Versus | |
| 1.Muhammad Bashir son of Muhammad ... Amir caste Pathan r/o Village Lakan Afghan. 2.The State | | Respondents |

CRIMINAL MURDER REFERENC NO.7/I OF 2009

The State Versus Muhammad Bashir

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| Counsel for the appellant . | | Mr.Afab Ahmad Khan,Advocate |
| Counsel for the petitioner | | Mr.Muhammad Ilyas Siddiqui,Advocate |
| Counsel for the State. | | Ch. Muhammad Sarwar Sidhu, Addl: Prosecutor General for State |
| Case FIR No. date & Police Station | | No.315, dated 9-9-2000 P.S . Saddar Barooni Rawalpindi. |
| Date of judgment of trial Court. | | 27-06-2002 |
| Date of Institution of Jail Appeal in FSC | | 28.02.2009. |
| Date of hearing | | 04.08.2011. |
| Date of decision | | 04.08.2011 |

JUDGMENT

JUSTICE RIZWAN ALI DODANI, J:- This Jail Criminal

Appeal preferred by Muhammad Bashir son of Muhammad Amir is directed against the judgment dated 27.06.2002 passed by the learned Additional Sessions Judge, Rawalpindi whereby convicted the appellant under section 302(b) PPC and awarded him Death sentence and to pay compensation of Rs.100,000/- to the legal heirs of the deceased under section 544-A Cr.P.C. and in default of payment of compensation the appellant is further directed to undergo for 06 months imprisonment. The trial Judge has also convicted the appellant under section 392 PPC and sentenced him 05 years R.I. with payment of fine of Rs.20,000/- in default thereof to further undergo 02 months imprisonment. The appellant has also been convicted under section 412 PPC and sentenced to 05 years R.I. and to pay a fine of Rs.20,000/- or in default thereof to undergo 02 months imprisonment.

2. Precisely recapitulated facts of the case as gleaned from FIR registered on 09-09-2000 at police station Saddar Barooni, Rawalpindi on the statement of Muhammad Iqbal PW-10 that on 07-09-2000, Mst. Safoora Begum left her house at 11.30 a.m. for her treatment. After having medical consultation with her Doctor she went to her under construction house situated near Mohra Chapper Stop Chakri Road where Muhammad Bashir accused was residing alongwith his family as an employee/Chowkidar. When Mst. Safoora Begum did not return back till dusk, the complainant started searching her. That eventually on 09.09.2000 at 1.30 p.m. the complainant found dead-body of Mst. Safoora Begum in bath room of his said under construction plot. The dead-body of Mst. Safoora Begum at that time was emitting smell revealing that she was assassinated on 07.09.2000. The accused Muhammad Bashir left/ran way from the house as was not present there even his family member were not found there, therefore, on suspicion accused Muhammad Bashir was named in the FIR. It is

added that there was marks of strangulations on the neck of the deceased Mst. Safoora Begum.

3. The police arrested the accused on 19.2.2001 and after due investigation submitted the challan against the accused persons Muhammad Bashir, his wife Mst. Bilqees Begum alias Tatari and son Pishtoon Khan. That subsequently Mst. Bilqees Begum alias Tatari and Pishtoon Khan were declared Proclaimed Offender and their case was separated from this case. On 08.12.2001, a formal charge against the accused Muhammad Bashir under sections 302/397/392/394 PPC read with section 17 Harabah of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and 412 PPC was framed by the trial Court to which the accused plead not guilty and claimed the trial.

4. The prosecution has produced 13 witnesses at the trial. The gist of these witnesses is as under :-

PW-1 Qamar-ud-Din draftman who prepared the scaled site plan of the place of the occurrence

and handed it over to the police on 17.10.2000. The site plan is Exh.PA and Exh.PA/1, the drawing and note in black ink are in his hand writing and bears his signatures.

PW-2

Lady Doctor Tallat Mahmooda, SWMO DHQ Hospital, Rawalpindi conducted the post-mortem examination of the deceased Mst. Safoora Begum wife of Muhammad Iqbal, aged about 60 years. Her dead body was brought by Ghulam Farid, H.C. No.773 on 9.9.2000.

The observations of Doctor were as follows:-

The dead body was with swollen face, eyes were protruding out. Body was putrified, wearing pink white printed shalwar and Kameez and black brazier. Rigor mortis is absent. P.M. staining present. Mouth and neck were tied with black Burka straps and green doppta. Ligature mark was covering neck and is about 7.cm in width and 61.cm.

Around the mouth and neck under lying subcutaneous tissue echymosed trachea congested, hyoid-bone intact. Scratches and bruises around both wrists present, hands partially clenched. Scalp congested. Vertebrae not opened. Membranes intact. Brain congested. Larynx and both lungs are congested. Blood vessels congested. Abdominal wall swollen and putrefied. Mouth, pharyaz and esophagus, liver, spleen all are congested. External genetalia swollen putrified. Three

vaginal swabs sent to the Chemical Examiner for sperm detection. In rest of the organs nothing abnormal was detected.

OPINION

In my opinion, "the deceased died due to asphyxia caused by ligature around mouth and neck leading damage to vital organ and ultimate death. The injury is ante-mortem and sufficient to cause death in the ordinary course of nature. Probable time between injury and death was within half an hour and between death and post-mortem was about 2 to 3 days." After conducting the post mortem examination, I handed over the stitched dead-body of the deceased alongwith last worn clothes and sealed bottle to the police. Exh. PB is the correct carbon copy of post-mortem report of Mst. Safoora Begum which is in my hand and bears my signature. Ex. PB/1 and Ex. PB/2 is the pectoral diagram also in my hand writing and bears my signature.

PW-3 Ikhlaq Khan, Constable No.1290 deposed as PW-3. On 2.11.2000 that non-bailable warrants of arrest of the accused Muhammad Bashir Ex.PC, Pishtoon Khan Ex.PD and Mst. Bilqees alias Tatari Ex.PE were entrusted to this witness for execution which were not executed due to non traceable and deliberately concealed themselves. His report on the non-bailable warrants of arrest of three accused are Ex.PC/1, Ex.PD/1 and Ex.PE/1 which are in his hand and bear his signature.

PW-4 **Muhammad Iqbal, Head constable No.2724 appeared at the trial as PW-4 and stated that on 9.9.2000 Muhammad Akram S.I handed over to him one sealed envelope and one sealed phail for safe custody in malkhana. On 14.9.2000, he handed over the above said sealed envelope and sealed phail to Ghulam Farid, LHC for onward delivery to the office of Chemical Examiner, Rawalpindi. No body tampered with them.**

PW-5 **Habibullah, Head constable No.910 appeared as PW-5 and stated that on 28.2.2001, proclamations of the accused Pishtoon Khan Ex.PF and Mst. Bilqees alias Tatari Ex.PG issued by the Illaqa Magistrate were handed over to him by Muhammad Akram S.I for their execution. I made compliance of both the proclamations according to law. His reports on the proclamations are Ex.PF/1 and Ex.PG/1 respectively.**

PW-6 **Ghulam Farid, Head constable No.773. This witness stated that on 9.9.2000, the I.O. handed over to him the dead body of Mst. Safoora Begum (deceased) for its post mortem examination. After the Post mortem examination, Medical Officer handed over to him the last worn clothes of the deceased consisting of Kameez P1, Shalwar P2, Burka P3, Doppta Ex.P4 and a sealed phail Ex.P5, he handed over the above said articles to the Investigation Officer who secured the same vide recovery Memo Ex.PH signed by him and**

attested by the Investigation Officer. On 14.9.2000, he deposited a sealed phail and a sealed envelope in the office of Chemical Examiner, Rawalpindi which were delivered to him by Investigation Officer intact.

PW-7

Sheikh Ishfaq Ahmad is a witness of disclosure memo made during investigation by accused Muhammad Bashir. Muhammad Bashir accused made the following disclosure.

1. The accused made disclosure in presence of this witness and in the presence of Khalid Saleem PW that he murdered Mst. Safoora Begum with the help of his son Pashtoon Khan and wife Mst. Balqees Begum by tying the neck of deceased with her Burka.
2. He also made disclosure that he looted one golden Bangle and one pair of ear ring and Rs.1500/-.
3. He further disclosed that he could lead for recovery of articles which he concealed under the ground near the wall of the place of occurrence. Accused pointed the place of 'wardat' and also pointed the bathroom where he had thrown the dead-body of Mst. Safoora Begum (deceased).After digging the ground, got recovered one bangle Ex.P6 and one pair of ear ring Ex.P7/1-2 which were taken into possession vide a joint recovery memo of pointation Ex.PJ signed by him and Khalid Saleem PW.

- PW-8** **Nazar Abbas, ASI (Retired).** This witness on 9.9.2000 received complaint Ex.PK on which, he chalked out the formal FIR Ex.PK/1 without any addition or omission.
- PW-9** **Javaid Iqbal.** He is the son of complainant Muhammad Iqbal and Mst. Safoora Begum (deceased). He narrated the same story of occurrence as mentioned in the FIR. He supported the version of his father.
- PW-10** **Muhammad Iqbal complainant** appeared at the trial as PW-10 and supported the contents of FIR Ex.PK/1. In his supplementary statement recorded on 9.9.2000 he stated that accused Bashir snatched a golden 'Kara' from her wife's hand, two ear rings from her ear and some money as he checked and found that these things were also missing.
- PW-11** **Amjad Saeed, Special Judicial Magistrate** stated that on 24.2.2001 accused Muhammad Bashir was produced before him for recording his statement under section 164 Cr.P.C. by Muhammad Akram Khan, S.I. He allowed the application Ex.PM and thereafter he recorded the statement of the accused Muhammad Bashir. This witness was satisfied that the accused Muhammad Bashir was making confessional statement with his free will. The confessional statement is Ex.PN and he also given the certificate in his own hand and under his signature which is Ex.PN/1.
- PW-12** **Muhammad Ramzan, Inspector.** On 9.9.2000 at 1.30 p.m. on telephonic information, he

reached at the place of occurrence, recorded the statement of Muhammad Iqbal complainant which is Ex.PK. he read over the contents of Ex.PK to the complainant and he signed the same as a token of its correctness. Ex.PK was sent to P.S. through Ghulab Khan constable for the registration of the case.

He inspected the place of occurrence and prepared injury statement/application for post mortem examination Ex.PO, and handed over the dead body to Ghulam Farid constable for P.M. examination to the Hospital. He took into possession the 'Rassi', Ex.P6, one pair of 'sleeper' P7/1-2, one 'Nakab' Ex.P8 which he took into possession vide recovery memo Ex.PL. He recorded the statements of the PWs and searched for the accused but did not succeed. He also prepared the inquest report Ex.PP. This witness has partly investigated the case.

PW-13 Muhammad Akram, SI. he stated that the investigation of this case was handed over to him by the Inspector/SHO on 26.9.2001, he arrested accused Muhammad Bashir on 19.2.2001 at Torkham Border and got him transferred to Rawalpindi, then he obtained his physical remand on 20.2.2001.

5. According to this witness that during investigation Muhammad

Bashir accused disclosed and later on got recovered gold 'Kara' Ex.P6

and two ear rings Ex.P7/1-2 which were taken into possession vide recovery memo Ex.PJ. Accused Muhammad Bashir pointed out the place where he concealed the stolen articles and place of the occurrence through memo Ex.PJ. On 24.2.2001, the statement of the accused was recorded under section 164 Cr.P.C. where accused voluntarily confessed his guilt and was sent to Judicial Lock up. He found the accused guilty and challaned the accused to stand trial. He also got the ornaments identified by Muhammad Iqbal complainant and memo of identification Ex.PQ was prepared. He also prepared rough site plan Ex.PR.

6. Learned DDA on behalf of the state closed the case for the prosecution on 7.6.2002.

7. The appellant/accused recorded his statement under section 342 Cr.P.C. In reply to question No.11 why the PWs have deposed against him and why this case against you, he stated as under:

“The entire prosecution case is prepared on the mere suspicion that as there was no body at all in the adjacent area of the place of the occurrence and I was the last one who left the said premises. The complainant and the police misconceived that I am the murderer of the deceased”. However, he did not opt to produce any evidence or to record his statement on oath, as provided under section 340(2) Cr.P.C.

8. After hearing both the parties learned trial Court convicted and sentenced the appellant as mentioned in opening para of this judgment.

9. Learned counsel for the appellant inter alia submitted that the prosecution has utterly failed to establish the case against the appellant.

He, in support of his arguments, raised the following contentions:-

- a. That police has subsequently added section 17 (Haraba) of Offences Against Property (Enforcement of Hudood Ordinance,1979.**
- b. That till two days from the date of alleged missing of the deceased to discovery of the dead body no report was made in this regard.**
- c. That police called the complainant party for identification of allegedly theft articles on 22-2-2001, whereas the**

identification memo made on 26-4-2001 that is after about 2 months.

- d. That the judicial confession was recorded after 5 days of the arrest of the accused/appellant and that after recording of the confessional statement the custody of the appellant was handed over to the police which creates material illegality and damages the sanctity attached to the confessional statement.**
- e. No injury report was prepared nor was mentioned in inquest report.**
- f. No record of arrest of the accused allegedly made from Torkham Border is available on record.**
- g. That the Investigating Officer has not even mentioned in the rough site plan regarding the Veil (Naqab) then how it has mentioned in the inquest report.**
- h. The police first arrested Said Ullah brother of the accused and then released him.**
- i. That allegedly the extra-judicial confession was made by the accused before Shaikh Ishfaq Ahmad, PW-7, and one Khalid Saleem but the latter was given up as has not been produced before the trial Court and no explanation has been furnished for withholding his evidence, which puts dent on the prosecution's evidence.**
- j. That accused in his statement under section 342 Cr.P.C. categorically stated that he went away to Afghanistan one month prior to the occurrence.**

k. That there is no direct evidence and any last seen evidence available on the record and as such it is a case of no evidence.

10. He relied upon 2001 SCMR page-168 on the point of judicial confession that it can be taken as corroboration and not in isolation.

11. That the learned counsel for the complainant in rebuttal mainly argued that section 17 Haraba of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 has inserted on the supplementary statement of complainant after feeling missing of golden ornaments and cash amount. That a report of missing of deceased got lodged on 8-9-2000 by Javed son of deceased and it has been mentioned in evidence. That admittedly the accused was living in a room with his family situated in under construction plot and that the accused was disappeared only after the occurrence without intimation, this fact strengthen the commission of offence at the hands of accused. That Shaikh Ishfaq Ahmad PW-7 is an independent witness and not related to any one as such his deposition is trust

worthy and confidence inspiring and therefore cannot be ignored casually. That no plausible justification was given by the accused while recording statement under section 342 Cr.P.C. as to the retraction from the judicial confession. That the Medical Report is supportive of the manner in which the deceased was murdered. That the delay in recording of confession as pointed out by the counsel for the appellant is immaterial and could not render the confessional statement defective and that in support of his contentions he placed his reliance on PLJ 2007 SC page-403(Nazeer alias Wazir Vs. The State). He next argued that the recovery of theft articles was made on the pointation of the accused in the presence of independent witness namely Shaikh Ishfaq Ahmad PW-7. He finally argued that in the presence of such a material i.e. judicial confession against which no substantive and material discrepancy or irregularity was pointed out by the defence which could lead to demolish the sanctity attached to confessional statement and moreover the extra-judicial confession of the accused

was also before an independent witness namely Shaikh Ishfaq Ahmad PW-7 which carries weight and above all the disappearance/absconion of the accused from his room situated at the place of occurrence with his family without intimation to the complainant, the prosecution successfully made out the case beyond any shadow of doubt against the accused.

12. Learned Additional Prosecutor General for State contended that the accused after recording of his judicial confession was sent to judicial lock up and not to the police custody as alleged and therefore, the probative value of judicial confession is intact and can be made basis to convict the accused/appellant. He further submitted that the report as to the arrest of the accused/appellant from Torkham Border is also available on file at page-51 and he further submitted that he adopts the contentions already raised by the learned counsel for the complainant and support the impugned judgment as it does not suffer from any infirmity and illegality and in the end he contended that

prosecution has established its case on the basis of worth of credence evidence.

13. We have heard the learned counsel for the parties. The entire evidence has been thrashed out with the eminent assistance of the learned counsel and the judgment of the learned trial Court has been perused thoroughly. It has been observed that the appellant was named in the FIR which was promptly lodged immediately after the dead body of missing deceased was found from the under construction plot of the complainant. The report as to the missing of Mst. Safoora Begum was also made wherein the name of appellant was not mentioned which depict the fairness on part of the complainant party and takes away the possibility of false implication of the appellant. That admittedly the accused/appellant was living in a room situated within the boundary wall of a under construction plot. It has been categorically stated by the accused/appellant in his statement recorded under section 342 Cr.P.C. while replying the question No.3 that his

stay in the under construction house was till the continuation of the construction but in the same breath he improved himself and uttered that one month prior to the occurrence as construction of house was stopped he left the said house and proceeded to Afghanistan. This statement of the accused itself elaborates that the accused left the house without intimation. That this statement under section 342 Cr.P.C. also does not find mention as to the enmity which also brushes out any chance of false implication of accused/appellant at the hands of complainant. That insertion of section 17 (Haraba) of Offence Against Property (Enforcement of Hudood) Ordinance,1979, at the later stage also goes in favour of the prosecution as it has been inserted only after the dead body was found and the complainant party came to know that golden ornaments and the cash was not found with the dead body. That it is also on the record that theft articles were got recovered on the pointation of the accused vide recovery memo Ex.P/J in the presence of Musheer Shaikh Ishfaq Ahmad PW-7 who is an

independent witness, though in the latter proceedings i.e. recovery on the pointation, requirement of section 103 Cr.P.C. is not mandatory, as such, taking independent witness as a Musheer of recovery makes it more probable and trust worthy. That it has been also observed that the accused/appellant has got recorded his confessional statement and the Special Judicial Magistrate, Rawalpindi who recorded the statement has been produced before the trial court as PW-11 who deposed that all due measures were undertaken by him before and after recording it and that it was recorded by the accused voluntarily, he was subjected to cross-examination but nothing reasonably favourable to accused came out of it. That the learned counsel for the appellant pointed out that the confessional statement was recorded after 05 days of the arrest of the accused/appellant which was controverted by the counsel for the complainant contending that it is immaterial and he replied upon PLJ 2007 S.C.page-403. That we are in agreement with the contentions of the learned counsel for the

complainant that delay in getting recorded the confessional statement
does not affect adversely for the reason that it depends on the
conscience, and instinct of a person as to the feelings of guilt and for
which there is no time limit to occur and as such, it does not damage
the probative value of confession. That as regards the aspect of
absconsion/disappearance of accused/appellant from the place of
occurrence after the incident of murder gains great significance
inasmuch as admittedly the accused/appellant staying at the place of
occurrence and he categorically stated that in his statement recorded
under section 342 Cr.P.C. that his stay was there till the continuation
of the construction and stated that he left the premises though
according to him one month prior to the occurrence but he did not
mention that he had intimated the complainant about his leaving from
the plot nor any element of enmity was reported, so inference can
reasonably be drawn that the accused is responsible for the death of
deceased. Occurrence though was unwitnessed, but chain of

circumstantial evidence is so strong that it completely excludes hypothesis of innocence of accused and leads to his guilt without leaving any room to doubt.

14. In view of what has been discussed above we find accused/appellant guilty and therefore maintain his conviction.

However, looking at the aspect that the case of the prosecution is based on the circumstantial evidence although it qualifies in all material particulars that it can be made basis for conviction inasmuch as it is not possible for the prosecution to have direct evidence or eye account in every case. But there is no cavil to this settled proposition of law that it cannot take place of direct and ocular evidence in terms of quality, therefore deeming it as mitigating circumstance we are inclined to convert the death sentence to one of life imprisonment. The other sentences are maintained as awarded by the trial Court. That all the sentences shall run concurrently. The appellant shall be entitled for the benefit of section 382-B Cr.P.C.

15. Appeal is dismissed accordingly.

16. Consequently the Criminal Revision No.4/I of 2009 is dismissed
so also the Criminal Murder Reference No.7/I of 2009 is no more
relevant and hence answered in negative.

17. These are the reasons for our short order passed on 04-08-2011.

JUSTICE RIZWAN ALI DODANI

JUSTICE SHAHZADO SHAIKH

JUSTICE DR.FIDA MUHAMMAD KHAN

Islamabad, the
Dated 04-08-2011
Abdul Majeed/**

Approved for reporting.

JUSTICE RIZWAN ALI DODANI