FEDERAL SHARIAT COURT OF PAKISTAN
(Appellate/Revisional Jurisdiction)

Present:

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE
MR. JUSTICE DR. SYED MUHAMMAD ANWER

Jail Criminal Appeal No.9/I of 2020

Moula Bux alias Mouli son of Hidayatullah Qazi, Caste Qazi,
Resident of Makrani Parra, Gul Shah road, Hyderabad.

….. Appellant

VERSUS

The State

…. Respondent

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Counsel for the Appellant	….	Mr. Anees Muhammad Shahzad, Advocate
Counsel for the State	….	Mr. Zafar Ahmed, Additional Prosecutor General Sindh
FIR No. & date	….	20/2004 Dated 14.03.2004
Police Station	….	Phuleli, District Hyderabad
Date of judgment of Trial Court	….	25.10.2010
Date of receipt of Appeal	….	26.12.2020
Date of hearing	….	09.02.2021
Date of Judgment	….	15.02.2021

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JUDGMENT:

MUHAMMAD NOOR MESKANZAI, CJ--- This appeal calls in question the legality, validity and propriety of the conviction and sentence recorded vide judgment dated 25.10.2010 passed by the learned IInd Additional Sessions Judge, Hyderabad, whereby the appellant was found guilty and sentenced as under:-

i. Under Section 302(c) PPC to suffer 25 years R.I.

ii. Under Section 201 PPC to seven years R.I. with fine of Rs. 20,000/- or in default thereof to further undergo three months S.I.

Benefit of Section 382-B Cr.P.C. was extended to the convict/appellant.

2. The brief facts of the case are that FIR No.20/2004 was lodged by complainant Bhindo son of Bahadur at Police Station Phuleli, District Hyderabad to the effect that on 13.03.2004 at 7:30 p.m. his grand-daughter namely Baby Asifa daughter of Ali Nawaz, aged about seven years, after taking money went out of the house for purchasing candies. She did not return home, therefore, the complainant and his nephews Ghulam Fareed and Azad started search of Baby Asifa. It was further narrated in the FIR that in the *Mohallah* one Moula Bux alias Mouli had a shop of candies in his house, wherefrom the children used to purchase candies etc. The complainant party visited the house of the accused, however, the same was locked from outside. Further search for Baby Asifa did not materialize and this fact was brought to the notice of the police. According to the FIR, the search remained continued up to 11:00 p.m. and again the house of the accused was visited, though it was

not locked yet despite knocking for a considerable time the same was not opened. Due to odd hours the complainant party stopped the search, however, on the next day i.e. 14.03.2004 at 6:30 a.m. the children made noise that one dead body was burning on which the complainant party went to the place and found that dead body of Baby Asifa was burning. After extinguishing the fire, the dead body was removed to the house and subsequently on registration of the case the police took the dead body to the hospital for post-mortem.

3. The police conducted Investigation, arrested the accused, recovered *Chappal* and *Duppatta* of the deceased girl from inside the house of the accused, got recorded the confessional statement of the accused and thus filed challan against the accused.

4. The learned trial Court framed the following charge against the accused:-

> *"That on 13-3-2004 at about 8-0 p.m. in your house situated in Makrani Para Gul Shah Road Hyderabad, you did commit Qatl-e-Amd of Baby Asifa D/o Nawaz Ali by means of strangulation through piece of rope, after committing Zina Bil Jabar upon her and thereby committed an offence punishable U/s. 302(A) PPC R/w Section 10(3) Offence of Zina (EHO) 1979 within the cognizance of this Court.*
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> *I further charge you that on 14-3-2004 at about 4-0 a.m. you knowingly that the Qatl-e-Amd committed by you is punishable with Qisas or Death, thrown the dead body of said Baby Asifa in garbage bin and on same date at about 4-30 a.m. put fire to it, with intention to screening yourself from legal punishment and thereby committed an offence punishable U/s. 201 PPC within the cognizance of this Court."*

5. The statement of accused was recorded under Section 342 Cr.P.C. He did not opt to record his own statement as contemplated under Section 340(2) Cr.P.C. nor proposed to produce DWs.

6. After examining as many as 13 witnesses, the learned trial Court, in order to appreciate evidence, formulated the following points for determination:-

> *"1. Whether on 13.3.2004 at about 8-00 p.m. in the house of accused Moula Bux alias Mouli situated in Makrani Para Gul Shah Road Hyderabad, deceased baby Asifa aged about 7 years died her unnatural death by means of strangulation through piece of rope?*
> *2. Whether on the above date and place, accused Moula Bux alias Mouli committed Qatl-e-Amd of deceased baby Asifa aged about 7 years by means of strangulation through piece of rope and also caused disappearance of evidence by throwing dead body in the garbage and put fire to it with intention of screening from legal punishment?*
> *3. What offence if any has been committed by the accused persons?*
> *4. What should the order be?"*

7. The learned trial Court, at the conclusion of the trial, found the accused guilty of the offence and awarded sentences as mentioned in Para 1 of this judgment.

8. Feeling dissatisfied with the conviction recorded by the trial Court, the appellant filed the instant appeal.

9. Learned Counsel for the appellant, at the very outset, stated that the appellant has already undergone a substantive portion of his sentence and if the jail authorities are directed to count the period, may be, the accused come out of the prison as perhaps he has almost completed the awarded sentence provided the sentence awarded under

Section 201 PPC is directed to run concurrently. Further stated that even otherwise on merits the prosecution has failed to establish its case.

10. The learned Additional Prosecutor General Sindh conceded to the first request, however, opposed the plea that the prosecution has not been able to prove its case.

11. The attention of the learned Counsel for the parties was invited to the three vital, incurable irregularities apparent in the judgment. Firstly, the charge framed under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 has not been answered as neither the accused has been acquitted nor convicted for that charge. Secondly, while formulating the points for determination though the charge for the offence under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 was there, but no point to this effect was formulated. Thirdly, the trial Court found the appellant guilty of the offence under Section 302(c) PPC and awarded the sentence as referred to herein above without keeping in mind the essential and inevitable requirement of Section 367(5) Cr.P.C. The learned Counsel for the parties conceded that in these circumstances, the remedy lies in remand of the case to the trial Court for re-writing of the judgment.

12. In our estimated view, the last error on the part of the learned trial Court is quite fatal and sufficient enough to vitiate the judgment. Here in this case the trial Court opted for Clause (c) of Section 302 PPC without dilating how Section 302(c) is attracted. The Trial Court mechanically and without bearing in mind the circumstances that justify the applicability of Section 302(c) concluded that the

appellant is guilty under Section 302(c) PPC. Legally, none of the conditions that are *sin qua non* for applicability and attraction of clause (c) were available in this case. It is not the idiosyncrasy or sweet will of the Judge while proposing sentence, in case of multiple choices provided for an offence qua the quantum of sentence, to award sentence whatever is pleased to him, rather on finding the accused guilty of the offence the Court is required to weigh, assess, evaluate and determine what should be quantum of the sentence that is viable, justified and warranted by the circumstances of the case. So, in such state of affairs, the judgment is defective and not sustainable at all as it clearly runs contrary to the mandatory requirements of Section 367(5) Cr.P.C. leaving us with no other option but to set aside the impugned judgment. For holding the view, we are fortified with the judgment laid down by the Hon'ble Apex Court in the case of "Muhammad Aslam & others Vs. The State & another" reported as 'PLD 2009 SC 777' wherein it has been held as under:-

> *"Determining the quantum of punishment deserved by a convict, especially in the matter of offences which are punishable also with death, should not be taken lightly as a mere triviality. And we need to keep reminding ourselves that the normal punishment for such-like offences was death and death alone. And it was for the said reason that the provisions of subsection (5) of section 367 of the Cr.P.C. commanded that where:-*
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> > *(5)…….The accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reasons why sentence of death was not passed.*

> *The rule in such-like cases, therefore was, imposition of the sentence of death and a punishment other than death could, thus, be awarded only in exceptional cases and that also on strict proof of facts and circumstances justifying a deviation from the said normal rule."*

Reliance may also be placed on the case of "Abdul Salam Vs. The State" reported as '2000 SCMR 338'. Relevant portion is reproduced as under:-

> *"---It is now well settled that normal sentence for Qatl-i-amd as Ta'zir is death. The Court, however, has the discretion to award the lesser sentence of life imprisonment in case there are mitigating circumstances. Such discretion is neither uncontrolled nor it is to be exercised arbitrarily. It is to be exercised judiciously. The Court, after reaching the conclusion that the accused is guilty of Qatl-i-amd, can award lesser sentence of life imprisonment provided the Court records reasons for awarding such lesser sentence i.e. mitigating circumstances on account of which a case is made out for not awarding the normal sentence of death. We are, therefore, of the view that, though in section 302(b), PPC provision has been made for awarding death sentence or life imprisonment as ta'zir for Qatl-i-Amd, the normal sentence for committing such offence is death and in case the other punishment, i.e. life imprisonment is awarded the court is required to record reasons for such sentence."*

13. Similarly, the trial Court was required to have answered the charge under Section 10(3) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 either the accused was acquitted or convicted. This aspect of the matter remained unattended. Same is the position for not formulating point for determination qua the charge framed under Section 10(3) of the Offence of Zina (Enforcement of Hudood)

Ordinance, 1979 as narrated herein above. In our considerable opinion, this is a case for re-writing of judgment afresh, after hearing the parties.

14. With the consent of the parties and for the reasons stated herein above, we are inclined to accept this appeal, set aside the conviction recorded by the learned trial Court vide judgment dated 25.10.2010 and remand the case to the learned trial Court with the direction to re-write the judgment after hearing the parties preferably within a period of two months.

15. These are the reasons for our short order dated 09.02.2021.

MR. JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE

MR. JUSTICE DR. SYED MUHAMMAD ANWER

Dated, Islamabad, the
15th February, 2021
*Imran/**

Approved for reporting.

MR. JUSTICE MUHAMMAD NOOR MESKANZAI
CHIEF JUSTICE