

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE DR.FIDA MUHAMMAD KHAN
MR. JUSTICE SHEIKH AHMAD FAROOQ

JAIL CRIMINAL APPEAL NO.33/I OF 2012

Sabir Hussain son of Muhammad Zaman,
R/o Dobhater Tehsil and District Abbottabad

..... Appellant

Versus

The State Respondent

Counsel for appellant Mr. Muhammad Yousaf Zia,
Advocate

Counsel for complainant Mr. Sultan Mohammad Khan Tanooli,
Advocate

Counsel for State Syed Feroz Shah,
Advocate

FIR, Date and 555, 15.07.2010
Police Station Mirpur, Abbottabad

Date of judgment of 28.06.2012
trial court

Date of Institution 07.09.2012
of appeal

Date of hearing 03.04.2013

Date of decision 03.04.2013

Date of Judgment 15.04.2013

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JUDGMENT

Sheikh Ahmad Farooq, Judge.- Appellant/Sabir

Hussain has, through this appeal, challenged the judgment dated 28.06.2012 delivered by learned Additional Sessions Judge-VI, Abbottabad whereby he has been convicted and sentenced as mentioned herein under:-

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|----|--------------------------|---|
| a. | Under section 302(b) PPC | Life imprisonment and to pay compensation of Rs. 200,000/- under section 544-A, Cr.P.C. to the legal heirs of deceased. |
| b. | Under section 201 PPC | 03 years R.I. with fine of Rs. 2000/- or in default further 10 days S.I. |
| c. | Under section 404 PPC | 03 years R.I. with a fine of Rs. 2000/- or in default further 10 days simple imprisonment |

Sentences on all counts have been directed to run concurrently. However, benefit of section 382-B, Cr.P.C. has been extended to the convicted accused/appellant by the learned trial court.

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The co-accused/Mst. Samina was also tried alongwith the present appellant but she has been acquitted vide the same judgment.

2. Briefly stated, the facts leading to this case as disclosed in FIR dated 15.07.2010 (Ex.PA), registered at Police Station, Mir Pur, District Abbottabad by the complainant/Alam Zaib (PW.8), are that he was an employee in Allied Bank Abbottabad, and he received telephonic information on 15.07.2010 at about 10.00 A.M. that his paternal aunt (phoophi) namely Mst. Munawar Jan, aged 70/75 years, has been killed and her dead body was lying in the house. On receipt of the said information, the complainant rushed to the spot and saw that dead body of deceased Mst. Munawar Jan was lying on a cot in pool of blood. The complainant found injuries on the left side of the back of his phoophi caused by sharp edged weapon. He observed that lower portions of both ears were also cut. The complainant also stated that his "phoophi" was issueless

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and the property of her husband was also in her possession, and that she had no enmity with any one. The complainant requested for taking necessary legal action against the unknown accused.

3. The case was investigated by Fazal-ur-Rehman, Inspector, PW.14, who visited the place of occurrence, prepared site plan (Ex.PW.13/1), and took the blood stained earth vide memo (Ex.P1). He also took into possession a piece of blood stained bed sheet vide memo (Ex.P2) and pieces of broken bangles vide memo (Ex.P1/A). He sealed the articles into a parcel vide memo (Ex.PW.3/1) signed by the marginal witnesses. He also took into possession some other articles i.e. blood stained trouser (Ex.P3), shirt (Ex.P4) and white colour dopatta (Ex.P5). He attested the receipt (Ex.PW.8/2) through which the heirs of deceased had received the dead body of Mst. Munawar Jan after her post-mortem examination. On 18.07.2010, the I.O. arrested both accused Mst. Samina and Sabir Hussain. During the

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investigation, the accused led the police party to the shop of Khurram Jewellers, where the accused Sabir Hussain had sold the looted jewellery, weighing three tolas. The said gold ornaments were handed over to Sabir Hussain/accused. The I.O. got the said gold ornaments weighed from Saeed Akhtar Jewellers and accordingly, he placed the receipt on record as (Ex.PW.13/4). On the same day the accused led the police party to the place of occurrence and pointed out the place where he had committed the offence. The I.O. prepared pointation memo (Ex.PW.9/1) in the presence of marginal witnesses. Similarly the accused led the I.O. to his house and got recovered cash amount of Rs.47,500/- from an iron box. The accused further led the police party to a "Nulla" and got recovered one blood stained churri (Ex.P8) which was concealed beneath the grass. Similarly, at some distance two blood stained rubber gloves were picked up by the accused and handed over to the I.O. On 19.07.2010 the accused Sabir Hussain was

produced before the Illaqa Magistrate through application (Ex.PW.13/7) for recording his confessional statement. The accused confessed his guilt and his statement was recorded under section 164/364 Cr.P.C. and thereafter sent to judicial lock up. PW.14 recorded the statements of the witnesses under section 161 Cr.P.C. In addition to other legal formalities, the I.O. got identified the gold ornaments from Muhammad Saleem from on 31.7.2010 in presence of judicial Magistrate. On receipt of Chemical Examiner's report (Ex.PW.13/12), the same was kept in file for record. On completion of investigation, the I.O. handed over the file to SHO for submitting complete challan against the accused.

4. On receipt of report under section 173 Cr. P.C, the learned trial court framed charge against the accused/Sabir Hussain and his wife namely Mst. Samina under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance,

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1979 and under sections 201, 404, 202 PPC. The accused did not plead guilty and claimed trial to be tried.

5. The prosecution produced 15 witnesses at the trial to prove its case. A gist of their evidence is given hereunder:-

- * P.W.1 Tahir Iqbal, SHO submitted complete challan on receiving the file from I.O. on completion of investigation;
- * P.W.2 Dr. Shafiq-ur-Rehman, DMS District Headquarter Hospital, Abbottabad conducted postmortem of the dead body of deceased Mst. Munawar Jan on 15.07.2010 at 2.45 p.m. and observed as under:-

"EXTERNAL APPEARANCE:-

The deceased was an old woman of 70/75 years of age. The body was at the stage of rigor mortis.

ON EXAMINATION:-

1. An incised wound 3 x 1/5 muscle deep behind and below the left scapula, 5 inches from left shoulder joint. Corresponding wound present on the Qameez.
2. An incised wound present 1 inch below the first wound size about 2.5 x 1.5 muscle deep. Corresponding cut present on Qameez.
3. Two lacerated wounds present one on each ear on the lobules 1 x 1/4 in size.

CRANIUM AND SPINAL CORD.

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Walls ribs and cartilages:- Injured at the level of injury.

Pleurae:- Injured at the level of injury.

Larynx and trachea and right lung:- Intact.

Left lung:- Injured at the level of injury.

Pericardium and heart:- Injured at the level of injury.

Blood vessels:- Injured at the level of injury.

ABDOMEN:- Throughout intact.

MUSCLES, BONES AND JOINTS:- Already described.

REMARKS:-

The cause of death was damage to vital organ, left side of the back of chest, excessive bleeding, shock, leading to death.

Kind of weapon:- Sharp.

Nature of injury:- Fatal.

Time between injury and death:-30 minutes to 1 ½ hour.

Between death and postmortem:- 12 to 18 hours.

PW.2 stated that the Postmortem report Ex.PM consisting of six pages including pictorial is in his hand writing and correctly bears his signature. After PM examination, PW.2 handed over Qameez, Shalwar and Doppatta to Constable Ziafat No.277 along with Post Mortem Report."

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- * P.W.3/Khan Afsar Constable, who was working as driver at police station Mirpur at that time signed various recovery memos prepared by the I.O as marginal witness;
- * P.W.4/Muhammad Naseer, ASI deposed that during the days of occurrence he was posted as Moharrir ASI at police station Mirpur, Abbottabad and on receipt of Murasila, he drafted formal FIR (Ex.PA);
- * P.W.5/Ehsan-ul-Haq, Civil Judge-cum-Judicial Magistrate Mansehra stated that on 19.07.2010, he recorded confessional statement of Sabir Hussain, after completing all codal formalities. The said confessional statement is (Ex.PW.5/1);
- * P.W.6/Naseer, Constable deposed that on 20.07.2010, he was entrusted with the case property for onward transmission to the office of Chemical Examiner;
- * P.W.7/Abdur Razzaq, Constable is a marginal witness of various recovery memos prepared by the I.O.;
- * P.W. 8/Alam Zeb, who is the complainant of this case reiterated the facts got recorded by him to the police for registration of FIR.;
- * P.W. 9/Abdur Razzaq deposed that deceased Mst. Munawar Jan was his aunt and Mst. Samina wife of Sabir Hussain (co-accused) was his cousin. He is also marginal witness of various recovery memos;
- * P.W.10/Dost Muhammad Khan, Judicial Magistrate-II (wrongly typed as P.W.9) conducted identification test

of gold jewellery and issued identification report on 31.07.2010;

- * P.W.11/Muhammad Saleem (wrongly typed as P.W.10) who is a nephew of deceased Mst. Munawar Jan, identified gold ornaments belonging to deceased in presence of Dost Muhammad Khan, Judicial Magistrate PW.10;
- * P.W.12/Khurram Zaib, (wrongly typed as P.W.11), who is proprietor of Khurram Jewellers deposed that on 15.07.2010 accused Sabir Hussain had come to his shop and stated that his wife was suffering from cancer and he was in need of Rs.50000/-. Sabir Hussain/accused handed over gold ornaments to M/s. Khurram Jewellers and received the above amount in lieu thereof;
- * P.W. 13/Jamil Akhtar, IHC (wrongly typed as P.W.12) stated that on 20.7.2010, he handed over the samples regarding the present case to Naseer Constable for onward transmission to Forensic Science Laboratory;
- * P.W.14/Fazal-ur-Rehman,Inspector/Investigating Officer (wrongly typed as P.W.13) conducted the complete investigation of this case and handed over the file to SHO for submission of challan to the Court. The details of investigation have already been mentioned hereinabove;
- * P.W.15/Safdar Zaman, SI. (wrongly typed as P.W.14) drafted Murasila (Ex.PW.8/1) and sent the same to police station Mirpur for registration of FIR. He is also marginal witness of various recovery memos.

6. The learned trial court after close of prosecution evidence, recorded statements of accused under section 342 Cr.P.C. wherein the appellant/accused Sabir Hussain denied the prosecutions allegations and claimed innocence. In answer to question No.13 as to why the PWs have deposed against you?", he stated that " no independent PW has come forward to depose against me. The case is false and frivolous". In response to another crucial Question No.14, as to why he has been charged, he deposed as under:-

"I am innocent and have been charged falsely. Moreover, FIR was lodged against unknown culprits, no independent witness was associated with the proceedings, no finger prints have been taken from the articles and place of occurrence. Whole of the prosecution story is concocted. Moreover, deceased was having good relation with me and wanted to sell her landed property to perform "Hajj" and the complainant party does not like that being legal heirs of the deceased, therefore, I was involved in baseless case and I cannot being a Muslim commit this offence for merely Rs. 45000/- as I am a heavy duty driver and can earn more than Rs. 20,000/- per month. I am innocent".

Mst. Samina/co-accused took the same plea and pleaded innocence. Both the accused neither opted to make statement on

oath under section 340(2) Cr.P.C. nor produced any evidence in their defence. On conclusion of the trial, the learned trial court found the accused Sabir Hussain guilty and convicted and sentenced him as mentioned hereinabove. Hence, this appeal.

7. The learned counsel for the appellant, inter-alia, raised the following points in support of his appeal:-

- ❖ That the appellant has not been nominated in the FIR.
- ❖ The case of prosecution against the appellant/accused is highly doubtful, unreliable and against the facts borne on record.
- ❖ That the confessional statement of the appellant/accused recorded under section 164 Cr.P.C. does not fulfill the requirement as it has been recorded in English whereas the convicted accused/appellant is uneducated and only put his thumb mark on the said statement.

- ❖ The recovery of weapon of offence i.e. churri is also doubtful as no sketch has been given by the I.O.
- ❖ The evidence of PW.12 Khurram Zaib is highly doubtful as he did not weigh the ornaments himself.
- ❖ No proper identification of the stolen articles has been made.
- ❖ The FSL report about the blood grouping is silent.

In support of his arguments, the learned counsel for the appellant placed reliance on 2011 MLD 967, 2008 SCMR 1221, PLD 2008 SC 298, 1992 SCMR 196, 2001 PCr.LJ Peshawar 578, PLJ 2010 Cr.C (Lahore) 532, 2009 SD 145, 2007 SD 498, 2009 SCMR 230 and 2006 SCMR 1707.

8. Conversely, the learned counsel for the complainant advanced the following arguments:-

- ❖ That the case of prosecution is based on several pieces of circumstantial evidence and inspire confidence.

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- ❖ Though the appellant was not nominated in the FIR, but he was subsequently implicated in the supplementary statement made by the complainant on 22.07.2012.
- ❖ The recovery of churri on the pointation of appellant/accused is established on record.
- ❖ That the confession made by the appellant/accused was recorded by a highly responsible judicial officer after observing all legal formalities.
- ❖ The confessional statement of the convicted accused was voluntary, free and without any pressure.

The learned counsel for the complainant placed reliance on judgments reported in PLD 2008 SC.115, YLR 2012 FSC 2395, 2008 SCMR 387 and PLD 2005 SC 477.

9. Learned counsel for the State while, adopting the arguments of the learned counsel for the complainant, fully supported the impugned judgment and submitted that:-

- ❖ The confessional statement of the convicted accused was genuine and voluntary, which is fully corroborated by the medical evidence.
- ❖ PW.11 Khurram Zaib is an independent person and not related to any one. His evidence fully connects the accused with the commission of offence.

10. We have heard the learned counsel for the parties and perused the record with their assistance. We have also carefully examined the impugned judgment.

11. It is abundantly clear from the FIR that the occurrence was unseen and there was no direct ocular evidence about murder of Mst. Munawar Jan deceased. It is worth consideration that the complainant did not nominate anyone in the promptly lodged FIR, which was against some "unknown accused", who had not only committed the murder of his aunt but had also looted her ornaments. This fact alone shows that the complainant party bore no grudge, ill will or enmity against the appellant/accused, who was living in the same vicinity. After registration of the case, the

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police conducted initial investigation and resultantly arrested the accused on 18.07.2010. Thereafter, the appellant/accused made confession on 19.07.2010. His confessional statement was duly recorded by a Judicial Magistrate, according to legal requirements. Recoveries of various incriminating articles were also effected on his pointation. Subsequently, on 22.07.2010, supplementary statement of the complainant was recorded wherein the complainant nominated the present appellant as the accused, who had committed the offences.

12. Sequence of the events as stated above clearly indicate that, as legally required, the police started investigation from the nearby vicinity and interrogated close relatives and associates of the deceased lady, who were on visiting terms with her. Wife of present appellant/accused, who was not only related to the deceased but also had been serving her off and on. Therefore, she was among the first ones, who could be suspected. Her

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interrogation provided a clue, where-after, the appellant/accused was arrested and interrogated. On the next day of his arrest, the appellant/accused made a confessional statement before PW.5, Ehsan-ul-Haq, Civil Judge-Cum, Judicial Magistrate who, after observing all the codal formalities, recorded his confessional statement and issued a certificate accordingly. The document Ex.PW.5/2 contains all the relevant questions which establish that the appellant/accused was neither subjected to any torture, threat or force nor given any inducement for making the confessional statement. Appellant/accused admitted that he was making the confessional statement voluntarily, which was recorded just one day after his arrest. The certificate duly signed by the said PW shows that the appellant/accused was given half an hour initially and twice thereafter. During that time, PW.5 directed the police officials, including the Naib Court, to leave the Court room so that the accused/appellant should not feel any pressure. The

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appellant/accused was duly informed that he was before a Magistrate and he was not bound to record his statement and, in case he opted to do so, that confession will be used against him as a piece of evidence. PW.5, after getting satisfied that the appellant was making a voluntary statement, recorded his statement under section 164 and 364 Cr.P.C. According to this PW, the appellant/accused made statement in Urdu, which was translated into English. However, the confessional statement was read over to him and he was made to understand the consequences of his statement. His thumb impression was obtained on the confessional statement after his admission that the same had been recorded correctly. All this shows that the Magistrate, who is undoubtedly a responsible judicial officer and had nothing to do with the case of prosecution, was well-conscious of the situation and so he carefully recorded the statement, after observing all legal formalities as required under the law. No doubt, the statement under section 164

Cr. P.C. of the accused has been recorded on Oath, but it is only an irregularity, which does not vitiate the proceedings. The contents of said statement reveal the narration of events in a natural/convincing way and do not appear to be fabricated or tutored. Furthermore, the said confessional statement of the accused is fully corroborated by the recovery of blood stained "churri", on the pointation of appellant/accused. In this regard, we would like to refer to the Judgment delivered in the case of Shahzado Versus The State reported in PLD 2005 SC 477 wherein it has been held that "Mere fact that a judicial confession was recorded on oath would, however, not be sufficient to reject it as it may be only a procedural mistake in the form of an irregularity in exercise of jurisdiction which may not affect the statement in substance--- Rule is that notwithstanding the procedural defect in recording the confession, a retracted judicial or extra-judicial confession, if is found true, voluntary and confidence inspiring, can

safely be made basis of conviction." Similarly, the Honourable Supreme Court of Pakistan in the Judgment reported in PLD 2008 SC 115 has held that "retracted confession can be relied upon, provided its gets corroboration on material points".

13. Moreover, on the same day, the appellant/accused disclosed to the I.O that he had sold the gold ornaments looted by him, from the deceased, to Khurram Jewellers. Thereafter, he led the police party to the shop of Khurram Jewellers, wherefrom the looted gold ornaments were recovered. Khurram Jeweller has appeared as PW.12. He deposed that on 15.07.2010 the appellant/accused had come to his shop and told him that his wife was suffering from Cancer and he needed money for her treatment. Thereafter, he had handed over the said gold ornaments which consisted of three bangles, two ear rings, one ring and one Challa (ring) and in lieu of the same, he (PW.12) handed over Rs.50,000/0 to the appellant/accused on the condition

that if he succeeded in returning the said amount, in a week, he could take back the ornaments, otherwise, the transaction would be treated as sale of the said ornaments. He confirmed that after disclosure by the appellant/accused that he had sold the ornaments to him, the police had come to his shop alongwith the accused/appellant. PW.12 also confirmed that he did not know that the said ornaments to be a stolen property. He clarified that had he known, he would never have purchased the same. This PW is an independent and trustworthy person. He is a jeweller by profession, who had taken the ornaments from the appellant/accused, who was well known to him. This PW has been subjected to cross-examination but he has remained firm and his statement has not been shaken in any respect.

14. Beside this PW, the prosecution has examined PW.9 Abdur Razzaq, who is cousin of Mst. Samina, wife of the appellant/accused as well as nephew of the deceased Munawar

Jan. He is witness of the recovery memo (Ex.PW.9/1) and (Ex.PW.9/2). According to these memos, the appellant/accused pointed out the places where he had murdered the deceased and got recovered crime weapon i.e. blood stained "churri" (Ex.P-8), a pair of blood stained gloves (Ex.P-9) and (Ex.P-10) black in colour. He is also witness of the recovery memo (Ex.PW.9/3) whereby on pointation of the appellant/accused Rs.47,500/- of different denomination, being the price of stolen ornaments, were recovered from an iron box. This PW being related to both sides, rather closer to the appellant/accused, is very important and, therefore, his testimony cannot be easily brushed aside. He has also been subjected to lengthy cross examination but he has remained unshaken.

15. The FSL report regarding all the articles including the "churri" and gloves, is positive. Though the blood on these two articles was not found to be sufficient for grouping, but it is

pertinent that the said incriminating articles i.e. "churri" and gloves were recovered on pointation of the accused/appellant.

16. The upshot of above discussion is that the voluntary confessional statement made by the appellant/accused before the PW.5, Ehsan-ul-Haq, Civil Judge-Cum, Judicial Magistrate, duly corroborated by the medical evidence and the recovery of incriminating articles like blood stained churri and gloves as well as recovery of the stolen gold ornaments which were duly identified by PW.11 Muhammad Saleem, first cousin of the deceased, and depositions of PWs, particularly, PW.9 Abdul Razzaq and PW.12 Khurram Jewellers leave no doubt in a prudent mind to conclude with certainty that the an offence falling under the mischief of section 302(b) PPC was committed by the appellant/accused. There is absolutely no motive for his false implication by the complainant as he did not nominate him initially which prove his bonafides and truthfulness.

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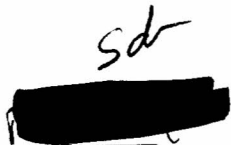
17. In this view of the matter, we have come to the conclusion that the appellant/accused has been rightly convicted and sentenced by the learned trial Court under section 302 (b) PPC. However, the conviction recorded by the learned trial Court under section 201 and 404 PPC is illegal as the necessary ingredients of the said sections are not at all attracted or established in the circumstance of this case. The present appellant admittedly did not cause dis-appearance of any evidence of the commission of the offence or gave false information to screen off the offender from legal punishment. Additionally, an accused cannot be convicted for offence falling within the mischief of section 404 PPC, if the charge against him is of murder and robbery. (Reliance NLR 2009 SD 658). Consequently, we set aside the conviction and sentences of the appellant under section 201 and 404 PPC and acquit him of the said charges. However, we maintain the conviction of the appellant under section 302 (b) PPC

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and the sentence of life imprisonment awarded thereunder. We also maintain the order of the learned trial Court regarding the payment of compensation of Rs.200,000/- to the legal heirs of the deceased under section 544-A Cr.P.C. The benefit of section 382-B, Cr, P.C. extended to him by the learned trial Court shall remain intact.

18. With the above modification in the impugned judgment dated 28.06.2012 passed by the learned Additional Sessions Judge-VI, Abbottabad, the instant appeal is decided accordingly.


19. The above are the reasons of our short order dated 03.04.2013.


JUSTICE SHEIKH AHMAD FAROOQ


JUSTICE DR. FIDA MUHAMMAD KHAN

Islamabad the 15th April, 2013
Umar Draz/-

Approved for Reporting


JUSTICE SHEIKH AHMAD FAROOQ