

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE
JUSTICE MUHAMMAD ZAFAR YASIN
JUSTICE SYED AFZAL HAIDER

Jail Criminal Appeal No. 77/I of 2008 Linked with

Muhammad Mukhtiar alias Moju s/o Muhammad Hussain, r/o Chak
No.92/15-L, Tehsil Mian Channu District Khanewal

..... Appellant

Versus

The State

.... Respondent

Criminal Murder Reference No. 07/I of 2008

The State

..... Appellant

Versus

Muhammad Mukhtiar alias Moju s/o Muhammad Hussain, r/o Chak
No.92/15-L, Tehsil Mian Channu District Khanewal

Respondent

Counsel for appellant

Mr. M. Javed Aziz Sandhu,
Advocate

Counsel for State

Mr. Shafaqat Ullah Butt
Deputy Prosecutor General

FIR. No. Date &
Police Station

149, 31.05.1998
Chhab Kalan Distt Khanewal

Date of Judgment of
Trial court

11.03.2002

Dates of Institution

05.08.2008 & 23.09.2008
respectively

Date of hearing

28.04.2009

Date of Judgment

28.04.2009

JUDGMENT

SYED AFZAL HAIDER, Judge.- Through this Jail

Criminal Appeal Muhammad Mukhtar alias Moju has challenged the

judgment dated 11.03.2002 delivered by learned Sessions Judge, Khanewal

whereby he has been convicted and sentenced as under:-

- i. U/S.10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 to 25 years rigorous imprisonment with whipping numbering 30 stripes;
- ii. U/S. 302(b) of the Pakistan Penal Code sentenced to death;
- iii. U/S. 201 of Pakistan Penal Code, 07 years rigorous imprisonment with a fine of Rs. 10,000/- and in default thereof to further under six months rigorous imprisonment; and
- iv. To pay a sum of Rs. 1,00,000/- as compensation to the legal heirs of the deceased under section 544-A of the Code of Criminal Procedure or in default thereof to further suffer six months rigorous imprisonment.
- v. Sentences awarded under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and under section 201 of Pakistan Penal Code have been directed to run concurrently. Benefit of section 382-B of the Code of Criminal Procedure was also extended to the appellant.

2. The learned District & Sessions Judge, Khanewal has also

moved Criminal Murder Reference No. 7/I of 2008 for confirmation of death

sentence awarded to the appellant under section 302(b) of Pakistan Penal

Code.

3. Crime report in this case was formally registered on 31.05.1998 with Police Station Chab Kalan as FIR No.149/98 after the receipt of Post Mortem Report undertaken by Medical Officer as a consequence of Ruppt No.7 dated 28.05.1998, the day when the dead body of an unidentified female child was retrieved from canal 15-L,whereafter proceedings under section 174 of the Code of Criminal Procedure had been undertaken. The initial information of the discovery of dead body was made by Shuja-ul-Haq on 28.05.1998, which statement was reduced into writing and sent to police station for entry in the daily diary. Later on FIR was recorded under section 302 of the Pakistan Penal Code without nominating any accused.

4. The informant Shuja-ul-Haq PW 12, had stated that he, a taxi driver by profession, was present at taxi stand Adda Chab Kalan alongwith Zubair Ahmad and Nazar Hussain when they saw a corpse of an unknown girl floating in Canal 15-L. Shuja-ul-Haq with the help of two persons retrieved the dead body from the canal and placed it on a cot. The informant had guessed that the girl got drowned while taking bath in the canal. The police officer reached at the spot and took into possession the dead body for

necessary action which had been guarded by Zubair Ahmed and Nazar Hussain.

5. After completing the preliminaries the case file was produced by ASI Altaf Hussain on 31.05.1998 before Barkat Ali, Inspector/SHO. PW.16 who added section 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, after inspecting the record. Thereafter he visited the place of occurrence in Chak No. 92/15-L and the house of Muhammad Yousaf, father of the deceased. He recorded statements of four persons under section 161 of the Code of Criminal Procedure and joined the other persons in the investigation who were present at the spot. He inspected the spot, prepared rough site plan Ex.PK. The DSP also reached there and directed to arrest the accused. On 01.06.1998 the Investigating Officer raided the house of Mukhtar alias Mouju accused and also recorded the statements of Zubair Ahmad and Nazar Hussain at Adda Chab Kalan under section 161 of the Code of Criminal Procedure. While returning to the police station Irshad Muharrir Head Constable handed over to him the last worn clothes of deceased i.e. shirt P1 and dopatta P2 of Mst. Kausar. The Moharrir also

handed over to him two sealed envelopes and four sealed phials which he took into possession vide recovery memo Ex.PA attested by Muhammad Irshad, Muharrir, Atta Ullah and Muhammad Riaz constables whose statement was also recorded under section 161 of the Code of Criminal Procedure. These articles were handed over to the Moharrir for safe custody in the malkhana. During investigation of the case Iftikhar Ahmad Khan and Ahmad Hayat Khan produced accused Mukhtar alias Mouju before him when he was present at Chak No.92/15-L. He recorded the statements of both the P.Ws and interrogated the accused. On the pointation of the accused he inspected the place where he committed zina-bil-jabr with Mst. Kausar deceased. The accused also got recovered a) Safa P3 placed on a peg with which he tied the mouth of the deceased and b) a cot P4. After completing all legal formalities he sent the accused to judicial lock up on 05.06.1998. The Investigating Officer got the accused medically examined on 04.06.1998 from Tehsil Head Quarter Hospital Mian Channu to verify his potency. Report under section 173 of the Code of Criminal Procedure was then submitted by police on 11.06.1998 requiring the accused to face trial.

6. The learned trial court on receipt of the report framed charge against the accused under section 10 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, as well as sections 302 and 201 of Pakistan Penal Code. The accused did not plead guilty and claimed trial.

7. The prosecution produced 16 witnesses at the trial in order to prove its case. The gist of deposition of the witnesses is as under:-

- i. Muhammad Riaz, Constable No.410 appeared as P.W.1 and stated that on 01.06.1998 Muhammad Irshad Moharrir produced the last worn clothes of the deceased and he attested the memo and kept those articles in the malkhana untampered in his custody.
- ii. Shamas Ali, Constable No.7 as P.W.2 stated that on 05.06.1998 Muhammad Irshad Moharrir handed over to him sealed envelope and four bottles which he transmitted intact in the Office of the Chemical Examiner, Lahore on 06.06.1998.
- iii. Abdul Hameed Draftsman P.W.3 stated that on 02.06.1998 on the direction of the police and pointation of the P.Ws he visited the place of occurrence and took rough notes on the basis of which he prepared site plans Ex.PB, Ex.PB/1 and Ex.PB/2 and

produced the said plans before the Investigating Officer on 05.06.1998.

- iv. Altaf Hussain, ASI appeared as P.W.4 and stated that on 28.05.1998 at Chak No.84/15-L on Pacca Road where Shuja-ul-Haq PW.12, the informant, appeared before him and made statement and he visited the place where dead body of the deceased was lying and took the same into possession and sent the same for post mortem. He sent a murasala to the police station which became the basis of Rupt No.7 Ex.PC drafted by Muhammad Irshad Moharrir Head Constable No.418 whereafter a formal FIR, Ex.PF was recorded on 31.05.1998 when he handed over the file to the Inspector/SHO for further investigation.
- v. Abdul Majeed, Head Constable No. 374 appeared at the trial as P.W.5 to depose that on 04.06.1998 Muhammad Irshad Moharrir handed over to him a sealed parcel containing vaginal swabs for onward transmission to the Office of the Chemical Examiner, Multan which was deposited intact on the same day.
- vi. Lady Dr. Kousar Sultana had conducted post mortem on the dead body of Mst. Kausar on 28.05.1998. She appeared at the trial as P.W.6 and gave the details of medical examination and the injuries found on the dead body of the victim vide report Ex.PG/1. She had also taken vulval swabs for analysis by the Chemical Examiner.

vii. Atta Ullah, Constable No.468, P.W.7, stated that on 28.05.1998 the dead body of Mst. Kausar was handed over to him which he escorted to THQ Hospital, Mian Channu for post mortem examination. The dead body was identified by her heirs. After post mortem the lady doctor handed over to him last worn clothes shirt P1, dopatta P2, two sealed envelopes and four sealed phials which in turn were handed over to Muhammad Irshad Moharrar for safe custody in the malkhana. He had attested the recovery memo vide which these articles were taken into possession by the Investigating Officer.

viii. Dr. Muhammad Akbar appeared as P.W.8 and stated that on 04.06.1998 he examined Mukhtar alias Mouju and found him fit to perform sexual intercourse. He issued medico legal report Ex.PH and handed over the same to the police.

ix. Manzoor Ahmad is a witness of wajtakkar. He appeared as PW.9 and deposed that during night between 27/28-05.1998 he was present at the dera of Iftikhar Ahmad "in connection with some private business." He left the dera at about 1.00.a.m. during night and proceeded to Chak No. 51/15-L on his bicycle. As he reached in square No.58, killa No.25 he saw a person, coming from Chak No.92/15-L and running on matelled road on the right side of canal 15-L. He stopped there and saw that Mukhtar alias Mouju was carrying a child on his shoulder. He "enquired from him about the child whereupon he told that the

child was daughter of Muhammad Yousaf who was ailing, her father Muhammad Yousaf was not present in the house, so he is taking her to Jandyali Bunglow for her medicine". On the next day PW.9 heard that dead body of Mst. Kausar was found in the canal 15-L and that she was subjected to zina-bil-jabr. On receiving this information he went to Muhammad Yousaf "and told him the above mentioned story."

- x. Iftikhar Ahmad was produced by prosecution as P.W.10 before whom the accused Mukhtar alias Mouju allegedly made an extra judicial confession in the presence of Ahmad Hayat P.W.11. This witness gave the detail of the confession disclosing manner in which the accused had committed the murder of Mst. Kausar after committing rape with her.
- xi. Ahmad Hayat appeared before the trial court as PW.11. He endorsed the statement of Iftikhar Ahmad P.W.10 regarding the extra judicial confession made by accused Mukhtar alias Mouju. This witness is the second witness of extra judicial confession made before both the witnesses simultaneously.
- xii. Shuja-ul-Haq appeared at the trial as PW.12. He stated that he had informed Altaf Hussain ASI about the discovery of dead body whereafter police investigation had been initiated.
- xiii. Statement of Liaqat Ali was recorded as P.W.13. He stated that he alongwith Ali Sher P.W were present at the police station

when the accused while in police custody gave the details about taking the deceased from the compound to his house whereafter he tied her mouth with Safa and committed Zina-bil-Jabr with her. During intercourse the minor died who was later on thrown in the canal.

xiv. Statement of Muhammad Yousaf, father of Mst. Kausar deceased was recorded as P.W.14. He deposed that during the night 27/28.05.1998 he went to ease himself at about 2.30.a.m. and on return he saw that Mst. Kausar deceased was not present on her cot and he started searching her. On the next day at about 10/11.00.a.m. he heard that police of Chab Kalan Police Station had recovered the dead body of an unknown girl. He alongwith Ali Sher and Liaqat Ali, his brothers, went to the police station where the police informed them that the dead body was dispatched to the civil hospital for post mortem and he reached the hospital and received the dead body. The witness also gave the details of the manner in which Manzoor witness disclosed to him as having seen the accused carrying the dead body of his daughter.

xv. Muhammad Irshad Moharrir Head Constable appeared as P.W.15 at the trial. He stated that on 28.05.1998 and 1.06.1998 Atta Ullah Constable handed over to him the last worn clothes of the deceased and other articles received from the hospital which were kept in the malkhana in safe custody.

xvi. Lastly Barkat Ali, Inspector, the Investigating Officer appeared as P.W.16 and gave the detail of investigation conducted by him in the case. Details of the investigation have already been given in an earlier paragraph of this Judgment.

8. The learned trial court after close of the prosecution evidence recorded statement of accused Mukhtar alias Mouju under section 342 of the Code of Criminal Procedure wherein he took up the plea of innocence and in answer to question, "Why this case against you and why the P.Ws have deposed against you"? stated as follows:-

"Wife of Muhammad Yousaf had illicit relations with Muhammad Ashraf resident of my chak. I informed Muhammad Yousaf about the illicit relations of Mst. Nasim wife of the complainant with Muhammad Ashraf to the complainant prior to the occurrence. Muhammad Yousaf and his wife took it ill and falsely involved me in this case. Actually it was a dark night and it was a blind murder. Due to old insult Muhammad Yousaf and his wife involved me in this case falsely. P.Ws being close relatives of the deceased have deposed falsely against me".

9. The learned trial court at the conclusion of the trial heard arguments of the parties. The learned trial court after considering the record of the case came to the conclusion that the accused was guilty under section 10(3) of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as well as guilty of Qatl-e-Amd punishable under section 302(b) and 201 of Pakistan Penal Code. The accused was accordingly convicted and sentenced as noted in the opening paragraph of this Judgment. Hence the present Jail Appeal against conviction by the appellant and the Murder Reference No.7 by learned Sessions Judge, Khanewal for confirmation of sentence.

10. The case of the prosecution depends upon the concatenation of three events: a) the factum of the deceased having been last seen with the accused which is sought to be established through the evidence of Manzoor Ahmad P.W.9; b) the element of extra judicial confession having been made by the accused before two witnesses Iftikhar Ahmad P.W.10 and Ahmad Hayat P.W.11 in one sitting and c) the production of the confessing accused

before the police by the same set of two witnesses of the extra judicial confession.

11. In other words this is a case which depends solely upon circumstantial evidence. The principles of appreciation of evidence applicable in cases depending entirely on circumstantial evidence have been enumerated in the case of Mohabbat vs. the State reported as 1990 P.Cr.LJ

73 which for the sake of reference may be enumerated as follows:-

- i. Circumstances from which the conclusions are drawn should be fully established.
- ii. The facts must be consistent with the hypothesis.
- iii. The circumstances should be of a conclusive nature and tendency.
- iv. The circumstances should, to a moral certainty, actually exclude every hypothesis, but the one proposed to be proved.

12. It therefore follows that the circumstantial evidence should lead the conclusion that the accused alone was guilty of the offence charged. A strong chain of events must exist and the hypothesis should not be capable of being explained away on any premise other than the guilt of the accused. It

is all the more necessary in a case which involve capital punishment. The prosecution has to discharge the onerous burden in order to claim a verdict of guilt against the accused.

13. We have gone through the file and perused the oral as well as documentary evidence adduced by the prosecution in addition to the statement of the accused recorded under section 342 of the Code of Criminal Procedure. The relevant portions of the impugned judgment have been scanned as well. We have also noted the points raised by learned counsel for the appellant and the learned Deputy Prosecutor General on behalf of the State. Our observations are as follows:-

- i. The evidence *of last seen* was provided by the prosecution through the testimony of Manzoor Ahmad P.W.9. He stated that on the night between 27/28-5-1998 he had gone to the dera of Iftikhar Ahmad in Chak No.22/15-L from where he returned at about 1.00 a.m. on cycle. When he reached square No.58 killa No.25 he accosted one person who was running on the metaled road on the right bank of canal. He stopped his cycle and looked at the man whom he identified as Mukhtar alias Mojoo carrying a child on his shoulder. On enquiry Mukhtar told him

that the child was the daughter of Muhammad Yousaf who had fallen ill and as her father was not available in the house so he was taking her to Jandiali Bungalow to procure medicine. The witness further stated that on the next day he came to know that the dead body of the daughter of Muhammad Yousaf aged about five years had been recovered from the canal and that the child had been subjected to zina-bil-jabr. He also claimed that on receiving this information he went to the house of Muhammad Yousaf and told *him that only last night he had seen Mukhtar accused carrying his daughter*. In cross-examination however he stated that he had seen the body of a person but could not identify as it was wrapped in a chaddar. In response to another question he stated that he had informed Muhammad Yousaf on the 3rd day of the announcement. If the first part of the statement is accepted that he had informed Muhammad Yousaf in the morning then it is incomprehensible that the latter did not inform the police on 28.05.1998 when he went to the Police Station and also received the dead body after postmortem. But if the third day version is accepted then his statement is of no value because he omitted to divulge a very important event of the blind murder of an innocent soul.

- ii. Altaf Hussain, ASI appearing at the trial as P.W.4 stated in the cross-examination that the complainant alone had come to him in the police station on 28.05.1998 after hearing an announcement in about the discovery of the dead body of a

unknown girl. Complainant P.W.14 i.e, father of the victim confirmed that on 28.05.1998 he had gone to the police station and he had identified the dead body of his daughter. It is indicative of the fact that the complainant was not aware of the actual cause of death on 28.05.1998. The inquest report is also silent on the real cause of death. The post mortem was undertaken at 6.30 p.m. on 28.05.1998 and the cause of death, as determined by Lady Doctor Kausar Sultana was Asphyxia^{10.} which means that the Airway to the lungs had got blocked. The obvious indicator was the factum of drowning.

- iii. The dead body had been retrieved by complainant on 28.5.1998 after it had been identified by him which fact is established by the deposition of Atta Ullah Constable P.W.7, who had escorted the dead body to Tehsil Headquarter Hospital, Mian Channu for post-mortem purpose. However formal FIR was registered on 31.05.1998 at about 4.15. p.m. on the basis of the earlier Ruppt No.7 dated 28.05.1998 recorded at 11.00.a.m. in the morning but in the police karrawai it is nowhere written that the father of the dead child had conveyed information to the police even on 31.05.1998 that the appellant was last seen by P.W.9 on the night between 27 and 28 May, 1998.
- iv. It does not stand to reason that the appellant while carrying the dead body of the child was running along the canal bank but he did not throw it in the canal till such time that P.W.9 had seen

him and had enquired from him as to what he was carrying. It is further surprising that the appellant disclosed the identity and the parentage of the child that he was carrying. It appears very strange that a murderer carrying the corpse surreptitiously should disclose the identity of the dead body to a person who would in a day or two become a potential witness against him.

v. It is also not on record as to how far was the village where the minor victim resided from the place from where her dead body was recovered from the canal. From the registration of the case in the police station and the conduct of the investigation by police officer attached with the police station it appears that the place of recovery of dead body and the place of origin of the fall of the minor girl in the canal is within the territorial jurisdiction of the same police station. The possibility cannot be ruled out that the child fell in the canal in the morning and the body was seen floating by PW.12 at about 10.30 a.m. who then reported the matter to police at 11.00 a.m. after salvaging the dead body from the canal.

vi. Reverting to the evidence of extra judicial confession, sought to be proved through the deposition of Iftikhar Ahmad PW.10 and Ahmed Hayat PW.11, we find an intriguing similarity between the two depositions. The words and the sequence employed in the statement of these two witnesses is almost the same. Notwithstanding the likeness between the deposition of these

witnesses, the answer given by these two witnesses to a very crucial question is however different. P.W.10 says that after the accused had confessed his guilt before them he went away and the witnesses sat down on the chairs whereas the second witness i.e. Ahmad Hayat P.W.11 stated that after the conversation with the accused, was over, they took him to the police. The other question that has not been clarified by learned counsel for the State is: why should be accused make an extra judicial confession before P.W.10 and P.W.11 simultaneously. Both of them are cultivators. They have no special influence over the father of the victim nor are they shown to be on very good terms with the accused to prompt him to repose confidence on an issue which will determine his fate. Moreover the prosecution has not adduced any evidence to show that the accused was motivated by any particular even which compelled him to go and make a confession. It has been held in the case of Muhammad Aslam and another vs. The State reported as 2003 SCMR 862 at page 865 that an extra judicial confession allegedly made by accused is of no value if it was made before two persons at the same time. Extra Judicial confession is a weak piece of evidence. It must be corroborated by independent and dependable evidence. It must be shown that it was made, and made voluntarily and further that it was made truly.

vii. As regards the production of the accused before the Investigating Officer Barkat Ali, Inspector P.W.16, it is apparent that this link was introduced during investigation only to strengthen the factor of last seen and the element of extra judicial confession.

viii. P.W.14 Muhammad Yousaf father of the deceased child had stated at the trial that his wife had developed illicit relations with the accused. The accused however stated that he had in fact informed the complainant about the illicit relationship of his wife with one Muhammad Ashraf. PW.10 admitted in cross-examination that the wife of Muhammad Yousaf was a woman of easy virtue. In this view of the matter it becomes amply clear that the burdon of this blind murder, if it was a case of Qatl-i-Amd, was shifted to the accused who was suspected of carrying on with the wife of the complainant, which fact is admitted by the complainant himself, or the complainant bore a grudge against the accused because he had informed him that Mst. Nasim was an unfaithful wife.

ix. Nothing incriminating was recovered from the accused either before or after the alleged confession to connect him with the charge of murder. It is a case which rests upon suspicion and weak type of circumstantial evidence. Extra Judicial confession of the nature produced in this case is not sufficient to sustain conviction. The complainant PW.14 in response to a question,

stated that he is a person before whom extra-judicial confession was made. This is a conscious improvement and an effort to tighten the rape around accused because the Investigating Officer also proceeded to introduce Ali Sher and Liaquat as well before whom the same extra-judicial confession was made. This Liaquat Ali appeared as PW.13. He stated that *the confession was made by the accused in the police station 4/5 days after the occurrence.*

- x. Learned Deputy Prosecutor General has not been able to explain the various points mentioned above nor has he been able to explain the reason why the depositions of both the witnesses of extra judicial confession in the trial court are almost identical. It appears that both the witnesses were tutored a given statement which they had obediently reproduced at the trial. It is an established principle of law that the prosecution is duty bound to prove its case beyond any reasonable doubt and if a single doubt is created about any link, in a case based on circumstantial evidence, the conviction cannot be claimed by the prosecution. In that case the benefit must go to the accused because the missing links or weak type of uncorroborated evidence tends to raise serious doubts about the veracity of the prosecution story. The principle recognized by superior Judiciary in this context is that one weak piece of evidence does not corroborate another weak piece of evidence. In the absence of strong piece of evidence coming from any independent

source, weak specie of evidence like an extra judicial confession made before two persons at one and the same time cannot corroborate the last seen evidence of the nature produced in this case.

xi. The fundamental principles governing the appreciation of evidence, particularly in cases involving capital punishment are:

a) that the prosecution must stand on its own legs and prove the case against the accused beyond reasonable doubt as the onus of proof lies heavily upon the prosecution; b) that it is not sufficient to be satisfied that murder has been committed but the judicial mind must be satisfied that the accused has committed the offence; c) benefit of every reasonable doubt is the entitlement of accused and not the prosecution; d) that it is the quality of evidence and not the quantity which determines the culpability of the accused; e) the iron clad principle of criminal justice is that an accused cannot be held guilty on the strength of weak piece of evidence emanating from a doubtful source. The accused can also not be held guilty on the basis of conjecture, probabilities or presumptions. Suspicion or conjecture is an apprehension or an assumption without solid ground. It can never substitute direct evidence or deposition coming from an independent and reliable source.

14. In this view of the matter we are of the considered view that the prosecution has not been able to prove the case beyond reasonable doubt

against the accused. In view of what has been stated above we are not persuaded to maintain the conviction and sentence recorded by the learned trial court. On the other hand we are inclined to give the benefit of doubt to the appellant and accept this appeal. The impugned judgment dated 11.03.2002 delivered by learned Sessions Judge, Khanewal in Sessions Case No. 64-S of 1998/Sessions Trial No. 9-S of 1999 whereby the appellant Muhammad Mukhtar alias Moju was convicted and sentenced under three counts is hereby set aside. The order of learned trial court regarding payment of compensation of Rs. 100,000/- to be paid to the legal heirs of the deceased under section 544-A of the Code of Criminal Procedure or in default whereof to further suffer six months rigorous imprisonment is also set aside. The Criminal Murder Reference No. 7/I of 2008 is answered in the negative. Short Order was announced on 28.04.2009 and reasons for the same are being given through this Judgment.

Sauwida

JUSTICE SYED AFZAL HAIDER

[Signature]

JUSTICE HAZIQUL KHAIRI
Chief Justice

M. Z. Yasir

JUSTICE MUHAMMAD ZAFAR YASIN

Islamabad the 28th April, 2009.
UMAR DRAZ/

Sauwida

Fit for reporting