

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

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PRESENT:

HON:MR.JUSTICE DR.FIDA MUHAMMAD KHAN
HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI

Jail Criminal Appeal No.14/I of 1996.

Muhammad Sadiq s/o Amanat Ali Caste Teli r/o Burj Singh P.S. Chunian	.....	Appellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Mr.Mehmood Akhtar Warraich Advocate
Counsel for the State	.....	Mr.Jamashad Talet, Advocate
FIR No. Date and Police Station	.....	84/93 dated 20-4-1993 P.S. Khudian
Date of the judgment of the trial Court	.....	5-07-1994
Date of Institution	18-01-1996
Date of hearing	17-02-1997
Date of Decision	22-05-1997

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JUDGMENT:

ABDUL WAHEED SIDDIQUI, J:- This Jail Criminal Appeal has been preferred against an order on the order sheet dated 5-7-1994 passed by the Court of Sessions Judge, Kasur by which he has convicted the appellant under section 302 P.P.C. as well as under section 14 Offences against Property (Enforcement of Hudood) Ordinance, 1979 read with section 379 P.P.C. On the first count the appellant has been sentenced to imprisonment for life and to pay compensation amounting to Rs: 20,000/- to the legal heirs of the deceased in default of payment thereof to suffer imprisonment for a period of six months S.I. On the second count he has been sentenced to R.I. of two years. Both the sentences have been ordered to run consecutively.

2. Story of prosecution in brief is that one Mohammad Tufail (PW-11) got a complaint (Ex:PB) recorded by Manzoor Ahmed (PW-14) Inspector/ S.H.O. Police Station/^{thana} Khudian District Kasur on 20-4-1993 @ 1200 hours while he was at Addah Khudian on petrol duty. It was sent to the police station and was registered as FIR (Ex:P.B/1) @ 1220 hours on the same day. The complaint (Ex:PB) in a nutshell is that the complainant is a resident of Saidpur and is a cultivator. On 18-4-1993

he left his son Khadim Hussain (deceased) aged 8/10 years in the fields for grazing cattle. He was accompanied by Mohammad Nawaz (PW-10). They had seen on the spot the present appellant and Rahmat (acquitted accused) some where near his son. By the evening, his son did not return alongwith the cattle. He started search and was informed by Nazir Ahmed (PW-13) and Mohammad Sadiq that they had seen his son going towards Kot Piran alongwith cattle. He remained in search of his son and the cattle but had failed. He indicated his strong suspicion about the murder of his son by the appellant and his accomplice Rahmat and theft of cattle by both. He was going accompanied by Haji Bashir Dogar for report to the police station but the police party met him on the way and got the complaint (Ex:PB) recorded.

On secret information, appellant was arrested on the same day from bus stop Talvandi/ ^{who} led to the recovery of the dead body of the deceased from the fields. After compliance of necessary requirements of law, the dead body was sent for post mortem examination to DHQ Hospital Kasur. A post mortem examination was conducted by Dr.Arif Mehmood (PW-5) on 20-4-1993 @ 4-50 P.M. Next day the stolen cattle were taken into possession by Manzoor Ahmed, (PW-14) first Investigation Officer, from

Police Station Allahabad which was already taken into possession by the said police station on 18-4-1993 under section 550 Cr.P.C. vide Ex:PE. Recovery of blood stained churri(P.4) was effected by Mushtaq Ahmad (PW-12) SI/SHO, second Investigation Officer of the case, at the indication of the appellant. Acquitted co-accused Rahmat was arrested on 31-5-1993. Both the convicted appellant and acquitted co-accused were challaned and were charged by the Court of Sessions Judge Kasur on 9-5-1994 under section 302/34 P.P.C. and under section 14 Offences against property (Enforcement of Hudood) Ordinance, 1979 to which both of them pleaded not guilty.

3. At the trial PW-1 to PW-6 were examined, on 29-5-1994. The trial Court was then informed on 23-6-1994 by counsel for the appellant that the appellant wanted to make confessional statement for which grant of a reasonable time was requested. On 3-7-1994 the appellant made a statement in the trial court that he had filed an application before the Superintendent, District Jail, Kasur to the effect that he wanted to make confessional statement before the Court but it was not forwarded. The application was called for from the Superintendent, District Jail, Kasur and came under judicial scrutiny by the trial court on 5-7-1994. The substantial part of this application written in Urdu and thumb marked by the appellant and

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L.T.I. attested and signed by Deputy Superintendent, District Jail, Kasur on 28-6-1994 reads:

" میں ملزم محمد صادق ولد امانت علی یہ اقرار کرتا ہوں کہ اس کیس میں میں گنہگار ہوں اور جو قتل ہوا ہے وہ میں نے ہی کیا ہے اور میرا مقدمے وار رحمت علی ولد مندا قوم انصاری بے قصور ہے۔ اس کا اس قتل میں کوئی ہاتھ نہیں ہے۔ اور نہ ہی ہماری پہلے مقتول سے کوئی دشمنی تھی۔ یہ تو سارا تقدیر کا کمال ہے۔ میں دوبارہ خدا کو حاضر ناظر جان کر یہ اقرار کرتا ہوں کہ مقتول کا قتل میں نے کیا ہے۔ اور رحمت علی ولد مندا قوم انصاری بے گناہ ہے۔ لہذا آپ سے استدعا ہے کہ مہربانی فرما کر رحمت علی ولد مندا کو بری کیا جائے اور میری حال پر بھی رحم کیا جائے۔ "

In order to satisfy itself that this confession was voluntary, the trial court completed the procedure under section 364 Cr.P.C. on 5-7-1994. The substantial part of the confession reads as under:

"On 18-4-1993 at about 8 A.M. Khadim Hussain son of Muhammad Tufail aged 8-10- years resident of Sadd Pur was grazing buffalos etc I wanted to commit theft of his buffalos. Therefore, I murdered him by causing churi blows to him. Therefore, I took away his four buffalos, one small he-buffalo and one small cow. Rehmat Ali accused was not with me at the time of occurrence."

Immediately after that the trial court passed the impugned order convicting the appellant and directing for coming up of the remaining prosecution on 12-7-1994 against the co-accused

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Rahmat Ali who had not confessed.

The prosecution completed 14 PWs against co-accused Rahmat Ali, closed its side, and he made statement under section 342 Cr.P.C., declined to be examined on oath under section 340 (2) Cr.P.C. and did not produce evidence in his defence. Vide judgment dated 24-10-1994 co-accused Rahmat Ali was acquitted by giving him benefit of doubt. One of the reasons shown for acquitting this co-accused is relevant in the circumstances of the appeal before us. Hence it is reproduced here:

"It is also noticeable that Mohammad Sadiq accused (since convicted) had also exonerated Rehmat accused in his confessional statement from the commission of the crime charge."

With this back-ground of the case, we proceed to take a judicial notice of certain factors which remain hidden into the heaps of papers into the police records and the records of the trial court as shall be discussed below.

4. We heard the learned counsel for appellant engaged for him on State expenses, vide order on order sheet dated 23-1-96 and the learned counsel for State. The learned counsel for appellant has contended that the appellant had pleaded not guilty when charge sheeted by the trial court and that after the

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examination of 6 PWs he had made a confessional statement in the trial court whereas the trial had not yet concluded, therefore, his confession had no legal value in the presence of sections 244, 265-D, 265-E, 265-F of Cr.P.C. Consequently the impugned order of conviction was not maintainable. In this context he relied on 1986 P Cr.LJ 2250 and 1985 P Cr.LJ 167. The learned counsel for State could not produce any case law superceding or alternating the law cited above and submitted that this was a case fit for remand back to the trial court to be taken up from where it was left i.e. from re-examination of PW-7 onwards. Simultaneously he contended that the proposition of remand back was an alternative suggestion or consent on his part otherwise the Jail Criminal Appeal was hopelessly barred by 560 days and that the appeal was admitted to regular hearing on 1-4-1996 subject to objection about limitation.

5. We propose to take first of all the contention of State counsel regarding limitation of appeal. Impugned order was passed on 5-7-1994 and Jail Criminal Appeal was received in this court on 18-1-1996 vide Inward No.139. Hence it was received 550 days from the date of order appealed from. Rule 18 (1)(A) of the Federal Shariat Court (Procedure) Rules 1981 reads:

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"(A) An appeal shall be presented to the Court within sixty days from the date of the order or decision appealed from. Provided the Court may for sufficient cause extend the period". Rule 19 (1) of the Rules supra reads:

"(1) Notwithstanding anything contained in rule 17 or rule 18, where an accused is confined in Jail and is not represented by a counsel, he may file an appeal through the superintendent of the Jail where he is confined."

This Jail Criminal Appeal has been filed through the Superintendent, Central Jail, Lahore vide out ward No.215 dated 14-01-1996. Now the question before us as to whether there exists sufficient cause to extend the statutory period of sixty days for filing appeal from the date of order to such a lengthy period of limitation. We have reasons to reply this question in affirmation. A careful reading of the grounds of appeal submitted from Jail alongwith the reading of the application for making confessional statement dated 28-6-1994, substantial part of which has already been reproduced above, and the wording of confession under section 364 Cr.P.C. made before the trial court on 5-7-1994 as reproduced above, persuades us to do so. Ground Nos. 2,4,5,6,7 of the Memo of Jail Criminal Appeal read as under:

۲ - "یہ کہ سائل فریب خاندان سے تعلق رکھتا ہے سائل نے قبل ازیں تفتیشی آفیسر اور ماتحت عدالت فیصلہ کنندہ کی خدمت میں عرض کی تھی بندہ مقدمہ ہذا میں بالکل بے گناہ ہے مگر جب سائل کو کسی طرف سے کوئی امید نہ دی تو

رحمت عرف کاکو ولد مندا دونوں باپ بیٹا نے قرآن پاک پر مجھے حلف دیا کہ تم اقبال حرم کو لو ہم تجھے ٹھیک ایک ماہ کے بعد صلح کروا کر جیل سے باہر نکلوا لیں گے۔ کم سنی کی وجہ سے بندہ ان کے جھانسنے میں آگیا اور یہ بھی میرے ساتھ پیش کیا گیا کہ تمہارے ماں باپ اور بہن بھائیوں کی کفالت بھی کریں گے بدقسمتی سے میرا دوستانہ رحمت عرف کاکو کے چھوٹے بھائی سلامت کے ساتھ تھا۔ حالانکہ سائل کو اس مقدمے تک کا علم نہ ہے بھینسوں کی برآمدگی تک رحمت عرف کاکو کے گھر سے ہوئی ہے۔ مقتول خادم حسین کی نعش رحمت عرف کاکو کے گھر کے پاس سے برآمدگی ہوئی ہے۔ رحمت عرف کاکو خود گوشت کی دوکان کرتا ہے جو پولیس کے ریٹ کی خبر پا کر بھاگ گیا اور رحمت کے گھر والوں نے پولیس سے ملی بھگت کر کے رحمت عرف کاکو میرے پاس ظاہر کیا جو پولیس مجھے پکڑ کر لے گئی اور مجھے ہی مورد الزام ٹھہرا کر تھانے میں بٹھائے رکھنے کے بعد اشتہاری محرم قرار دیا، حکمہ رحمت عرف کاکو کو عرصہ تین ماہ بعد گرفتار کیا گیا، اور اسے اشتہاری نہ کیا گیا۔ مجھے پولیس نے ایک سوچے سمجھے منصوبے کے تحت مدعی کو بھی رافی رکھ کر رحمت عرف کاکو کی بھی مدد کر کے سائل کو اذیت ناک سزا میں مبتلا کر دیا ہے۔ سائل کا والد بھی سائل کی سزا کا صدمہ برداشت نہ کرتے ہوئے وفات پا چکا ہوا ہے۔ باقی بیوہ و والدہ تین چھوٹے چھوٹے مسموم بھائی اور تین کم سن پمشیرگان یتیمی کی حالت میں دربر کی ٹھوکریں کھا رہی ہیں جن سب کا سائل ہی واحد سہارا کفالت ہے۔ ماسوائے سائل کے ان کا اور کوئی سہارا کفالت نہ ہے۔ اور نہ ہی کوئی ایسی جائیداد یا ذریعہ معاش ہے جس سے پسماندگان کو روزی میسر ہو سکے۔

۲۔ یہ کہ سائل کے خلاف برآمدگی بھی بالکل بوگس ڈالی گئی ہے۔ رحمت عرف کاکو کے گھر سے سب کچھ برآمد ہوا ہے۔ نعش تک رحمت عرف کاکو کے گھر کے نزدیک سے برآمد ہوئی ہے۔ جو رحمت اور مندا باپ بیٹے نے مجھے دھوکہ دے کر مجھ سے اقبال حرم کروایا اور کہا کہ ہمارے ساتھ مدعی فریق صلح ہوگئے نہ کریں گے، البتہ تمہارے صلح کروا کر ہم تجھے جیل سے نکلوا لیں گے۔ قرآن پاک پر ہاتھ رکھ کر میرے ساتھ وعدہ کیا تھا جو غریت کی وجہ سے سائل کو دانستہ بادل نغوا سے یہ زہر کا پیالہ نوش کرنا پڑا۔ حالانکہ اس کا حقیقت سے قطعاً تعلق نہ ہے جو بالکل جھوٹ اور بدبیتی پر مبنی ہے۔

۵۔ یہ کہ سائل کے خلاف تمام کے تمام گواہان جانبدار رکھے گئے ہیں۔ جو ریکارڈ پر موجود ہے۔ ایک گواہ بھی غیرجانبدار نہ رکھا گیا ہے۔ جائے برآمدگی تک وقت کا تعین نہ ہوتا ریکارڈ پر موجود ہے۔ برآمدگی اور نشاندہی تک بوگس بنا کر ایک من گھڑت کہانی کو پایا تکمیل تک پہنچایا گیا ہے۔

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۶۔ یہ کہ سائل کے خلاف محمد نواز اور نذیر احمد گواہ نے خود تسلیم کیا ہے کہ وہ مدعی کے رشتہ دار ہیں۔ دوسرا محمد نواز گواہ نے مدعی طفیل کے ساتھ چارہ کاٹنا تفتیشی آفیسر کو بیان کرنا اور مقتول کا نزدیک ہی مویشیوں کو گھاس جانا جو اس کا بیان ایف آئی آر کی تائید نہ کرتا ہے۔ بلکہ بیان گواہ میں تضاد پایا جاتا ہے۔ تیسرا مدعی نے تسلیم کیا ہے کہ اس نے نمبر دار دیہہ، جوکیدار اور کونسلر حتی کہ پولیس تک کو مقتول خادم حسین کی تین دن تک اطلاع نہ دی تھی۔ پھر اس نے بیان کیا ہے کہ وہ رحمت کے گاؤں تک نہ جانتا ہے اور نہ ہی قتل کے سلسلے میں اس کے گھر کا معائنہ کیا ہے۔ اور اس نے یہ بھی تسلیم کیا ہے کہ چار دن کے بعد وقوعہ سے ان کے مویشی تھانہ میں شناخت کئے ہیں۔ نذیر گواہ نے یہ بھی تسلیم کیا ہے کہ، نہ تو اس نے مقتول کو رحمت کے ساتھ دیکھا ہے اور نہ ہی وہ مقتول کے والد طفیل کے ساتھ رہا ہے۔ حتی کہ تمام تر گواہان اور مدعی کے بیانات رپورٹ ابتدائی کی تائید تک نہ کرتے ہیں۔ پھر بھی سائل بتیم کو معاف نہ کیا گیا ہے۔

۷۔ یہ کہ سائل کے خلاف مدعی فریق اور پراسیکیوشن حالات و واقعات مقدمہ بجا ثابت کرنے میں بری طرح ناکام رہے ہیں۔ تمام کے تمام گواہان جانب دار رکھے گئے ہیں۔ تمام گواہان کے بیانات میں تضاد پایا جاتا ہے۔ حتی کہ مدعی تک کے بیان کی تائید ایف آئی آر کی نہ ہوئی ہے۔ برآمدگی بوگس نشاندہی بھی جعلی خود ساختہ کی جا کر ایک چھوٹی کہانی کو پروان چڑھایا گیا ہے۔ استدعا ہے کہ سائل کی حالت زار پر رحمت فرماتے ہوئے سائل کے چھوٹے چھوٹے بہن بھائیوں اور بیوہ والدہ پر شفقت فرماتے ہوئے سائل کی اپیل منظور فرما کر مقدمہ بجا سے بری کئے جانے کا حکم صادر

فرمایا جاوے۔ غریب پروری ہو گی، اپیل بجا بغرض سماعت ارسال خدمت ہے۔"

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The wording of the application for rendering confessional statement and statement under section 364 Cr.P.C. is an indicator that this confession has been made only to help acquittal of the co-accused and naturally it was done under special circumstances which have remained shrouded in mystery till the mystery is unfolded by the grounds of appeal reproduced above. This appeal, in the circumstances expounded above, is corroborated by Zimnis of the record of police, statements of P.Ws under section 161 Cr.P.C., FIR, last seen evidence of PW-11, PW-10, PW-13, unexplained long abscondence of acquitted co-accused Rahmat has persuaded us to extend the benefit of proviso to Rule 18 (1) (A) of the Federal Shariat Court (Procedure) Rules 1981 and condone the delay in filing the appeal from Jail for sufficient cause which exists.

6. Now we take the only contention of the learned counsel for appellant. In this context we are persuaded by a ruling of Peshawar Jurisdiction cited as 1985 P Cr.LJ 167 which is quoted verbatim:

" Ss. 242, 243, 244, 342 & 364- Framing of charge
---- Once a formal charge framed and put to accused is denied under section 242, Cr.P.C. provisions of S. 243, held, ipso facto become inoperative and Court has to proceed under section 244 by hearing complainant and his evidence and afterwards accused

and his evidence in defence -- Once evidence of prosecution commences there cannot be staged a retreat to section 243, Cr.P.C. by procuring a plea of guilty from accused and at this stage if accused makes a voluntary confession same will be recorded within requirements of section 364, Cr.P.C. and shall be put to accused for his explanation as incriminating circumstance under section 342 and such a confession, held further, shall not amount to a plea of guilty within meaning of Ss. 242 and 243, Cr.P.C. as to be made sole basis of conviction by Court.---(Confession--Conviction).

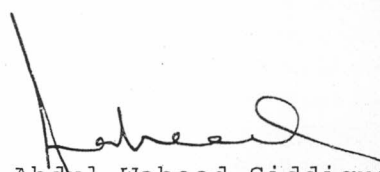
We are also persuaded by another citation of a ruling of special Court Sindh at placentium (a) of 1986 P.Cr. LJ. 2250 which reads:

"Ss. 242, 243, 265-D, 265-E & 265-F- Customs Act (IV of 1969), Ss. 156 (1) (8) & 185-F--- Revision--- Accused pleaded not guilty to charge framed against him and his case was fixed for evidence-- Accused subsequently made an application wherein he pleaded guilty and prayed for leniency in sentence held, second plea on same charge could only be recorded when charge was amended otherwise Courts were not empowered to record other plea-- Same charge could not be read over again and again at will of accused---plea at later stage would sometime be on understanding on point of quantum of sentence-- plea could not be equated with confession which could be recorded by competent Magistrate when case was under investigation and there were other legal formalities to be observed in confession."


The learned counsel for State has consented that the case is a fit one for remand back for taking it up for trial from 5-7-1994, the date on which confessional statement was recorded by the trial court and announced conviction on the same date.

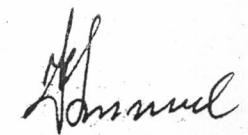
10. Although there is lot of material for discussion available before us so far as subsequent judgment of the trial court acquitting the co-accused Rahmat is concerned, but since there is no criminal acquittal appeal assailing the said judgment before us, the discussion might prejudice a fair trial of the appellant.

11. The upshot of the discussion is that the impugned order is set aside and the case is remanded back to the trial court to be taken up once again from 5-7-1994 for further proceedings while considering the confessional statement of the appellant as null and void in the eyes of law.


(Abdul Waheed Siddiqui)
Judge

FIT FOR REPORTING


(Abdul Waheed Siddiqui)
Judge


(Dr. Fida Muhammad Khan)
Judge

Announce in open Court
today 22-5-1997, Islamabad.

Zain/*