IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE ZAFAR PASHA CHAUDHRY
MR.JUSTICE S. A. RABBANI

JAIL CRIMINAL APPEAL No.31-I of 2003

Muhammad Afzal alias Kaka son of Muhammad-Ashraf, Resident of Sada Goal, Lalamusa Tehsil Kharia, Distt: Gujrat

Appellant

Versus

The State	Respondent
For the appellant	Mr M.Yousaf Zia, Advocate
For the State	Mr.M.Sharif Janjua, Advocate
No.date of FIR and police station	No.116,dt 23.3.2001 P.S. City Lalamusa
Date of the order of trial Court	20.11.2002
Date of institution	26.2.2002
Date of hearing	28.10.2003
Date of decision	

2003

JUDGMENT

S. A. RABBANI, J. - The appellant has been convicted by Additional Sessions Judge, Kharian under section 302 PPC with a sentence of 25 years rigorous imprisonment. He has also been ordered to pay Rs. one lac as compensation to the legal heirs of the deceased and, in default, to undergo six months R.I. He has further been ordered to pay compensation of Rs.50,000/- to the brother of deceased and Rs.50,000/- to another witness Wasim Haider.

2. On the report of one Muhammad Arshad, F.I.R in this case was registered at City Police Station Lalamusa on 23.3.2001 for offences under sections 302 and 377 PPC and section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979. The report was that the present appellant had taken minor son of the complainant to a 'dera' of Dr.Ghulam Muhammad where, after some time, he was seen running away from dera, where Muzzamal Hussain, the minor son of the complainant aged about six years, was found lying naked and dead.

3. The trial court charged the present appellant only for commission of 'qatl-e-amd' under section 302 PPC. He was not charged for kidnapping or sodomy. On the basis of evidence of complainant Arshad Hussain, his son Asjad and a minor boy Wasim Haider, the trial court held that the appellant was guilty of the murder.

4. The prosecution case was that two children informed the complainant that his minor son Muzzamal Hussain was taken away by the present appellant towards 'dera' of Dr.Ghulam Muhammad telling the boy that he would give him mulberry fruit. On this information, the complainant, his son and one Khalid Mehmood went towards the 'dera' where they saw the present appellant coming outside the 'dera', who ran away seeing them. They went inside the dera and found Muzzamal Hussain lying dead, who was strangulated after sodomy.

5. To prove the prosecution case, 12 witnesses were examined by the trial court, which included the complainant Muhammad Arshad, his son Asjad, an eye witness minor boy Wasim Haider, the medical officer P.W Dr.Naveed Iqbal and police officials involved in the investigation. The

appellant/accused stated that he was falsely implicated by his political opponents who are influential persons. He also examined one witness in defence.

6. The dead body of the minor child Muzzamal Hussain was found at the place of incident i.e 'dera' of Dr.Ghulam Muhammad. Dr.Naveed Iqbal conducted examination post mortem and he gave opinion that death had occurred due to axphysixia as a result of the injuries found on the body and, in his opinion, it was, thus, a case of sodomy. There was adequate evidence on record for proof of death of the minor child after sodomy.

7. The point for determination in this case was, whether there was adequate evidence on record to connect the accused/appellant with the commission of the offence. There is no evidence to suggest that any witness saw the appellant committing sodomy or killing the deceased. The prosecution produced two pieces of evidence to connect the accused with the commission of the offence. One was that children informed the complainant that the appellant had taken the deceased to the 'dera' of Ghulam Muhammad and the other that, after some time, the appellant was seen by

witnesses coming out from the dera whereafter the dead body was found in the dera. According to prosecution, there were four witnesses on this point. They are complainant Muhammad Arshad, his son Asjad, minor boy Wasim Haider and one Khalid Mehmood.

8. Mr.M.Yousaf Zia, learned counsel for the appellant submitted that the evidence on record is not adequate for a conclusive proof of the allegation that it was the present appellant who committed this offence. He pointed out material contradictions in the evidence. He submitted that the accused/appellant was falsely involved in this case for political rivalry between two persons, as he was a worker of one of them. Mr.M.Sharif Janjua, learned counsel for the State, submitted that the appellant kidnapped the minor child, committed sodomy with him and killed him. He submitted that the evidence of the complainant and other witnesses on record proves that appellant was the person who committed this heinous offence.

9. Complainant Muhammad Arshad stated before the trial court that two small children came inside his house raising noise and they told him that his son Muzzamal Hussain was taken away by Muhammad Afzal accused on the

pretext of giving him mulberry fruit at the 'dera' of Dr.Ghulam Muhammad. He said that, along with two persons, he went in search of his son. These persons he named as Arshad Hussain and Khalid Mehmood. It appears that the trial court has wrongly recorded the name Arshad Hussain instead of Asjad Hussain, son of the complainant. The other witness named by the complainant is Khalid Mehmood, who was given up by the Prosecutor under a statement, which mention that this witness was won over by the accused. The witness Khalid Mehmood, who was allegedly present with the complainant, does not, thus, support the version of the complainant. Presumption in this case will be against the prosecution story.

10. The complainant has not given the names of two children who allegedly informed him about taking away of his son by the appellant. P.W Asjad, who is son of the complainant, stated before the trial court that he was Wasim Haider who informed them that Muzzamal Hussain was taken away by the present appellant. Wasim Haider was known to the complainant's son and was resident of the same locality and non mention of his name in the F.I.R and statement of the complainant before the court

indicates a possibility of setting up Wasim Haider as a witness afterwards. This also gets support from the statement of Wasim Haider that the 'thanedar' had given him Rs.50/- to tell the truth about the occurrence. P.W Wasim Haider, who is a child aged 10 years, claimed that the said dera belonged to his father, but neither his father nor Dr.Ghulam Muhammad, who is said to be owner of the 'dera', were brought before the court to explain about the presence of dead body found in their 'dera' and to clarify as to how the appellant had an access to the 'dera'. The evidence about information to the complainant about taking away the deceased by the appellant is, also not free from doubt.

11. According to complainant, there were three persons, namely the complainant himself, his son Asjad and one Khalid Mehmood, who had seen the appellant coming out of the 'dera' after the offence. Khalid Mehmood did not appear to support this version. The complainant and his son Asjad do not say that the boy Wasim Haider also went with them to the 'dera', but Wasim Haider says that he, alongwith the complainant,went to the 'dera' and saw the dead body of the deceased. Thus, the prosecution evidence to

prove that the present appellant committed this offence is not free from doubt.

12. From the record, it appears that the trial court had not been duly careful through out the proceedings. The charge was framed by Mr.Shahid Mehmood Additional Sessions Judge, who mentioned wrong name of the deceased as Muhammad Hussain instead of Muzzamal Hussain. He also did not care to frame charge about offences of kidnapping and sodomy. Mr.Ghaffar Jalil, Additional Sessions Judge, succeeded Mr.Arshad Mehmood in the office, but he proceeded with the trial without caring to rectify or amend the charge. In the statement of the complainant, before the court, the trial court recorded wrong name of the witness Asjad Hussain as Arshad Hussain.

13. Mr.Ghaffar Jalil, Additional Sessions Judge Kharian, gave judgment in this case and he observed that considering the occular account of the complainant P.W Asjad and P.W Wasim Haider, he was of the view that the accused had taken minor Muzzamal Hussain deceased and what ever had happened to the minor deceased was done by the present accused. Despite

this finding, the learned Judge did not deem it necessary to amend charge about kidnapping and sodomy. He also erred in appreciating the evidence of these witnesses. The trial court also relied upon the recovery of clothes of the accused/appellant coupled with the reports of the Chemical Examiner. Pieces of clothes were sent to the Chemical Examiner and the Chemical Examiner's report on record mention that shalwar was stained with blood and pieces of shalwar and qamees were stained with semen. The report does not mention that it was human blood. The reports mention that pieces of the clothes were sent to the Serologist for determination of origin of blood and semen grouping. That was of no consequence because report of the Serologist on record mentions that grouping could not be done because specimen was insufficient. The Chemical Examiner's report does not, therefore, help the prosecution case.

14. Regarding sentence, the learned Additional Sessions Judge observed, in the impugned judgment, that there was no evidence which could establish that there were any mitigating or extenuating circumstance in favour of the accused, but he further observed that the extreme penalty of death was not being awarded to the accused for the sake of safe administration of justice,

considering that only the circumstantial evidence is available against the accused in this case. On one side he said that there was no mitigating circumstance ,on the other he refused to impose death penalty. He observed that death penalty could not be awarded as there was only circumstantial evidence against the accused. It logically means that according to the learned Judge of the trial court, the evidence on record fell short of that required for proof of the charge against the appellant and that practically created a doubt in the mind of the Judge about proof of the charge, and the legal result of this doubt should have been an acquittal and not a lessor penalty.

15. As discussed above, the evidence of the prosecution to connect the accused/appellant with the commission of the offence was defective and in-adequate and, thus, the charge against him was not proved beyond a reasonable doubt. The accused/appellant was entitled to the benefit of doubt. We accordingly allow the appeal and set aside the conviction and sentence. The appellant be released forthwith in this case.

S. A. RABBANI
JUDGE

ZAFAR PASHA CHAUDHRY
JUDGE

Announced on 14.11.2003. in Open Court
At Islamabad/
M.Akram/

Fit for reporting

JUDGE