IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE S. A. MANAN
MR.JUSTICE S. A. RABBANI

JAIL CRIMINAL APPEAL NO.236-I-2004

Waris alias Warsi son of Muhammad Bashir,
Resident of Mohallah Salimpura,thana Sukheki,
District Hafizabad
(Now confined in Central Jail Kot Lakhpat,Lahore)

Appellant

Versus

The state

Respondent

For the appellant	Mr.M.Akram Gondal, Advocate
For the State	Mr.Shafqat Munir-Malik, A.A.G
No. Date of FIR Police Station	No.446,dt.3.11.02 P.S Sukheki
Date of order of trial court	26.3.2003
Date of institution	4.8.2004
Date of hearing and decision	20.9.2005

JUDGMENT

S. A. RABBANI,J. The appellant has been convicted by Mr.Manzoor Hussain, Additional Sessions Judge, Hafizabad, under sections 377 and 302 (b) Pakistan Penal Code. Under section 377 PPC, he has been sentenced to ten years rigorous imprisonment, with a fine of Rs.10, 000/- and under section 302 (b) PPC, the appellant has been sentenced to imprisonment for life. To challenge his conviction and sentences, appellant Waris sent this appeal from Central Jail Kot Lakhpat Lahore, where he is undergoing the sentence.

2. According to the F.I.R lodged by one Yar Muhammad at Sukheki police station Hafizabad, on 3.11.2002, dead body of his minor son Fayyaz was found in a field, with the neck and hands tied by the shirt of the deceased himself. The F.I.R was against an unknown person. On the next day, complainant gave another statement nominating the present appellant as an accused. The accused/appellant was accordingly tried and convicted.

3. To prove the charge before the trial court, the prosecution examined 14 witnesses, who included ten official witnesses who remained connected with the investigation at different stages. Medical officers, patwari, a Judicial Magistrate and police officials were amongst those ten witnesses. The other four witnesses include Yar Muhammad complainant, father of the deceased boy, one Falak Sher who had identified the dead body, one Dilmeer who claimed that the accused made an extra judicial confession before him. The last of them was one Dosa, who said that he had seen the accused near the place of occurrence. In his statement under section 342 Cr.P.C, the accused/appellant stated that the police took him as a suspect, with four five other persons, who were released after inquiry and, as he was a poor man, he was sent up for trial. The trial court while recording evidence of witnesses did not clearly mention whether the witnesses were cross-examined by an advocate or by the accused himself.

4. Since the appeal was sent from jail and the appellant was unable to engage an advocate, Mr.Muhammad Akram Gondal, Advocate, was assigned the task of representing the appellant. He submitted that there was

no eye witness of the incident and the accused/appellant has been convicted merely on the basis of his judicial confession, which was retracted, and which was not corroborated in material particulars by any other evidence on record. He submitted that the conviction could not be recorded merely on the basis of retracted judicial confession in the circumstances where there was no other evidence on the record to connect the accused with the commission of the crime.

5. Mr.Shafqat Munir Malik, learned Assistant Advocate General submitted that on the next day of lodging of F.I.R, the complainant gave the name of the present appellant as the person who had committed the offence. He contended that the accused had admitted his guilt by way of his confession recorded by the Judicial Magistrate.

6. Almost all the criminal courts in the Punjab persistently ignore the mandatory requirement under section 367(I) Criminal Procedure Code that every judgment shall contain the points for determination and decision thereon with reasons. Like all other judgments written by criminal courts in the Punjab, the trial court, in this case also, ignored this provision of law and

failed to mention points for determination, which would have made the decision more clear. A charge cannot be said to have been proved by merely discussing the evidence on record in general.

7. In the present case , the points for determination could be:

i) Whether Fayyaz, son of the complainant yar Muhammad, was killed?

ii) Whether sodomy was committed upon him?

iii) Whether the evidence produced before the trial court was sufficient to connect the accused/appellant with the commission of the crime? and

iv) What offence, if any, was committed by him.

8. The first point stands proved beyond doubt by the evidence placed on record, as the dead body of the boy was found by the complainant and witnesses and was seen by police witnesses who prepared inquest report and by the evidence of P.W Dr.Asghar Ali who conducted examination post mortem on the dead body which was identified by P.W. Falak Sher, a first

cousin of the deceased. This evidence leaves no room for a doubt about the killing of the deceased boy.

9. There is no witness who claims that he saw the accused/appellant committing sodomy, or saw any body committing sodomy, upon the son of the complainant i.e the deceased in this case. The evidence relied upon by the trial court in this respect includes the report of the Chemical Examiner that the swabs sent to him for examination were found stained with semen This report was produced on record but it was never proved to be correct. Section 510 Cr.P.C make its permissible to produce Chemical Examiner's report without calling the Chemical Examiner, but it does not mean that any such report, produced under this provision of law, is to be taken as a proved document. In the present case, this report was in conflict with the medical evidence comprising the statement of Dr.Asghar Ali, who found no injury in or around anal canal. He saw no marks of violence around the anal canal. Thus the medical evidence was not conclusive for proof of sodomy and there was no eye witness of the incident. The only evidence on record, on this point, comprises judicial confession of the accused/appellant, which

was retracted. It was not thus proved that sodomy was committed upon the boy who was killed.

10. The evidence on record to connect the accused/appellant with the commission of this crime is only his confession before the Judicial Magistrate and this evidence alone has been believed by the trial court, as mentioned in the impugned judgment. The evidence relating to the extra judicial confession before P.W Dilmeer has not been believed by the trial court itself. One piece of evidence relied upon by the prosecution is that the accused/appellant lead the police to the place of incident. The accused denied it, but even otherwise it would not be material because the place of incident was already in the knowledge of the prosecution witnesses before the accused allegedly lead them to that place. There is one witness Dosa who said that he had seen the accused near the place of occurrence By the same statement , practically, P.W Dosa admitted his own presence also near the scene of occurrence . It would not thus make the accused more liable.

11. The judicial confession was retracted and it has been admitted by the witnesses that, after recording of confession, the Magistrate handed over the custody of the accused to the same police officer who produced him before the Magistrate and he kept him in lock-up at the police station for the whole night. More over, the tone of the statement recorded by the Judicial Magistrate is not of a confession of his doings by a person but like a story of a drama , which can be inferred from the following passage of the confessional statement:

" کبری اپنے بھائی کو گوبھی سائیکل پر لدواتی ھے اور خود اپنا سامان سنبھال کر اس کے بعد اپنے گھر چلی جاتی ھے ۔ پھر جب وہ چلی جاتی ھے تو میں وھاں سے نکل کر جب کھالے پر آتا ھوں کہ میں روڈ پر آ سکوں تو سامنے سے آتے ھوئے لڑکا جس کا اس وقت نام و پتہ معلوم نہ تھا ، کو بازو سے پکڑتا ھوں اور ایک ھاتھ منہ پر رکھ کر اسے گوبھی کے ساتھ والے کھیت میں تمباکو لگا ھوا ھے، کے ساتھ والے کھالے کے بنے کے ساتھ ساتھ چھوٹی چھوٹی ٹاپلیوں کے درمیان لے جاتا ھوں ۔ "

In any case, however, conviction cannot be recorded merely on the basis of a retracted confession in the absence of a corroborating evidence. Thus the evidence placed on record failed to prove connection of the accused with

the commission of the crime. In view of above findings on points No.2 and 3, commission of any offence by the present appellant was not proved.

12. The learned judge of the trial court convicted the appellant under section 302 (b) PPC but has not explained why he was not convicted him under section 302 (a) or 302 (c) PPC.Section 302 of Pakistan Penal Code, as it exists today, reads as under:

> **"Sec.302. Punishment of qatl-I-amd.** Whoever commits qatl-I-amd shall, subject to the provisions of this Chapter be:
>
> (a) punished with death as qisas;
>
> (b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the cases, if the proof in either of the forms specified in section 304 is not available; or
>
> (c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the injunctions of Islam the punishment of qisas is not applicable."

13. Clause (b) of this section provides for a sentence of death, or imprisonment for life as ta'zir, in a case where proof as provided under section 304 PPC is not available. This makes reference to section 304 PPC for mode of proof viz. the requirement in respect of evidence. Section 304 PPC mentions two forms of evidence in its clauses (a) and (b). Clause (a),

mentions a confession and clause (b) again refers to Article-17 of Qanun-e-Shahadat Order, 1984. Thus if an evidence other than a confession is required to prove Qatl-e-amd liable to Qasis, it shall be the evidence as provided in Article 17 of the Qanun-e-Shahadat Order. Again, Article 17 of Qanun-e-Shahadat Order 1984, in its sub-section (2), provides two categories of the evidence. Clause (a), which relates to matters pertaining to financial or future obligations, is applicable to civil cases only. The evidence relevant to section 304 PPC would be what is given in clause (b), which says that, in all other cases, the court may accept or act on the testimony of one man or one woman or such other evidence as the circumstances of the case may warrant. It can be seen that this clause does not provide for any specific evidence and, thus, for proof of qatl-e-amd under section 304 PPC, any sort of evidence, warranted in the circumstances, may be accepted for such a proof . There remains,therefore, no basis for distinction in clause (a) and (b) of section 302 PPC.

14. Clause (I) of Article 17 of Qanun-e-Shahadat Order, 1984 provides that competence of a person to testify, and the number of witnesses

required in any case, shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah. The number of witnesses to prove a murder for qisas has neither been prescribed in the Holy Quran nor in Sunnah of the Holy Prophet (SAW). There is no case in the history during the life time of the Holy Prophet (SAW), in which any specific number of witnesses was demanded for proof of qatl-e-amd.

15. Clause (I) of Article 17 of the Qanun-e-Shahdat Order limits the requirement to the Holy Quran and Sunnah and there is nothing in the Holy Quran or Sunnah about any specific number of witnesses required to prove qatl-e-amd for qisas. In these two sources of law, the competence of a person to testify is applicable with respect to all crimes and it would not make a difference for proof of a qatl-e-amd in the cases where qisas is applicable and those where a killer is sentenced to death as ta'zir. An accused may be punished under section 302 (b) PPC only when it is proved that he has committed the offence of qatl-e-amd and if stands proved that he has killed a person for which he is being punished. There is,therefore, no wisdom in depriving the legal heirs of the person killed from their right of

qisas or diyat. The law framed in section 302 PPC,therefore, needs a reconsideration.

16. The condition of Tazkiya-Al-shuhood although does not have its origin in the Holy Quran or Sunnah, it has been provided in the cases of Hudood laws in the Hudood Ordinances but it has no where been provided in law for applicability in the cases of proof of qatl-e-amd for qisas.

17. As mentioned in the preceding paras, it was not proved on record that the present appellant had committed this offence. The justification given, in the impugned judgment by the trial court, for conviction and sentence of the appellant was not based on law and reasons. The impugned judgment cannot, therefore, be maintained. Accordingly, the appeal is allowed and the impugned judgment is set aside. The conviction and sentences awarded to the appellant are set aside consequently. It has already been ordered that the accused/appellant be released in this case forthwith.

S. A. RABBANI
JUDGE

S. A. MANAN
JUDGE

Fit for reporting

JUDGE

Islamabad, 20.9.2005
M.Akram