

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SALAHUDDIN MIRZA
MR. JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTICE SYED AFZAL HAIDER

Jail Criminal Appeal No. 131-I- 2008
Criminal Murder Ref.No.8-I-2008

Ghulam Murtaza son of Muhammad Javaid
Now confined in Central Jail Rawalpindi

Appellant

Versus

The State

Respondent

Counsel for appellant

Malik Abdul Haq,
Advocate

Counsel for State

Mrs. Rukhsana Malik,
Addl: Prosecutor General
Punjab.

FIR. No. Date &
Police Station

No.304, 30.6.2002
P.S. Gujar Khan

Date of Judgment of
Trial court

7.11.2002

Dates of Institution

17.12.2008

Date of hearing

27.05.2009

Date of decision

29.05.2009

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JUDGMENT

MUHAMMAD ZAFAR YASIN, JUDGE.- This jail criminal appeal is directed against the judgment dated 7.11.2002 passed by learned Additional Sessions Judge Rawalpindi, whereby appellant Ghulam Murtaza has been convicted under section 302 PPC for commission of murder of Mst. Rifat Zahida and her son Danish Farooq and sentenced to Death on each count. The appellant has further been convicted under section 6 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced to death and whipping 100 stripes.

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Along with this appeal we shall also decide the murder reference No. 8-I-2008 sent by learned Additional Sessions Judge Rawalpindi for confirmation of the death sentence awarded to the appellant Ghulam Murtaza on three counts.

2. Brief facts of the case as emerged from FIR No.304/2002 P.S Gujar Khan recorded at the instance of Aurganzeb, who made a written complaint to the SHO are as under:-

"That they are three brothers and is residing in separate house, Muhammad Javed, his brother, is in Air-force Department at karma whose family is residing with him there. Muhammad Bisharat, his brother, is serving in Saudi Arabia, whose wife Mst.Riffat Zahida and her son aged about one year Danish Farooq, is residing in the village in her house. Elder son of Mst.Riffat Zahida, namely, Umar Farooq is residing at village Sagri with his maternal grand mother and is studying there. Muhammad Javed and Muhammad Bisharat has one house. Nephew Ghulam Murtaza son of Muhammad Javed, about 8-10 days has come from Kamra to Borgi to his house and was residing with Mst.Zahida. Yesterday at evening time Mst.Riffat Zahida, Danish Farooq, aged about one year and Ghulam Murtaza son of Muhammad Javed (accused) slept on the cots in the court yard and the complainant had gone to his house. Early in the morning, Mst.Riffat Zahida had not gone to the house of Muhammad Banaras for fetching milk on which Muhammad Parvez son of Muhammad Banaras came to the house of the deceased Mst.Riffat Zahida at about 7.00 a.m where he saw blood in the court yard of Mst.Riffat Zahida and turned back and came to the complainant and told him about the said fact. On which the complainant also went to the house of Mst.Riffat Zahida and saw that dead body of Danish Farooq was lying on a

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cot whereas the dead body of Mst.Riffat Zahida was lying in a room on the floor in a pool of blood. In the room, clothes of the accused i.e shalwar, kameez, bunyan, of the accused Ghulam Murtaza were lying there. All these were blood stained. Ghulam Murtaza was missing from there. Ghulam Murtaza murdered Mst.Riffat Zahida and Danish Farooq in the dark of night.”

3. The motive behind the occurrence is that Ghulam Murtaza was not having a good character. Ghulam Murtaza committed zina-bil-jabr with Mst.Riffat Zahida while she was alone in her house and just to suppress this reality and with fear that she will make it open to the family and society, he committed the murder of Mst.Riffat Zahida and her son Danish Farooq. Hence this case.

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4. After registration of the case investigation of the case was conducted, the dead bodies were sent for post mortem and site plan of the place of occurrence was prepared and further the I.O recorded the statements of the witnesses under section 161 Cr.P.C. During investigation the accused was arrested on 29.7.2002 and he was got

medically examined for potency test; thereafter he was produced before Illaqa Magistrate for recording his confessional statement under section 164 Cr.P.C. Confessional statement of the accused was recorded by the Magistrate under section 164 Cr.P.C on 31.7.2002. The I.O also recovered hatchet (weapon of offence) at the instance of the accused on 30.7.2002. after completion of the investigation, challan was submitted in the court. The accused was summoned to face the trial. The trial court distributed the copies under section 265 Cr.P.C to the accused on 31.10.2002. On 7.11.2002 charge was framed. The accused pleaded guilty to the charges and made his statement which was also signed by him. On the basis of the confession of the accused made before the trial court, Ghulam Murtaza accused was convicted and sentenced as noted above on the same day. Hence this jail criminal appeal.

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5. Learned counsel for the appellant has argued that the appellant was charged of offences which entail capital punishment and it was

obligatory for the trial court to provide him counsel at State expense while in this case the trial court has failed to follow the Lahore High Courts Rules in this respect which resulted into serious miscarriage of justice. Further argued that in the impugned judgment the conviction has been recorded on the basis of confession made by the accused before the Ilaqa Magistrate which has never been part of the judicial record. Neither the confession made before the Magistrate has been exhibited nor the Magistrate had appeared as a witness and lastly it has been argued that even the confession made by the appellant before the trial court in response to the charge sheet, where he pleaded guilty, the court has not given him a show cause as to why his conviction should not be based on his confession before the trial court. It has also been argued that the appellant was a boy of a tender age. The court did not bother to get determination of the age of the accused. In view thereof, his conviction and sentence is illegal.

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6. On the other hand learned Additional Prosecutor General Punjab has argued that the appellant has not only confessed his guilt before the trial court but he had also made a confessional statement before the Ilaqa Magistrate on 31.7.2002. Further-more, the appellant had never claimed his right to be defended by a counsel at State expense. Hence his conviction and sentence is in accordance with law.

7. Heard. Record perused.

8. The conviction of the appellant has been recorded under section 302 PPC but the learned trial court has failed to mention whether the conviction has been recorded under section 302 (a) or 302(b) PPC.

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Further more, the trial court in paragraph No.6 of the impugned judgment has observed that the accused had also made his statement voluntarily, wherein he also admitted his guilt; while neither the confession made before the magistrate was made part of the judicial record nor it was exhibited in the court. Moreover, in paragraph No.7 of the judgment the learned trial court has held that the accused had also

made his voluntary confession without any duress or coercion before the trial court, while the court had never put these questions to the accused, whether he has made his confessional statement without any duress or coercion; nor the trial court has given any note there-under that the confessional statement of the accused was voluntary and without any duress or coercion. The accused was also not given any

show cause as to why he should not be convicted and sentenced on the basis of his voluntary confession made before the trial court. More over the conviction of accused Ghulam Murtaza recorded by the trial court under section 6 Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentence of death under said provision of law is also unwarranted by law.

9. Under High Court Rules and Orders Vol.III Chapter 24 Rule 1 it is obligatory for the Sessions court to provide a counsel at State expense to the pauper accused of an offence which entails capital punishment. The record of the trial court reveals that neither the

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appellant had services of a counsel of his own choice at the trial stage nor the trial court provided him a counsel at State expense and thus the court has acted illegally in proceeding with the trial. Therefore the impugned judgment being out come of material illegality is liable to be set aside. In this respect reference may be made to the judgment reported in 2005 P.Cr.L.J-1884 (Muhammad Shafquat Vs. The State)

10. In view thereof we are left with no option except to set aside the impugned judgment and further answer the murder reference in negative. We accordingly set aside the impugned judgment dated 7.11.2002 passed by the learned Additional Sessions Judge Rawalpindi whereby the appellant Ghulam Murtaza has been convicted and sentenced in case FIR No.304, dated 30.6.2002 P.S Gujar Khan ; and remand the case to the learned Sessions Judge Rawalpindi for its denovo trial after providing a counsel at State expense to the accused Ghulam Murtaza. The learned Sessions Judge is further directed to conclude the trial within three months from the receipt of the order of

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this court. The office is directed to transmit the original record to the learned Sessions Judge, Rawalpindi for compliance of this order.

The jail criminal appeal bearing No.131-I-2008 and criminal murder reference No.8-I-2008 are disposed of accordingly.

m. z. yasin

JUSTICE MUHAMMAD ZAFAR YASIN

[Signature]

JUSTICE SALAHUDDIN MIRZA

APPROVED FOR REPORTING

m. z. yasin
JUDGE

Syaidat

JUSTICE SYED AFZAL HAIDER

m. z. yasin

Announced on 29.5.2009
at Islamabad
M.Akram/*