

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

*Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Irshad Ali Shah.*

**SPECIAL CRIMINAL ATJ APPEAL NO.95 OF 2019
SPECIAL CRIMINAL ATJ APPEAL NO.109 OF 2019
CONFIRMATION CASE NO.46 OF 2019**

Appellants	<p>1 Abdul Majeed @ Bohra S/o Rehmat Ali, confined in Central Prison, Karachi through Mr. Iftikhar Ahmed Shah, Advocate</p> <p>2. Bashir Ahmed S/o. Karim Bux, confined in Central Prison, Karachi through Mr. Muhammad Farooq, Advocate.</p>
Respondent/State:	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.
Date of hearing.	15.09.2021.
Date of Judgment:	23.09.2021

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Abdul Majeed @ Bohra S/o. Rehmat Ali and Bashir Ahmed S/o. Karim Bux were tried by Judge Anti-Terrorism Court No II, Karachi for offence under sections 302/376-II, 364-A/34 PPC R/w Section 7 of ATA, 1997 registered at PS Joharabad, Karachi. After full dressed trial vide judgment dated 13.03.2019 (the impugned judgment) appellants Bashir Ahmed was punished on three counts as under,

“under section 364-A of PPC for kidnapping Alishba punishable with death, under section 376(2) of PPC for raping Alishba punishable with death and under section 302 (b) PPC for committing Qatil-e-Amad punishable with death and qisas and awarded death penalty subject to confirmation by this Court and appellant Abdul Majeed alias Bohra who had common intention with accused had kidnapped deceased Alishba and raped her was convicted under section 364-A of PPC for kidnapping of Alishba punishable to undergo RI for life. He was also convicted and punished under section 7(e) of ATA with life imprisonment for kidnapping Alishba to commit Zina and also convicted under section 7(a) of ATA with life imprisonment for having common intention of Qatil-e-Amad of Alishba. The benefit of section 382-B Cr.P.C. was also given to appellant Abdul Majeed”

2. The brief facts of the case according to FIR No.261/2011 lodged by one Muhammad Nazeer, who is complainant, at PS Joharabad on 14.12.2011 are that at about 1800 hours are that he lives in House No.314, Block-15, F.B. Area, Karachi Joharabad. On 12.12.2011 he was in his house when he received information at 5:00 pm that his niece Alishba aged about six years at about 05:00 pm had gone out of the house to play at Edigah ground but had not returned home. Since she had not returned the whole family was worried and tried to find out her whereabouts but without success. The children of the Mohallah told him that she had gone for a camel ride and on 14.12.2011 the family of Jamal Mirza who had come to his house informed him that two camel people had taken one child on the camel hence his case is against those accused persons whose name and residence were unknown and requested that action be taken against them for kidnapping his niece.

3. After completion of the formal proceedings charge was framed on 16.04.2013 to which the accused pleaded not guilty and claimed trial of the case.

4. In order to prove its case the prosecution examined 12 witnesses and exhibited numerous documents and other items. The appellants gave their statements under S.342 Cr.PC in which they denied the allegations against them claiming that the complainant party had falsely implicated them in this case concerning appellant Bashir's painting business.

5. After appreciating the evidence on record the learned trial court convicted and sentenced the appellants as mentioned earlier in this judgment hence the appellants have filed these appeals against there convictions.

6. Learned counsels for both the appellants have contended that the appellants are completely innocent and have been falsely implicated in this case on account of a dispute over paint works by the complainant and the police; that this is a case of no evidence; that there are no eye witnesses; no last seen evidence; that the recoveries have been foisted and belong to the wife of the murdered child; that the only evidence against the appellants is their retracted extra judicial confessions before the police

which are inadmissible in evidence and their alleged taking of the police to the scene of the murder where the recoveries were made and that for any of the above reasons the appellants should be acquitted by extending them the benefit of the doubt. In support of their contentions they have placed reliance on the cases of **Hayatullah v. The State** (2018 SCMR 2092), **Muhammad Usman v. The State** (2020 P. Cr.LJ 799), **Muhammad Ibrahim v. Ahmed Ali and others** (2010 SCMR 637), **Gul Muhammad and another v. the State through Prosecutor General Balochistan** (2021 SCMR 381), **Joygun Bibi v. The State** (PLD 1960 Supreme Court (Pak.) 313) and **Faqirullah v Khalil-uz-Zaman and others** (1999 SCMR 2203).

7. On the other hand learned APG appearing on behalf of the State who was also representing the complainant has fully supported the impugned judgment. He has contended that the retracted extra judicial confessions made by the appellants to the police are admissible in law and can be used against them as those are corroborated by other pieces of evidence which in this case are the recoveries of the murdered girls chapal, chaddar, the poker used to poke out her eyes and the recovery of her dead body which were recovered on the pointation of the appellants after their extra judicial confessions and the medical evidence which supports their extra judicial confessions and the chemical report which found sperm on the recovered clothes of the dead girl and as such the prosecution had proved its case beyond a reasonable doubt against both the appellants whose convictions and sentences be maintained and the appeals dismissed. In support of his contentions he placed reliance on the cases of **Muhammad Amjad v The State** (PLD 2008 Lahore 32), **Shaukat Ali v The State** (PLD 2019 SC 577), **Nazir Shehzad v The State** (2009 SCMR 1440) and **Fazal Akbar v The State** (2013 P Cr. L J 369).

8. We have heard the arguments of the learned counsel for the appellant as well as learned APG who was also acting for the complainant, gone through the entire evidence which has been read out by learned counsel for the appellants along with the impugned judgment who have ably assisted us and have considered the relevant law including the case law cited at the bar.

9. At the very outset we note that this is a particularly heinous crime where a young innocent girl has been abducted, raped, strangled and then had her body mutilated by having her eyes burnt out by a poker before being dumped in a nalla. We however as judges cannot be swayed by the heinousness of the crime and our emotions. Our role is only to reassess the evidence before us and to without emotion objectively determine whether the prosecution has proved its case against the appellants beyond a reasonable doubt. In this respect reliance is placed on the case of *Naveed Asghar and two others v. The State* (PLD 2021 SC 600) which held as under at Para 10;

"10. The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocent continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structure manner without being influenced by the nature of the allegations". (bold added)

10. Based on our reassessment of the evidence of the PW's, especially PW 5 Dr. Hassan's medical evidence and medical reports including chemical reports we find that Alishba (the deceased) was kidnapped, raped and murdered and had her dead body dumped in a nulla between 12.12.2011 and 14.12.2011 and that the deceased was initially kidnapped

whilst being given a camel ride from an Eidgar ground near Goharabad Karachi.

11. The only question left before us therefore is whether the prosecution has proved beyond a reasonable doubt that it was the appellants who kidnapped, raped and murdered the deceased by strangulation at appellant Bashirs house and then dumped her dead body during the aforesaid period from the aforesaid place in a nalla.

12. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellants for which they were convicted for the following reasons;

- (a) There is no eye witness to the kidnapping, rape, murder or dumping of the dead body of the deceased by the appellants.
- (b) There is no last seen evidence to connect the appellants with the deceased. According to PW 4 Nimra the deceased was last seen on a camel which was being lead **by some one else other than the appellants** whose identity remains unknown. This is corroborated by PW 6 Asma Jamal and PW 7 Jamal Mirza who was her husband who stated in cross examination that, 'I cannot identity any body neither the camel person nor the person running along with the camel'. At best it appears that appellant Bashir may only have paid for the camel ride.
- (c) There was no evidence that the appellants had anything to do with camels. It has come in evidence that the appellant Bashir was a painter by profession. Appellant Majeed was not even seen with Bashir at the time when he paid for the deceased's camel ride which might have even been an act of kindness on appellant Bashir's behalf as the deceased had no money whereby PW 4 Nimra who was riding on the camel with the deceased paid for the ride herself.
- (d) That the prosecution case mainly revolves around the retracted extra judicial confessions made by the appellants before the police. It is well settled by now that a confession made before a police officer is inadmissible in evidence. In this respect reliance is placed on the case of **Hayatullah** (Supra). Interestingly, the police made application for the judicial magistrate to record the appellant's confessions but this was not done. The Supreme Court authority relied upon by the prosecution concerns a retracted judicial confession and thus is not applicable to this case which concerned a retracted confession before the police. In the case of **Gul Muhammed** (Supra) it was held by the Supreme Court as under at P.386;

"It is admitted fact that there is no direct evidence available on the record which connects the involvement of the petitioners in the occurrence alleged against them even otherwise the learned trial court has relied upon the extra judicial confession which was recorded by the Investigating Officer in the presence of PW-03 Shabir Ahmad 995/C. It is strange enough that the extra judicial confession recorded in the presence of police personnel when they were under arrest and at the time of making statement they were also in handcuffs. This practice of recording extra judicial confession by the police officials in presence of police officers is nullity in the eye of law and no credence can be extended to this piece of evidence. As far as the recovery of certain articles belonging to the deceased are concerned, it is sufficient to mention that recovery of all those articles are result of conjecture and surmises and without any legal backing hence, do not advance the case of the prosecution especially when all those piece of evidence were denied by the accused while making their statement under section 342, Cr.P.C". (bold added)

- (e) That although semen was found on some of the clothes of the deceased no DNA report was exhibited so as to link the semen to either of the appellants in connection with the rape of the deceased. The best that can be said is that the deceased was raped but by whom remains unproven. In this respect reliance is placed on the case of **Muhammed Usman** (Supra)
- (f) Even if it was believed through the evidence of PW 2 Muhammed Akram (who allegedly lived above the appellant Bashir) that Bashir lived below him as no rental agreement was produced it does not appeal to logic, reason or common sense that whilst the deceased was screaming during the rape and then having her eyes gauged out by a poker nobody heard anything especially as many other tenants lived in the building. No blood was recovered from the place of the rape and murder which puts the place of the incident in some doubt.
- (g) With regard to the recoveries of the chapal and chaddar found at appellant Bashir's apartment there is no evidence that these belonged to the deceased and even other wise when the deceased's body was moved from appellant Bashir's house it does not appeal to reason, logic or common sense that he would have left these belongings of the deceased at his house where they could be readily found. He would have disposed of them when he allegedly disposed of the body. Even if it is accepted that the recoveries were made on the pointation of the appellants which they later denied these recoveries alone would not be sufficient to convict the appellants without overwhelming other admissible prosecution evidence which was available in the authorities cited by the APG but which was not available in this case as discussed above.

- (h) The body of the deceased was found in a nulla about 8 KM's from the appellant Bashir's house and the body (which was complete rather than being chopped up) according to the prosecution was taken from his house to such location by motor bike. Again it does not appeal to reason, logic or commonsense that a dead body would be transported for 8 KM's on a motor bike without being noticed.

13. It is a golden principle of criminal jurisprudence that the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

14. For the reasons discussed above by extending the benefit of the doubt both the appellants are acquitted of the charge, the impugned judgment is set aside, their appeals are allowed the confirmation reference is answered in the negative and both the appellants shall be released forthwith unless wanted in any other custody case.

15. The appeals and reference stand disposed of accordingly.