

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Jail Appeal No.S-03 of 2004.

Khan Muhammad

Versus

The State

Appellant Khan Muhammad : Through Mr. Waqar Ahmed Memon, Advocate.

Respondent the State : Through Mr. Shahid Ahmed Shaikh, A.P.G.

Date of hearing: 07.06.2017.

Date of judgment: 07.06.2017.

J U D G M E N T

SALAHUDDIN PANHWAR, J.- Instant jail appeal is pending since 2004. This is a case of capital punishment, therefore, Mr. Waqar Ahmed Memon Advocate who was present in Court was appointed as an advocate to proceed with the instant appeal on behalf of the pauper accused / appellant. Copy of paper book was provided to him. He sought time and the matter was taken up again.

2. Instant appeal is directed against the judgment dated 11.12.2003, passed by the learned Sessions Judge, Mirpurkhas, in Sessions Case No.41/1995 (arisen out of Crime No.09/1995 of PS: Khan, under section 302 PPC), whereby appellant was convicted under section 302(b) PPC and sentenced to suffer life imprisonment and fine of Rs.20,000/-; in case of default in payment of fine the appellant was ordered to suffer S.I. for 06 months more. The amount, if recovered, half of the same will be paid to the L.Rs. of deceased Mst. Mariam as compensation.

3. Precisely, facts of the prosecution case are that on 14.06.1995 complainant Rasool Bux lodged F.I.R. alleging therein that accused Khan Muhammad was married to his daughter Mst. Mariam and was residing in the common house, but had some differences with his wife Mst. Mariam. On 14.06.1995, Khan Muhammad informed him that he was taking away his wife Mst. Mariam for treatment to Patoyun. After some time of his departure, complainant's brother Hassan Ali and Atta Muhammad also proceeded to Patoyun for their own work; soon after Atta Muhammad came running and informed the complainant that when they reached near Purani Phittal Shakh, they heard cries, went running there and saw that accused Khan Muhammad was causing Churi blows to Mst. Mariam. They raised Hakals and went near. On their arrival, accused ran away. They saw that Mst. Mariam had sustained injuries and was bleeding from neck and died. Thereafter, complainant alongwith Atta Muhammad proceeded to the place of vardat and saw the dead body of Mst. Mariam having injuries on her neck and other parts of body.

4. During investigation confessional statement of the accused was recorded and after completing formalities he was sent up to stand trial.

5. At trial, prosecution to prove its case, examined as many as 11 witnesses. Thereafter, statement of the accused under section 342 Cr.P.C. was recorded. In his said statement, accused while denying the prosecution allegation has stated that:

“I was married with deceased Mst. Mariam, I wanted to live in the house of my mother alongwith Mst. Mariam in village Ravat Khaskheli, but complainant

and his relatives were not allowing Mst. Mariam to live with me in village Ravat Khaskheli and she has been insisting that. On the day of incident, she left the house of his father for village Ravat Khaskheli, which is also called village Misri, but the near relatives of the complainant were annoyed and murdered her in absence of complainant and have falsely implicated me in this false case. I am innocent.”

6. After hearing the counsel for the parties, learned trial Court vide impugned judgment convicted the accused / appellant as mentioned above.

7. Learned counsel for appellant argued that appellant has served 16 years, 04 months and 20 days in prison without remission; whereas he has earned remissions of 06 years and 19 days and remaining sentence is only 03 years and 21 days; that as per F.I.R. two P.Ws. namely, Atta Muhammad and Hassan Ali have identified the appellant while causing murder of Mst. Mariam; whereas, in their depositions before trial Court they have not stated so in spite of that they were not declared as hostile. Except confessional statement and recovery of Churi as well medical evidence, no direct evidence is available on the record; prosecution story is belied by the eye-witnesses, hence this case is not free from doubt; that confessional statement is retracted and same cannot be used against the appellant; that circumstantial as well medical evidence will not prevail over the ocular account, which is contradictory; that alleged recovered item is easily available in the market; same was sent to the Chemical Examiner for report with a delay of 02 months and with only opinion “human blood” hence it will not connect the appellant with the commission of instant crime.

8. In contra, learned APG contends that though confession is retracted but same can be relied upon as same is in line of F.I.R.

9. Heard arguments and perused the record meticulously.

Before going into *details*, I feel it necessary to refer the *operative* part of the evidence of complainant which will make it clear that in instant case the *ocular account* is confined to evidences of two persons i.e PWs Hassan Ali and Atta Muhammad. The *operative* part whereof reads as:-

“I returned back to my village at 4-00 p.m or 5-00 p.m from Jam Goth when **P.Ws Hussain and Atta Muhammad informed me that they had seen accused Khan Muhammad** taking my daughter Mst: Mariam from the village towards Patiyoon village, on the pretext of providing medical treatment to her and that on the way, at about 12-00 noon, at the old abhond churri blows on the person of my daughter Mst: Mariam, do not know if they raised hakals to the accused.

Thus, it should *no more* be ambiguous that evidence of complainant to extent of *ocular account* is hear-say hence needs not be discussed. Having said so, now I would refer *operative* part of evidences of both these witnesses *first* which are:-

PW Hussain Bux

On the day of incident I was at my village one person from village Patiyoon came to me about 2 hours before the sun set time. He informed me that Mst: Mariam had been murdered by Khan Muhammad.

PW Atta Muhammad.

About one or 11/2 years ago I was in my village at about 4-00 I was informed about the incident by brothery people. He informed me that Khan Muhammad has escaped after

killing Mst: Mariam at abandoned water to the vardat

From referral of above, it is quite safe to say that *incident* was un-witnessed crime and was based on *circumstantial* evidences only. Needless to add that it is by now a settled principle of law that for a case, based on circumstantial evidences, all pieces of such evidences have to make an *unbroken* chain. In case of any missing link in the chain, the whole chain is broken and no conviction can be recorded in crimes entailing capital punishment. Reference is made to a recent judgment, recorded by Apex Court, in the case of Azeem Khan 2016 SCMR 274 wherein it is held as:

“31. As discussed earlier, the entire case of the prosecution is based on circumstantial evidence. The principle of law, consistently laid down by this Court is , that different pieces of such evidence has to make on chain, an unbroken one where one end of it touches the dead body and the other the neck of the accused. In case of any missing link in the chain, the whole chain is broken and no conviction can be recorded in crimes entailing capital punishment. “

The evidence, left with prosecution, is of *confessional statement* and *recovery*. I would *first* take up the confessional statement. There can be no *denial* to the legally established principle of law in this respect that before relying upon a *confessional statement* it must appear to be *natural* and fitting in the prosecution story else a conviction *legally* cannot be recorded on a *prima facie* unnatural confessional statement which does not *match* with material parts of prosecution case. Reference may be made to the case of Azeem Khan supra.

10. A referral to operative part from evidence of the complainant would be sufficient to cause a *cut* at root of motive, so set-up by prosecution which is:

“My daughter Mst. Mariam was not keeping good health therefore accused kept my daughter in village Patiyoan. **After the marriage accused and my deceased daughter were living happily with each other. Accused never fought with her.**”

Further, the evidence of the Magistrate would show certain *irregularities*, committed by the Magistrate while recording the confessional statement of the accused as:-

“Usually the police, which come for evidence, stands outside the Court room i.e. in Varanda. **Court room was visible from the Varanda through door and window.**”

“It is correct to suggest that specifically questions and answers in respect of warnings are not mentioned.”

“It is correct to suggest that replies are not mentioned in the words, used by the accused.”

“I do not remember with whom the accused was sent to judicial custody.”

“It is not mentioned in the confessional statement that I had summoned the police guards from police line. It is correct to suggest that accused was sent to judicial custody through police.

“I had not verified marks of violence on his body by removing his cloths. Vol. says that no such compliant was made by the accused.

11. There can be no denial to the well established principle of law that the **replies must have to be recorded in verbatim of accused** which the Magistrate admittedly *didn't*. The Magistrate

also not got *himself* satisfied that confession is being *voluntarily* which (satisfaction) requires much more than mere mentioning that **‘accused does not complain maltreatment’**. Further, the Magistrate also sent the accused to custody with same police. The procedure *strictly* to be observed by the Magistrate was reiterated in the case of Azeem Khan supra as:

’15. Keeping in view the High Court rules, laying down a binding procedure for taking required precautions and observing the requirements of the provision of Section 364 read with section 164 Cr.P.C, by now it has become a trite law that before recording confession and that too in crimes entailing capital punishment the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that, all signs of fear inculcated by the Investigation Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person is willing to confess, then all required questions formulated by the High Court Rules should be put to him and the answers given, be recorded in the words spoken by him. The statement of accused be recorded by the Magistrate with his own hand and in case there is a genuine compelling reason then, a special note is to be given that the same was dictated to a responsible official of the Court like Stenographer or Reader and oath shall also be administered to such official that he would correctly type or write the true and correct version, the accused stated and dictated by the Magistrate. In case, the accused is illiterate, the confession he makes, if recorded in another language i.e Urdu or English then, after its completion, the same be read-over and explained to him in the language, the accused fully understand and thereafter a certificate, as required under section 364, Cr.P.C with regard to these proceedings be given by the Magistrate under

his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official / officer whether he is, Naib Court wearing police uniform, or any other police official / officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.

12. Therefore, this confession *alone* was not sufficient to make a base to record conviction particularly when *ocular* account, so set-up by prosecution, collapsed. Reference may be made to the case of Azhar Iqbal v. State 2013 SCMR 383 wherein it is held as:

“2. ...It had not been appreciated by the learned courts below that the law is quite settled by now that if the prosecution fails to prove its case against an accused person then the accused person is to be acquitted even if he had taken a plea and had thereby admitted killing the deceased. A reference in this respect may be made to the case of Waqar Ahmed v. Shaukat Ali and others 2006 SCMR 1139. ..”

Now, there remains the *recovery*. It needs not be reaffirmed the well settled principle of law of appreciation of evidence that **recovery** is only a corroborative piece and *alone* cannot hold the conviction but at the *most* could provide some help to other evidences. For recovery it would suffice to say that it does not appear to common sense that an accused of heinous crime of murder would instead of swiftly getting rid of weapon, used in commission of crime, prefer to keep or carry the same till his *arrest*. Even otherwise, the recovery was not found *blood-stained*; which even is easily available in *open* market hence possibility of it being foisted cannot be ruled out particularly in a case where the complainant had set-up *ocular* account on evidence of those related persons who *however* during trial did not own the same.

13. Since, the law is also quite clear that acquittal should not be avoided even if a single doubt *prima facie* causes material dent in prosecution case. Accordingly, I am of the clear view that prosecution never successfully proved the case against the present appellant. These are the reasons for the short order dated 07.6.2017 whereby the conviction was set-aside and in consequence whereof the appellant was acquitted.

14. This judgment shall be communicated to learned PG Sindh for payment of professional fees of learned counsel for pauper appellant.

JUDGE

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