

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

**Crl. Jail Appeal No. D-105 of 2014
Confirmation case No.24 of 2014**

Before;

Mr. Justice Muhammad Iqbal Mahar
Mr. Justice Irshad Ali Shah

Appellant: Muhammad Asif son of Muhammad Sadique,
Through Mr. Faisal Nadeem Abro, Advocate

Respondent: The State, through Mr. Shahzado Saleem
Nahiyoon, D.P.G.

Date of hearing: 04 -11-2019.

Date of decision: 11-11-2019.

J U D G M E N T

MUHAMMAD IQBAL MAHAR, J. The facts in brief necessary for passing the instant judgment are that on 21.06.2012 the appellant allegedly after abducting baby Aiyesh the girl aged about 06 years committed her Qatl-e-Amd by cutting her throat for that he was booked and reported upon.

2 At trial, the appellant did not plead guilty to charge and prosecution to prove it, examined PW-1 Dr. Abdul Qadoos at (Ex.05), he produced impotency certificate of the appellant; PW-2 Dr. Shahida Parveen at (Ex.06), she produced lashchakas form and provisional and final post mortem reports on dead body of the said deceased; PW-3 complainant Abdul Salam at (Ex.07), he produced FIR of the present case and receipt, whereby he acknowledged the

dead body of the deceased; PW-4 Nisar Ahmed at (Ex.08), he produced his 164 CrPC statement; PW-5 SIO/SIP Ali Khan at (Ex.09), he produced Roznamcha entries, Danishnama and memo of place of wardat, memo of arrest and recovery, memo of recovery of blood stained clothes of the deceased and letter to Mukhtiarkar for preparation of sketch; PW-6 Mashir Faisal at (Ex.11), PW-7 SIO / SIP Fazal Muhammad Shah at (Ex.12), he produced report of chemical examiner; PW-8 Mr. Abdul Qadeer Buriro, the then Judicial Magistrate, Tando Muhammad Khan at (Ex.14), he produced 164 Cr.P.C statement of PW Muhammad Zaman and confessional statement of the appellant; PW-9 Tapedar Ali Gohar at (Ex.15), he produced sketch of wardat and then prosecution closed its side.

3. The appellant in his statement recorded u/s 342 Cr.PC denied the prosecution allegation by pleading innocence by stating that he himself has surrendered at PS Tando Muhammad Khan as his mother was illegally confined by the police; the recovery has been foisted upon him by the police only to strengthen its case; he was induced by the police to be released together with his mother after making confessional statement and after confessional statement he was remanded to custody through same police officer; his brother Danish was also confined illegally by PWs Nisar Metlo and Muhammad Zaman at village Saeedpur in house of their relative Ghulam Rasool; complainant and his witnesses being related interse are inimical with him as his mother refused to marry

her daughter with Nisar Metlo and Nisar Metlo in order to take revenge of such refusal got involved him in this case falsely; the incident has taken place at un-known date and time at the hands of unknown person(s) and he has been involved in this case falsely by the police at the instance of Nisar Metlo who now has also occupied his house.

4. The appellant however, did not examine anyone in his defence or himself on oath to disprove the prosecution allegation against him.

5. On evaluation of evidence, the appellant was convicted and sentenced as under by learned Sessions Judge, Tando Muhammad Khan vide his judgment dated 18.10.2014, the operative part whereof reads as under;

“Accordingly, the accused Muhammad Asif Aarain is convicted for an offence punishable under section 302(b) PPC and sentenced to death for deceased baby Aisha. He shall be hanged by his neck till he is dead and also to pay fine of Rs.100,000/-in default thereof S.I for period of one year more. The accused Muhammad Asif Aarain is also convicted for an offence punishable U/S 376 PPC and sentenced to R.I (for) ten years and to pay fine of Rs.10,000/-, in default thereof (undergo) S.I for three months more.”

6. The appellant by preferring the instant appeal has impugned the above said judgment of conviction while learned trial Judge has made a reference u/s 374 Cr.P.C with this Court for confirmation of death sentence. Both are now being disposed of together by way of instant judgment.

7. It is contended by learned counsel for the appellant that the appellant being innocent has been involved in this case falsely by the complainant party; none has seen the appellant committing the alleged incident; no mark of violence suggesting rape was found on the person of the deceased; the recovery has been foisted upon the appellant; PWs Muhammad Ramzan and Muhammad Zaman have not been examined by the prosecution; the confessional statement of the appellant was got recorded after putting him under duress same as such could not be used against the appellant and learned trial Court has misread the evidence while awarding the capital punishment to the appellant. By contending so, he sought for acquittal of the appellant.

8. Learned D.P.G by supporting the impugned judgment has sought for dismissal of the appeal of the appellant and confirmation of death sentence by contending that the appellant has committed the offence in a very brutal manner.

9. We have considered the above arguments and perused the record.

10. Un-natural death of the deceased after committing rape with her, the prosecution has been able to prove by examining medical officer Dr.Shahida Parveen, which even otherwise, is not disputed by the appellant. Only dispute with the appellant is that he has got nothing to do with the alleged incident. It is stated by complainant Abdul Salam that on the date of incident his daughter

baby Aiyesha came back from the school, changed the uniform, had a lunch, took rupees five from him and then went out to spend it, but did not return. Thereafter, he and PWs Muhammad Farooque, Muhammad Zaman, Nisar Ahmed and Muhammad Ramzan went to make search for her, when reached at Primary Boys School Mushtarqa Colony, there they heard cries of baby Aiyesha, coming from inside of the school. They went inside of the school, there they found the appellant running away from the school. They went towards gallery of the school there they found dead body of baby Aiyesha wrapped in 'Rilli' with rope fixed in her neck, she was bleeding. Her 'Shalwar' was found removed to some extent and then leaving the said witnesses there, went at PS Tando Muhammad Khan and lodged report of the incident. The evidence of the complainant takes support from the evidence of PW Nisar Ahmed. Despite lengthy cross examination they have stood by their version, on all material points. They could not be disbelieved only for the reason that they are related interse and / or PWs Zaman and Ramzan have been given up by the prosecution. It is settled by now that it is the quality of the evidence which matters and not its quantity. There is nothing on record which may suggest that someone else except the appellant was available at the place of incident. On arrest, from the appellant as per SIO / SIP Ali Khan has been secured the dagger which he allegedly used in the commission of incident. Such recovery is proved by the prosecution by

examining PW/Mashir Faisal. Subsequently, during course of investigation appellant voluntarily made a confessional statement, thereby he admitted his guilt. It was recorded by Mr. Abdul Qadeer Burioro, the then Judicial Magistrate, Tando Muhammad Khan, he being independent person was having no reason to support either to the appellant or to the prosecution. The appellant has not been able to examine his mother or brother to prove that they actually were put under wrongful confinement, when he was forced to make confessional statement. In that situation, it would be hard to make a conclusion that the confessional statement of the appellant is sustaining infirmities. In these premises, learned trial Court was right to conclude that the prosecution has been able to prove its case against the appellant beyond shadow of doubt.

11. However, the death sentence awarded to the appellant requires to be modified for the reasons that none indeed has seen the appellant committing the alleged incident and he was seen when was making escape good from the place of incident and the conviction has been recorded against the appellant mainly on the basis of his confessional statement. It is modified accordingly with Rigorous Imprisonment for life with compensation of rupees one lac payable to the legal heirs of the deceased and in case of default whereof the appellant would undergo Simple Imprisonment for three months. The conviction and sentence awarded to the appellant for offence punishable u/s 376 PPC would remain same.

All the convictions / sentences to run concurrently, with benefit of section 382-B Cr.P.C.

12. In case of ***Ghulam Mohiuddin alias Haji Babu & ors Vs. The State (2014 SCMR-1034)***, it has been observed by the Honourable Supreme Court that;

“---S.302(b)---Qatl-e-amd---Sentence---Death sentence or imprisonment for life—Single mitigating circumstance—Sufficient to award life imprisonment instead of death penalty---Single mitigating circumstance, available in a particular case, would be sufficient to put on guard the Judge not to award the penalty of death but life imprisonment--If a single doubt or ground was available, creating reasonable doubt in the mind of Court/Judge to award either death penalty or life imprisonment, it would be sufficient circumstance to adopt alternative course by awarding life imprisonment instead of death sentence---No clear guideline, in such regard could be laid down because facts and circumstances of one case differed from the other, however, it became the essential obligation of the Judge in awarding one or the other sentence to apply his judicial mind with a deep thought to the facts of a particular case---If the Judge/Judges entertained some doubt, albeit not sufficient for acquittal, judicial caution must be exercised to award the alternative sentence of life imprisonment, lest an innocent person might not be sent to the gallows---Better to respect human life, as far as possible, rather than to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed”.

13. The captioned appeal and death reference are disposed of accordingly.

Judge

Judge