

IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Cr. Jail Appeal No.D- 35 of 2013
Cr. Spl. ATA Appeal No.D- 36 of 2013
Cr. Spl. ATA Appeal No.D- 37 of 2013
[Confirmation Case No.08/2013]

PRESENT:

Mr. Justice Naimatullah Phulpoto
Justice Mrs. Rashida Asad

Date of Hearing : 12.08.2020
Date of Judgment : 20.08.2020

Syed Zeeshan Ali Shah, Advocate for appellant Noor Ali in Criminal Jail Appeal No.D-35/2013.

Mr. Zahid Mallah, Advocate for appellant Fahad in Cr. Spl.ATA Appeal No.D-36/2013.

M/s Farhad Ali Abro and Shaukat Ali Kaka, Advocates for appellant Waleed Raza in Criminal Spl. ATA Appeal No.D-37 of 2013.

Mr. Shahzado Saleem Nahiyoon, D.P.G. for the State.

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J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellants Noor Ali son of Jumoon by caste Panhwar, Waleed Raza son of Shakeel Ahmed by caste Rajput Bhatti and Fahad son of Baboo Din by caste Qureshi were tried by the learned Judge, Anti-Terrorism Court, Mirpurkhas Division at Mirpurkhas in Special Case No.01 of 2013. On conclusion of the trial vide judgment dated 29.04.2013, the appellants were convicted u/s 364-A, 376(2), 302(a), 201, 34 PPC read with Section 7(a) of Anti-Terrorism Act, 1997 and sentenced to death to all counts however, subject to confirmation by this Court. Appellants

were further directed to pay the compensation of Rs.2,00,000/-(Rupees two lac) each to the legal heirs of deceased minor Nimra in terms of Section 544-A Cr.P.C. Trial Court made Reference to this Court for confirmation of death sentence u/s 374 Cr.P.C.

2. Brief facts of the prosecution case as disclosed in FIR are that on 11.01.2013 at 02-00 p.m, minor Nimra aged about 09 years went from her house, to buy some articles / sweets. Baby Nimra did not return home. The father of Nimra went out in her search alongwith P.Ws Tarique Ahmed and Naveed Ahmed but could not find her anywhere. It is alleged that on 16.01.2013 at 08-35 a.m, he received a telephone call from Naveed Ahmed who told Muhammad Hameed, father of the minor that he has found the dead body of minor Nimra lying at bushes adjacent to Mir Allah Bachayo Colony Mirpurkhas. Muhammad Hameed went there and saw the dead body of Nimra, several persons of the locality were present. Dead body of Nimra was wrapped in a plastic bag. Complainant saw that teeth of his daughter were broken and she was partly burnt. He atonce informed Satellite Town police. Police came over there. Dead body of baby was brought to Civil Hospital Mirpurkhas where postmortem of the deceased was conducted. Thereafter, complainant lodged FIR on 16.01.2013 at Satellite Town Police Station. The same was recorded vide Crime No.02/2013 for offences u/s 364-A, 302, 376, 201, 34 PPC and Section 6/7 of ATA, 1997.

3. Further statement of the complainant was recorded on 17.01.2013 in which appellants were nominated as accused on the basis of information of PWs Kashif and Jabbar Hussain who had seen them lastly while kidnapping the minor deceased girl on 11th January, 2013. All the accused were arrested during investigation and they led the police to the place from where they had kidnapped the minor baby and detained her in an abandoned room near the Water Supply Tank of the city. Police recovered a pair of chappal of minor girl

from the said abandoned room and also recovered motorcycle which was used for the abduction by the appellants so also the Rickshaw used by the appellants for throwing the dead body. Police had also secured wire on the pointation of accused from Rickshaw which was used for strangulation. Investigation Officer secured cassette provided to him by Media person in which accused Noor Ali admitted guilt before the Media. Investigation Officer had sent the clothes of deceased as well as accused persons for chemical examination, postmortem report was also collected by the Investigation Officer. On conclusion of the investigation, challan was submitted before the learned Judge ATC, Mirpurkhas Division @ Mirpurkhas for offences u/s 302, 364-A, 376, 201, 34 PPC r/w Section 6/7 of ATA, 1997.

4. Trial Court framed the charge against appellants / accused at Ex.5. All the three accused pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined in as much as 11 witnesses. Thereafter, prosecution side was closed.

6. Statements of accused were recorded u/s 342 Cr.P.C at Ex.71, 72 and 73. All the accused claimed false implication in this case and denied the prosecution allegations. Accused declined to give statement on Oath in disproof of their prosecution allegations. Accused Waleed Raza examined DW-1 Shakeel Ahmed whereas other accused did not lead any evidence in their defence.

7. Learned trial Court after hearing the learned advocates of the appellants as well as Prosecutor and on assessment of the evidence vide judgment dated 29.04.2013, convicted and sentenced the appellants to death as stated above. Hence, firstly Criminal Jail Appeal No.D- 35/2013 was filed by all the three appellants then Criminal Special ATA Appeal No.D- 36/2013

was filed by appellant Fahad and Criminal Special ATA Appeal No.D- 37/ 2013 was filed by appellant Waleed Raza.

8. By this single judgment, we intend to decide the aforesaid appeals together as well as confirmation Reference made by the trial Court as the same appreciation of evidence is required in all the appeals.

9. The facts of this case as well evidence produced before the trial Court find an elaborate mention in the judgment passed by the trial Court and therefore, the same may not be reproduced here so as to avoid duplication and un-necessary repetition.

10. Learned advocates for the appellants after arguing the appeals at length do not press the same on merits and prayed for reducing their sentence of death to imprisonment for life; that there are three accused persons and allegations are generalized in nature, it is not clear that which of accused committed murder of deceased girl; that appellants have been sentenced to death on 29.04.2013; that the principle of expectancy of life is the relevant factor to be considered; that appellants were examined by the Medical Officer during investigation; that the appellant Noor Ali was aged about 25 years, Waleed Raza aged about 23 years and Fahad aged about 22 years; that the appellants were in the age of early youth at the time of incident; that in case of murder life imprisonment is the alternative punishment. Lastly it is argued that it would be harsh to sentence three appellants to death in the given mitigating circumstances. Reliance is placed upon the judgment of an unreported Criminal Suo Moto Review Petition No.84 of 2018 dated 28.01.2020 passed by Honourable Supreme Court of Pakistan, *Ishtiaq Ahmed v. The State and another* (2020 P.Cr.L.J Note 43) and *Ghulam Mohy-ud-Din alias Haji Babu and others v. The State* (2014 SCMR 1034).

11. Mr. Shahazado Saleem Nahiyoon, learned D.P.G. in the given mitigating circumstances highlighted hereinabove conceded for reduction of sentence of death of the appellants to the imprisonment for life.

12. It is pertinent to mention here that notice was issued to the complainant who engaged his advocate namely Mr. Muzzafar Ali Leghari. Record reflects that on several dates counsel for the complainant did not appear. Complainant and his advocate are also called absent today, without intimation.

13. It is the duty of the prosecution to prove its case against the accused beyond any shadow of doubt. Prosecution in order to prove the un-natural death of deceased minor Nimra has examined W.M.O. Dr. Farzana Shah at Ex.37 who has deposed that on 16.01.2013 she was posted as Senior Women Medical Officer, Civil Hospital Mirourkhas. On that day at about 10-30 a.m, SIP Ghulam Ali Kanhiyo of Police Station Satellite Town Mirpurkhas referred a dead body of girl Nimera aged about 8-9 years daughter of Muhammad Hameed Abro through ASI of Police Station Satellite Town Mirpurkhas for postmortem examination of the deceased. The dead body of the deceased was identified by her father Muhammad Hameed. On the same day at 10-30 a.m, W.M.O started postmortem and finished the same at 12-30 p.m. From the external examination of deceased, W.M.O found as under:-

Postmortem Lividity:	Nil.
Rigor Mortis:	Present.
Incident:	H/o kidnapping on 11.1.2013 then dead body received from a spot at Mir Colony covered in plastic bag with found smell.
Condition of Clothes:	Yellow coloured Qameez half burnt and Yellow Shalwar and small Dupatta.
General Examination:	A girl child lying in supine position in naked condition with opened thighs shalwar around the neck marks of burns on head hairs signed, trunk, abdomen, back

thighs fat protruded out at left side of anterior and posterior wall of abdomen. Greenish in colour blood stained discharge oozes from nostril and mouth.

Surface Wounds & Injuries:

- (1) 90 % superficial and deep burn skin damaged and peeled off from multiple area of body fat exposed at abdomen, trunk and thighs.
- (2) Thin mark of legation seen in neck. Head and neck moves freely all around.
- (3) Vulva, vagina torned 2nd degree tear in perineum, multiple petechial, hemorrhagic spots seen in lateral wall of vagina. Hymen torned. Admitted two fingers easily. Tissues of vagina was congested.

All Injuries are:

Injury No.1 was Postmortem. Injury No.2 and 3 were anti mortem in nature.

Internal examination:

Head/Neck:

On reflecting skin petechial hemorrhagic spots seen in subcutaneous tissues mussels was congested cricoid cartilage was torn. All the blood vessels compressed and congested. Atlas vertebrae fractured spinal cord was torned.

Thorax:

Congested intact.

Abdomen:

Skin damaged fat exposed at anterior and posterior abdominal wall viscera`s intact and congested.

Remarks:

A child girl about 8-9 years received in mortuary only wearing the shirt half burnt shalwar folded around neck. A wire folded the neck knotted at back of neck. 90% superficial and deep burnt fat oozes out from multiple part of body with tear in perineum and vagina.

Preservation:

- (1) Sample of high vaginal swab.
- (2) Sample of rectal swab.
- (3) Matted hairs with blood from head.
- (4) Remove hairs folded in right foot.

OPINION: W.M.O. on the basis of final report, opined that cause of death of minor girl was Asphyxia due to strangulation. Deceased Nimra was subjected to sexual intercourse before her death. The time between injuries and death was instantaneous and the time between death and postmortem was more than 48 hours. W.M.O produced such reports before the trial Court.

14. In order to prove its` case, prosecution examined the complainant. He narrated the facts as mentioned in FIR. PWs Kashif and Jabbar Hussain had deposed that they had seen baby Nimra with the appellants on their motorcycle on 11.01.2013. The appellants could not cause dent to the evidence of last seen witnesses during cross examination. Un-natural death and sexual assault upon the minor girl have been established by cogent and confidence inspiring evidence. Medical evidence has corroborated the prosecution story. Wire with which the minor girl was strangulation after illicit act was also recovered from the Rickshaw. Rickshaw and motorcycle on the pointation of accused were also recovered from the abandoned quarter adjacent to Mir Allah Bachayo Colony Mirpurkhas. Media person namely Nazeer Ahmed has deposed at Ex.62 that accused Noor Ali stated before the Media that they have committed the offence and it was recorded by Media person namely Nazeer Ahmed and cassette was played before the trial Court. Investigation Officer produced all the mashirnamas before the trial Court. We are conscious of the facts that conduct of the accused to lead Investigation Officer and mashirs to abandoned place / room where committed murder of a minor girl and subjected to illicit act and recovery of chappal of deceased girl from room on pointation of accused had played an important role in determining the guilt of accused and it is corroborative piece of evidence as held by Honourable Apex Court in the case of Riaz Hussain v. The State (2001 SCMR 177). Moreover, all the witnesses were cross examined at length but nothing favourable to the accused came on record. Complainant had no enmity with the appellants to involve them in the case of murder of his minor daughter.

15. The last seen evidence provided by the prosecution in this case is so consistent proximity of the time is that it is sufficient to connect the appellants with the commission of offence particularly, keeping in view of the

fact that victim was a minor girl of 09 years. It is fully established on record that the appellants took the minor girl outside of the house on motorcycle and she was detained in an abandoned room near the Water Supply Tank. She was found murdered after being raped. During investigation, huge evidence has been collected against the appellants and it is brought on record by the prosecution. Regarding the last seen evidence it was the liability of the appellants to give an explanation for death of the baby as held by Honourable Supreme Court of Pakistan in the case of Jafar Ali v. The State (1998 SCMR 2669) but the appellants not only failed to give an explanation but flatly denied that they had taken the baby with them on motorcycle which is otherwise fully proved on record.

16. For the above stated reasons we have no hesitation to hold that the prosecution established its case against the appellants beyond any shadow of doubt. The learned advocates for the appellants have not pressed the appeals on merits. According to the prosecution evidence, allegations against the appellants are generalized in nature. It is not certain as to who had strangulated the deceased and committed rape upon her. All the appellants were young persons and were in the age of early youth at the time of incident. In the given circumstances, it would be harsh to sentence all the three appellants to death. A 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. Extra degree of care and caution is required to be observed by the Judges while determining the quantum of sentence, depending upon the facts and circumstances of particular case / cases as held by Honourable Supreme Court of Pakistan in the case of Ghulam Mohyud-Din alias Haji Babu and others v. The State (2014 SCMR 1034). The relevant portion of which reads as under:-

“20. Albeit, in a chain of case-law the view held is that normal penalty is death sentence for murder, however, once the Legislature has provided for

awarding alternative sentence of life imprisonment, it would be difficult to hold that in all the cases of murder, the death penalty is a normal one and shall ordinarily be awarded. If the intent of the Legislature was to take away the discretion of the Court, then it would have omitted from clause (b) of section 302, P.P.C. the alternative sentence of life imprisonment. In this view of the matter, we have no hesitation to hold that the two sentences are alternative to one another, however, awarding one or the other sentence shall essentially depend upon the facts and circumstances of each case. There may be multiple factors to award the death sentence for the offence of murder and equal number of factors would be there not to award the same but instead a life imprisonment. It is a fundamental principle of Islamic Jurisprudence on criminal law to do justice with mercy, being the attribute of Allah Almighty but on the earth the same has been delegated and bestowed upon the Judges, administering justice in criminal cases, therefore, extra degree of care and caution is required to be observed by the Judges while determining the quantum of sentence, depending upon the facts and circumstances of particular case/cases.

21. A 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. No clear guideline, in this regard can be laid down because facts and circumstances of one case differ from the other, however, it becomes 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 entertain 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. So it is better to respect the human life, as far as possible, rather to put it at end, by assessing the evidence, facts and circumstances of a particular murder case, under which it was committed.

Albeit, there are multiple factors and redeeming circumstances, which may be quoted, where awarding of death penalty would be unwarranted and instead life imprisonment would be appropriate sentence but we would avoid to lay down specific guidelines because facts and circumstances of each case differ from one another and also the redeeming features, benefiting an accused person in the matter of reduced sentence would also differ from one another, therefore, we would deal with this matter in any other appropriate case, where, if proper assistance is given and extensive research is made.

In any case, if a single doubt or ground is available, creating reasonable doubt in the mind of Court/Judge to award death penalty or life imprisonment, it would be sufficient circumstances to adopt alternative course by awarding life imprisonment instead of death sentence.

For the above stated reasons, these appeals are dismissed to the extent of appellants' conviction but in the given mitigating circumstances, the death sentence awarded to the appellants is reduced to imprisonment for life, however, subject to following modification:-

- (i) u/s 302(b) PPC as Tazir:- to imprisonment for life to all the appellants and to pay the compensation of Rs.2,00,000/- (Rupees two lac) each in terms of Section 544-A Cr.P.C. to the legal heirs of deceased. In case of default in payment of compensation, the appellants shall suffer SI for 06 months each.
- (ii) u/s 364-A PPC:- to imprisonment for life to all the appellants and to pay the compensation of Rs.2,00,000/- (Rupees two lac) each in terms of Section 544-A Cr.P.C. to the legal heirs of deceased. In case of default in payment of compensation, the appellants shall suffer SI for 06 months each.
- (iii) u/s 376(2) PPC:- to imprisonment for life to all the appellants and to pay fine of Rs.2,00,000/- (Rupees two lac) each. In case of default in payment of fine, the appellants shall suffer SI for 06 months each.
- (iv) Conviction and sentence under Section 201 PPC is erroneous in law and it is set aside.
- (v) u/s 7(a) of ATA, 1997:- to imprisonment for life to all the appellants and to pay the fine of Rs.2,00,000/- (Rupees two lac) each. In case of default in payment of fine, the appellants shall suffer SI for 06 months each.

All the sentences are ordered to run concurrently.

Confirmation Reference made by the trial Court is answered in negative.

17. In view of the above modification in sentences, the aforesaid appeals are disposed of in the above terms.

JUDGE

JUDGE

