

HIGH COURT OF SINDH CIRCUIT COURT, HYDERABAD

Cr. Appeal No.D-22 of 2018

[Confirmation Case No.06/2018]

Re: Molvi Ghulam Murzata vs. The State

Cr. Appeal No.D-24 of 2018

R: Waseem Aarain vs. The State

Cr. Appeal No.D-25 of 2018

Re: Bilawal @ Bilal & Another vs. The State (Juvenile Offenders)

PRESENT:

MR. JUSTICE NAIMATULLAH PHULPOTO

JUSTICE MRS. KAUSAR SULTANA HUSSAIN

Date of hearing : 28.04.2021
Date of judgment : 28.04.2021
Appellants : Through M/s Om Parkash H. Karmani and Inderyas Barkat advocates
Complainant : None present
The State : Through Mr. Shahzado Saleem Nahiyoan, Deputy Prosecutor General Sindh

J U D G M E N T

NAIMATULLAH PHULPOTO, J:- Appellants Molvi Ghulam Murtaza and Waseem were tried by learned IInd Additional Sessions Judge, Badin for offences punishable U/Ss 302, 376 & 511 PPC [*Sessions Case No.39 of 2015 arising out of Crime No.09 of 2014 registered at PS Kadhan*]. After regular trial, vide its judgment dated 06.02.2018 appellant Molvi Ghulam Murtaza was convicted u/s 302(b) r/w Section 34 PPC and sentenced to death. While appellant Waseem was convicted u/s 302(b) r/w Section 34 PPC and sentenced to imprisonment for life. Both appellants were also convicted u/s 376 r/w Section 34 PPC and sentenced to 14 years R.I with directions to pay Rs.2,00,000/- each as compensation to the legal heirs of deceased as provided under Section 544-A Cr.P.C and in case of default thereof, it was ordered that they shall further suffer R.I for one year each. Sentences awarded to accused Waseem were ordered to run concurrently. However, he was extended benefit of Section 382-B Cr.P.C. Trial Court had made reference to this Court for confirmation of death sentence awarded to appellant/accused Molvi Ghulam Murtaza as required u/s 374 Cr.P.C. Trial Court held separate trial of juvenile offenders Bilawal @ Bilal and Aadil in aforesaid crime being *Sessions Case No.39-A of 2015*. After conducting trial according to Juvenile Justice System Ordinance, 2002, vide its judgment of even date both juvenile offenders were convicted u/s 302(b) r/w Section 34 PPC and sentenced to life imprisonment each. They were also convicted u/s Section 376 r/w Section 34 PPC and sentenced to suffer R.I for 14 years each with directions

to pay Rs.2,00,000/- each as compensation to the legal heirs of deceased as provided under Section 544-A Cr.P.C and in case of failure in payment of compensation, to further suffer R.I for one year each. The sentences awarded to both juvenile offenders were ordered to run concurrently, with benefit of Section 382-B Cr.P.C.

2. Being aggrieved and dissatisfied with aforesaid judgments appellants Molvi Ghulam Murtaza and Waseem filed separate appeals bearing No.D-22 & 24 of 2018 respectively while juvenile offenders appellants Bilawal @ Bilal and Aadil filed appeal bearing No.D-25 of 2018, which all are being decided by us through this single judgment alongwith reference made by the Trial Court for confirmation of death sentence.

3. The prosecution case against the appellants as divulged from the contents of FIR as mentioned in para-2 of the impugned judgments passed by the Trial Court are reproduced below:

“2. The accused are said to have committed forcible rape with deceased Muqadas in a mosque where she used to go to have an education of Quran Sharif and accused Molvi Ghulam Murtaza was teacher and Waseem, Adil and others boys of the village used to go for Quran 'nic education. On the fateful day i.e. 10.04.2014 in the morning complainant left her in the mosque but at close hours of Madersa she was stopped and confined in a room of the mosque as informed by the children to complainant on which complainant, Muhammad Faryad, Ali Asghar and Muhammad Tufail went in the mosque, the girl was lying in unconscious condition and four persons namely accused Molvi Ghulam Murtaza, Waseem, Bilal and Adil were present who on seeing the complainant party ran away. It is stated that the victim girl was then brought for treatment to compounder Hyder Ali Khaskheli on 10.04.2014 and then they went to their houses but her condition deteriorated, hence she was taken to Dr. Muhammad Ali Khatti who gave prescriptions and administered the injection and advised the complainant to take her to Badin as her condition was bad. But she died on the way at 10/11 p.m and she was then got checked up at Jaffery Medical center Badin where doctor disclosed that girl had died on the way and that complainant then disclosed facts to his cousin Abdul Khaliq and they got such entry recorded at P.S and obtained letter for postmortem and after receiving dead body and her burial the present FIR was lodged by the complainant on 12.04.2014 at P.S Kadhan to the effect that Ghulam Murtaza, Waseem Arain, Adil and Bilal Arain with a view to commit Zina have committed violence against the girl aged about 12 years and went unconscious and could not bear pain, therefore, died.”

4. After usual investigation, challan was submitted against all the aforesaid accused/appellants, where-after, as mentioned above, case of juvenile accused/appellants was tried under the provisions of Juvenile Justice System Ordinance, 2002 separately from the case of adult accused/appellants. At trial, Trial Court examined 17 witnesses, who produced certain documents. Thereafter, prosecution side was closed and then statements of accused/appellants were recorded u/s 342 Cr.P.C, in which they denied the prosecution's allegations and

claimed false implication in the case. After hearing the learned counsel for parties and assessment of evidence, vide separate judgments dated 06.02.2018 learned Trial Court convicted and sentenced all the accused/appellants, as stated above.

5. Learned defence counsel mainly argued that important piece of evidence regarding dying declaration, as mentioned by the PW-2, mother of deceased baby, was not put to the accused at the time of recording their statements u/s 342 Cr.P.C for explanation. It is further argued that Trial Court has relied upon that piece of evidence for conviction and main appellant (*Molvi Ghulam Murtaza*) has been sentenced to death. Learned counsel for appellants while relying upon the recent judgment dated 04.03.2021 passed by Hon'ble Supreme Court in the case of Jan Muhammad vs. The State [*Criminal Appeal No.77 of 2020*] submitted that conviction cannot be maintained, if all incriminating pieces of evidence were not put to the accused at the time of his/her statement u/s 342 Cr.P.C for response.

6. Learned DPG conceded the above submissions and submitted that case may be remanded to learned Trial Court for recording statements of accused/appellants afresh by putting all incriminating pieces of evidence to them in their statements u/s 342 Cr.P.C for their response.

7. Perusal of impugned judgments reveals that prosecution has mainly relied upon the evidence of complainant and his wife Mst. Khalida Parveen and medical evidence furnished by lady Doctor, who conducted postmortem of the deceased and took the vaginal swabs. In order to appreciate the contentions of learned defence counsel, we have carefully gone through the statements of appellants/accused recorded by Trial Court u/s 342 Cr.P.C. The scanned copy of statement of main accused Molvi Ghulam Murtaza is reproduced below:

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Exhibit No. 32

STATEMENT OF ACCUSED UNDER SECTION 342 CR.P.C

My name is: Molvi Ghulam Murtaza
 Father's name: Ghulam Murtaza
 Caste: Shur.
 Age about: 32 years.
 Occupation: *Molvi - Quran & Trade Quran Sharif.*
 Religion: Islam.
 Residence: *Village Khushi Mad. Arain.*
 Taluka: *B. Arain.*
 District: *B. Arain.*

DATED: 26-05-2017 EXAMINATION-OF-THE ACCUSED

Question: You have heard the prosecution evidence. It has come in evidence that you along with adult co-accused Waseem and Juvenile co-accused Bilawal and Adil on 10-04-2014 at 0900 hours inside a Masjid situated in Village Khushi Muhammad Arain, Deh Aahh, Taluka and District Badin in furtherance of your common intention committed forcible rape upon Baby Muqadas daughter of Ghulam Mustafa in the result she expired on 12.4.2014 in the way to hospital at about 10-11 a.m. due to hemorrhagic shock (continuous blood loss) resulting from tearing of her vagina due to rape committed by you. What have you to say?

Answer: *No case in fact.*

You have heard the evidence of Woman Medical Officer Dr. Farzana who conducted the autopsy on the dead body of deceased baby Muqadas. She in her evidence has deposed that the cause of death of deceased Muqadas occurred due to hemorrhagic shock (continuous blood loss) as a result of vaginal tears i.e. Injury Nos.1 & 2 (described in her evidence and postmortem report Exh.17-C) which were sufficient to cause the death in ordinary course of nature and further deposed that the act of rape was also evident? What have you to say?

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She has failed to mention the source of the sperm. Such a source is available but it was not detected. The source of sperm was not found.

Question:

I has also come in evidence that police arrested you in this case on 13-04-2014 at 1500 hours from village Khushi Muhammad in presence of mashirs Abdul Khaliq and Mehmood and recovered one Vigo tail mobile phone containing two SIMs and one memory card in running condition and cash amount of Rs.50-00 i.e. five currency notes of Rs.10. What have you to say?

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Yes. I am from Masjid Wala 2 Paid Day as per the Imam or teacher religious school.

Question:

It has also come in evidence that at the time of postmortem examination of deceased baby Muqadas W.M.O Dr Farzana collected vaginal swabs three in number and her clothes, and these articles were sent to the Director Laboratories and Chemical Examiner to the Government of Sindh Karachi, who in his report (Exh.17-G) has reported that Human sperms were detected in Vaginal Swab No.3 and Vaginal Swab No.1 and light brown with blue colour flowered Dupta of deceased were stained with human blood. What have you to say?

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Answer:

We are the father of the deceased baby. As per the report of the Director Laboratories and Chemical Examiner, the sperm was detected in vaginal swab No.3 and vaginal swab No.1 and light brown with blue colour flowered Dupta of deceased were stained with human blood. I am not responsible for this.

Question:

Why the P.Ws have deposed against you

Private P.Ws has deposed against me because they are confused and they are involved in this case. The P.Ws are not reliable. I am not responsible for this. I am not involved in this case. I am not responsible for this.

Question:

Do you want to examine yourself on oath under section 340(2) Cr.P.C in disproof of the charge leveled against you?

Answer:

Yes Sir.

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Do you want to lead any defence?

Yes Sir. I want to cross Huda Ali
 Ghulam Hussain Khushkhal (C) Husein
 Molvi Tahir and Molvi Talib.

Do you claim the mobile phone and cash amount of Rs.50-0 recovered from you by police at the time of your arrest?

Yes.

Have you anything else to say?

Yes Sir, I will record my statement in court properly.

[Signature]
 (Ramesh Kumar)
 1st. Addl. Sessions Judge, Badin

CERTIFICATE
 The above named witness has been examined and his statement has been recorded in the presence of the undersigned Magistrate and the same is being recorded in the court file.
[Signature]
 (Ramesh Kumar)
 1st. Addl. Sessions Judge, Badin

8. We have also perused the evidence of PW-2 Mst. Khalida Parveen, mother of deceased girl, who deposed that present incident took place on 10.04.2014, when her daughter has gone to the Mosque for recitation of 'Holy Quran', she did not return back, as she was detained by Molvi Ghulam Murtaza then the girl was brought to home in unconscious condition and when she regained her senses she informed her that Molvi Ghulam Murtaza, Waseem, Adil and Bilawal confined her in Mosque, caused fists blows and put-off her clothes and committed zina with her and she went unconscious. This material/incriminating piece of evidence has not been put to the accused persons at the time of recording their statements u/s 342 Cr.P.C. The Trial Court in para-17 of the impugned judgment has relied upon this piece of evidence and mentioned that the important evidence in this case is of PW Mst. Khalida Parveen

mother of deceased. For ease of reference para-17 of the impugned judgment is reproduced below:

“17. The important witness in this case is P.W Mst. Khalida Parveen the mother of deceased Muqadas. She besides the other details as informed to her by complainant has deposed regarding the dying declaration of her deceased daughter Muqadas. She has deposed in her evidence (Exh.10) that after regaining her senses the deceased Muqadas on inquiry disclosed before her that Molvi Ghulam Murtaza, Waseem, Adil and Bilawal had confined her in mosque, caused fists blows, turn off her clothes and then they all committed Zina with her and after that she became unconscious.”

9. It has been observed by us that main piece of evidence, as deposed by PW-2 Mst. Khalida Parveen and relied upon by the learned Trial Court for conviction has not been put to appellants/accused while examining them u/s 342 Cr.PC. It is observed that Trial Court has recorded the statements of accused u/s 342 Cr.P.C in a very casual manner and committed illegalities, which are not curable under the law. It has been held time and again by the Hon’ble Supreme Court that a piece of evidence produced by the prosecution against an accused, if not put to accused while examining him/her u/s 342 Cr.P.C cannot be used against that accused. The rationale beyond is that the accused must know and respond to the evidence brought against him/her by the prosecution. The accused must have firsthand knowledge of all the aspects of the prosecution case being brought against him/her, as held by the Hon’ble Supreme Court in the case of Jan Muhammad vs. The State (Criminal Appeal No.77 of 2020). The relevant para-5 is re-produced below:-

“5. It has been observed by us with concern that none of the afore mentioned pieces of evidence has been put to the appellant while examining him under section 342, Code of Criminal Procedure. It has been laid down many a time by this Court that a piece of evidence produced by the prosecution against an accused if not put to accused while examining him under section 342, Code of Criminal Procedure cannot be used against him. The rationale behind it is that the accused must know and then respond to the evidence brought against him by the prosecution. He (accused) must have firsthand knowledge of all the aspects of the prosecution case being brought against him. It appears that even the learned Judge in chambers, of High Court while reappraising evidence available on record did not consider this aspect of the matter. Keeping in view the peculiar circumstances of the case, learned Counsel for the appellant and learned Additional Prosecutor General, Sindh assisted by widow of deceased are in agreement that the matter needs to be remanded to the learned trial Court for re-recording statement of appellant under section 342, Code of Criminal Procedure while putting all pieces of prosecution evidence produced during trial to him, giving him an opportunity to know and respond to the same.”

10. For the above stated reasons the captioned appeals are partly allowed. Resultantly, conviction and sentence awarded to the appellants/accused by Trial Court through impugned judgments are set aside. Consequently, appellants/accused shall be treated as under-trial prisoners. The case is remanded back to learned Trial Court with directions to record the statements of all appellants/accused u/s 342 Cr.P.C afresh by putting all incriminating pieces of prosecution evidence so brought against them, enabling them to know and respond to the same and then after hearing the learned counsel for the parties decide the case within a period of one month of the receipt of this judgment strictly in accordance with law. Confirmation reference made by the Trial Court is answered in **NEGATIVE**.

11. In view of the above, captioned appeals as well as confirmation reference are accordingly disposed of.

JUDGE

JUDGE

Sajjad Ali Jessar