

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD**

Cr. Appeal No.D-143 of 2019
[Confirmation Case No.29 of 2019]
Cr. Jail Appeal No.D-142 of 2019

PRESENT

*Mr. Justice Naimatullah Phulpoto
Justice Mrs. Rashida Asad.*

Date of Hearing: 10.09.2020
Date of Judgment: 17.09.2020

Appellant: Aijaz Ali S/o Haji Khan Khoso,
Through Mr. Riazat Ali Sahar,
Advocate

The State: Through Mr. Shahzado Saleem
Nahiyoan, Deputy Prosecutor
General, Sindh.

J U D G M E N T

NAIMATULLAH PHULPOTO, J.– Appellant Aijaz Ali was tried by learned Vth Additional Sessions Judge / MCTC, Shaheed Benazirabad, for offences under Sections 302, 311, 201 PPC. On the conclusion of the trial, vide judgment dated 31.07.2019, appellant was found guilty of committing Qatl-i-Amd of Mst. Sahib Khatoon. He was convicted under Section 302(b) PPC as Ta'zir and sentenced to death. Appellant was directed to pay compensation of Rs.200,000/- payable to the legal heirs of deceased in terms of Section 544-A Cr.P.C. In case of default thereof, he was ordered to suffer S.I for 06 months. Appellant was also convicted under Section 201 PPC and sentenced to 05 years R.I and to pay fine of Rs.20,000/-, failing which, he was ordered to suffer S.I for 03

months. Death sentenced awarded to the appellant was subject to the confirmation of this Court.

2. Brief facts of the prosecution case as disclosed in the F.I.R are that on 21.06.2017 at about 2200 hours SIP Syed Pervez Ali Shah of P.S Pubjo left police station alongwith his subordinate staff, namely HC Abdul Latif, PCs Pervez, Altaf Hussain, Abdul Razzaque, Khamiso Khan and Zahid in a Government vehicle vide Roznamcha entry No.15 at 1730 hours for patrolling duty. While patrolling at various places, when the police party reached near Manharo Water Supply Road, SHO received spy information that at Rohri Canal near Yousif Dahri Bridge, one person (appellant) was throttling and dragging one woman to throw her into Rohri Canal and lady was raising cries for her rescue. After receipt of such information, police party proceeded to the pointed place and reached there at 1900 hours and saw that one person (appellant) was throttling one lady. Police party challenged the accused and in presence of the police party, appellant committed murder of the said lady and threw her into Rohri Canal. No police official knew the swimming, therefore, they could not rescue the lady. It is further alleged that police arrested the accused, due to non-availability of the private mashirs, HC Abdul Latif and PC Altaf Hussain were made as mashirs. Accused disclosed his name as Aijaz Khan S/o Haji Khan alias Pado Khoso R/o Village Ghulam Muhammad Jamali near Manohra Taluka Qazi Ahmed at present R/o Nusrat Colony, Karachi. It further is mentioned in the F.I.R that accused further disclosed that said lady was his wife, namely Mst. Sahib Khatoon, aged about

20/21 years; about 2/3 months prior to the incident, she had left the house of the accused due to some differences. Thereafter, it is alleged that accused came to know that she had joined with one Sarai Bilawal for illicit purposes and about 10 days back she returned home. Thereafter, appellant 4/5 days back brought her from Karachi to Village Ghulam Muhammad Jamali and on the day of incident brought her to the place of incident on motorcycle and after throttling committed her murder while suspecting her to be on illicit terms with said Sarai Bilawal and threw her into the Rohri Canal. Personal search of the accused was conducted by the SHO in presence of the mashirs. Copy of his CNIC and cash of Rs.400/- were also recovered from the possession of appellant. Appellant failed to produce the documents of the motorcycle and it was seized by the police under Section 550 Cr.P.C. Mashirnama of arrest and recovery was prepared in presence of the mashirs. Thereafter, accused and case property were brought to the Police Station where F.I.R was lodged on behalf of the State on 21.06.2017 at 2200 hours by the SHO vide Crime No.36 of 2017 for offences under Sections 302, 311, 201 PPC.

3. After registration of the FIR, investigation was carried out by the same police officer. During investigation, on 22.06.2017, I.O saw the dead body of the deceased, floating on the surface of the water of the canal. The dead body was taken out from the water and it was identified by her brother. SHO prepared mashirnama of the recovery of the dead body, so also mashirnama of place of incident, in presence of the mashirs. The dead body was shifted to

the hospital through PC Pervez for conducting the postmortem examination and report. I.O recorded 161 Cr.P.C statements of the police party, who were with the SHO during the patrolling as well as of the brother of the deceased.

4. On conclusion of the usual investigation, challan was submitted against the accused under Sections 302, 311, 201 PPC

5. Trial Court framed charge against the accused at Ex-02. Accused pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove the charge against the accused examined five(05) witnesses, who produced various documents and other items. Thereafter, prosecution side was closed.

7. Statement of the accused was recorded under Section 342 Cr.P.C, in which the accused denied all the allegations leveled against him by the prosecution and claimed false implication in this case. Accused stated that PWs are police officials and interested. Appellant raised plea that his wife had committed suicide by throwing herself into the Rohri Canal and when he came to know about the incident, he came from Karachi to Village Ghulam Muhammad Jamali. Accused neither examined himself on oath nor led any evidence in disproof of the prosecution allegations.

8. After appreciating the evidence on record, Trial Court convicted and sentenced the appellant as set out earlier in the

judgment. Hence, appellant has filed this appeal against his conviction.

9. The facts of this case as well as evidence produced before the Trial Court find the elaborate mention in the impugned judgment dated 31.07.2019 passed by the Trial Court, therefore, the same may not be reproduced here, so as to avoid duplication and un-necessary repetition.

10. Mr. Riazat Ali Sahar, learned Advocate for the appellant mainly contended that prosecution story is unnatural and unbelievable; that there are material contradictions in the evidence of the prosecution witnesses; that ocular evidence is contradictory to the medical evidence; that motive as set up by the prosecution has not been established at the trial; that all the incriminating pieces of evidence were not put to accused in his statement under Section 342 Cr.P.C for explanation. He lastly, contended that a single loophole in a case presented by the prosecution is sufficient to extend benefit of doubt in favour of the accused. In support of his contentions, he has relied upon the cases reported as ABDUL JABBAR and another v. The STATE (2019 SCMR 129) and HAJI NAWAZ v. The STATE (2020 SCMR 687).

11. On the other hand, learned Deputy Prosecutor General appearing on behalf of the State fully supported the impugned judgment. He contended that police officials had no enmity to falsely implicate the appellant in murder of his wife; that ocular account is corroborated by the medical evidence. However, learned D.P.G has

frankly stated that prosecution has failed to prove the motive at the trial and argued that appeal may be dismissed but sentence of death may be converted into life imprisonment.

12. We have heard the arguments of learned Counsel for the parties, gone through the entire evidence, which has been read out by the Advocate for the appellant, and impugned judgment with their valuable assistance and have considered the relevant law including the case law cited at bar.

13. As far the unnatural death of Mst. Sahib Khatoon is concerned, lady Doctor has deposed that on 22.06.2017 she received the dead body of deceased through PC Pervez for conducting the postmortem examination. The dead body was identified by the brother of the deceased. The Doctor started postmortem examination at 11:00 p.m. and completed at 12:00 a.m. On examination of dead body, Medical Officer found the following injuries:-

- “1. Tongue was swelling and with the marks of bitten by teeth.
2. Tongue was protruding out.
3. Mark of ligature were visible on the neck.
4. Body was decomposed 24 hours to 28 hours.
5. Bleeding was visible from the mouth, ear and nose.
6. Blisters were available all over the body.
7. Bruises were available on face and chest of dead body which indicates struggle.
8. Both eyes were edematous and with swelling.”

14. From the external as well as internal examination of the dead body of Mst. Sahib Khatoon, doctor was of the opinion that death of deceased was the result of strangulation caused by

Asphyxia. The duration between death and injuries was about 1.1/2 hours and duration between death and postmortem was 1.1/2 hour to 28 hours. Medical Officer produced such postmortem report at Ex-8/B. Unnatural death of Mst. Sahib Khatoon is not disputed by the defence Counsel. Trial Court has also come to the conclusion that death of deceased was the result of strangulation caused by Asphyxia. Finding of the trial Court requires no interference by this Court.

15. Now the crucial issue is whether the prosecution has succeeded to prove its case against the appellant? SHO Syed Pervez Shah (PW-02) had deposed that on 21.06.2017 he was posted as SHO P.S Pubjo. On the same day at 1730 hours, vide Roznamcha entry No.15, he alongwith his subordinate staff left for patrolling. When the police party reached at Water Supply near Manahro, SHO received information that one person was throttling the lady for committing her murder at Rohri Canal. Police party proceeded there and saw the present accused who was dragging the lady for throwing her into river and in presence of the SHO and police party, the lady was thrown into the canal. As no police official knew the swimming, as such, the lady could not be rescued. SHO has further deposed that accused was arrested by him in presence of mashirs, namely HC Abdul Latif and PC Altaf Hussain. Motorcycle of the accused was also seized for which he had no document. He lodged F.I.R on behalf of the State against the accused. During investigation on 22.06.2017 he visited the place of incident and found the dead body of deceased floating on the surface of the

water of the canal; it was taken out and the dead body was identified by the brother of the deceased. SHO referred dead body for postmortem examination. In cross-examination, he denied the suggestion for deposing falsely against the accused.

16. Abdul Latif (PW-03) has deposed that on 21.06.2017 he was posted at P.S Pubjo. On the same date, he under the subordination of SHO Syed Pervez Shah and other staff had left the police station for patrolling. During patrolling SHO received information that present accused was committing murder by throttling the deceased at the Inspection Path of Rohri Canal. Police party proceeded there and he saw that the present accused was throwing the dead body into the canal. Thereafter, accused was arrested in his presence. PW has denied the suggestion in cross-examination for deposing falsely against the accused.

17. Waryam (PW-1) has deposed that on 21.06.2017 SIP Syed Pervez Shah informed him that accused Aijaz has committed murder of his sister Mst. Sahib Khatoon. He went to the Rohri Canal alongwith his brother Kamal. On 22.06.2017, the dead body of his sister came on surface of water and he identified the dead body of his sister and it was shifted to Dolatpur Hospital for postmortem examination.

18. The question, therefore, is whether the evidence of the eye-witnesses / police officials is trustworthy, reliable and confidence inspiring, based on the particular facts and circumstances of the case. The story narrated by the police officials that they were on

patrolling duty and during patrolling they received spy information that appellant was committing murder of his wife by way of strangulation at the canal does not appeal to reason as to how a person would bring his wife on motorcycle to the canal for committing her murder in presence of the police officials. This aspect of the prosecution case does not appeal to reason, common logic, common sense or natural human conduct. SHO could not establish that on receipt of spy information he alongwith subordinate staff went to the place of occurrence, in the normal course police party was not supposed to be present at the place of incident. Police officials have failed to offer cogent, convincing and believable explanation, justifying their presence at canal. In this regard, reliance is placed upon the case of Mst. RUKHSANA BEGUM and others v. SAJJAD and others (2017 SCMR 596). SHO Syed Pervez Shah has deposed that they saw the present accused who pulled the lady and threw her into the river but police could not rescue her as no one knew the swimming. PW-03 ASI Abdul Latif has deposed that they reached at Inspection Path of Rohri Canal and saw that one person was throwing one female into the canal. Both the police officials have deposed that police had received information that the present accused was throttling a female at Inspection Path. In our considered view, ocular evidence is contradictory to the medical evidence. In the case of strangulation, normally the death occurs instantaneously, but in the present case, the probable time as per Doctor that elapsed between death and injury was 1.1/2 hour. This clearly shows that police officials had not witnessed the incident.

Otherwise, police officials were bound to rescue the deceased. The identification of dead body was also highly questionable. The Doctor has clearly stated that the dead body was completely decomposed and her features were not identifiable then the question here arises, as to how the brother of the deceased namely Waryam identified the dead body of the deceased. The offence under Section 302(b) PPC is punishable for death or imprisonment for life. The standard of proof in this case should have been far higher as compared to any other criminal case. It was, thus, desirable and even imperative that it should have been investigated by some other agency. Police, in this case, could not have been investigators of their own cause. Such investigation is woefully lacking independent character and cannot be made basis for maintaining the conviction in a case involving capital sentence, that too when it is riddled with many lacunas and loopholes, quite apart from afterthoughts and improvements as held in the case of ZEESHAN @ SHANI v. The STATE (2012 SCMR 428). Moreover, the Investigation Officer had received spy information on his cellular phone but we are unable to understand as to why Call Data showing the time of the receipt of the call from spy informer and location was not produced before the trial Court, in order to satisfy the Court that SHO had actually received spy information at the relevant time. No voice record was also produced. In this regard, reliance is placed upon the case of AZEEM KHAN v. MUJAHID KHAN (2016 SCMR 274).

19. The conduct of the police officials has been judged by us at the touchstone of Article 129 of the Qanun-e-Shahadat Order, 1984, which is reproduced below:-

“129. Court may presume existence of certain facts.-- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

20. The conduct of police officials at the time of incident was questionable. It is the settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eye-witnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused as held in the case of ABDUL JABBAR and another v. The STATE (2019 SCMR 129). Relevant portion is reproduced as under:-

“11. Having concluded in such a manner, the learned High Court still went on to maintain the conviction of the appellants under section 302(b)/34, P.P.C. while converting their sentence of death into imprisonment for life. We are afraid this approach of the learned High Court is a complete departure from the principles settled for administration of justice in criminal cases. It is the settled principle of law that once a single loophole is observed in a case presented by the prosecution much less glaring conflict in the ocular account and medical evidence or for that matter where presence of eye-witnesses is not free from doubt, the benefit of such loophole/lacuna in the prosecution case automatically goes in favour of an accused. At the cost of reiteration, it has been observed by us that, in a case, where the learned appellate court, after reappraisal of entire evidence available on record, has reached the conclusion that there is unexplained delay in lodging the FIR; the

presence of eye-witnesses is not established; there are irreparable dents in the case of the prosecution; the recovery is ineffective and is of no consequence; the ocular account is belied by the medical evidence; the motive behind the occurrence is far from being proved and almost non-existent, the said Court fell in gross error in maintaining the conviction of the appellants particularly on a capital charge. In these circumstances and after an independent evaluation of evidence available on record, we have no manner of doubt in our minds that the prosecution has not been able to prove its case against the appellants beyond reasonable doubt.”

21. Based on the above discussion, we have come to the conclusion that prosecution has failed to prove its case against the appellant and accordingly whilst extending the benefit of that doubt to the appellant, the appeals are allowed, conviction and sentence recorded by the Trial Court, vide judgment dated 31.07.2019, are set aside. Appellant Aijaz Ali S/o Haji Khan Khoso is acquitted of the charge, the confirmation reference is answered in negative and the appellant be released forthwith unless he is wanted in any other custody case.

22. The office of this Court shall send a copy of this judgment to Inspector General of Police, Sindh for taking action against the Investigating Officer of this case for conducting a defective investigation, in accordance with law.

23. Appeals are allowed and Confirmation Reference is answered in NEGATIVE.

JUDGE

JUDGE