# IN THE HIGH COURT OF SINDH AT KARACHI

**CR. APPEAL NO.751/2019**

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| Appellant | : | Muhammad Jauhar,<br>Through Mr. Atif Hanif Kashmiri advocate. |
| Respondent | : | The state,<br>Through Mr. Talib Ali Memon, Assistant Prosecutor General. |

Date of hearing : 01.04.2021.

Date of short order : 01.04.2021.

## JUDGMENT

**SALAHUDDIN PANHWAR, J.** Appellant has impugned judgment dated 17.10.2019, passed in S.C. Case No.251/2011 arising out of FIR No.4/2011 under section 302 PPC, PS Frere, Karachi, whereby he was convicted and sentenced to life imprisonment and to pay fine of Rs.3,00,000/- to legal heirs of deceased under section 544-A Cr.P.C. and in default thereof to suffer S.I. for six months more, he was extended benefit of section 382-B Cr.P.C.

2. Brief facts of the case are that complainant Latif Amin Shibli, lodged FIR that he was businessman and intended to admit his four years son Zauqh Nafees to Cadet College Abbotabad therefore left his son with one Muhammad Jauhar for getting tuition and preparation, for last two months his son was with said Muhammad Jauhar and during that period complainant had no complaint from Muhammad Jauhar or his wife Aisha, that these two persons restrained the complainant to meet with his son on pretext that as complainant intends to get his son admitted in Cadet college Abbatabad he would avoid to meet his son as due to such meetings son would remember his home and would not be prepared for entry test, on

06.01.2011 at 9.00 am when complainant let home he received phone call of his wife Mst. Nasreen that she was at beauty parlour and asked the complainant to come to the beauty parlour as their son was in Jamiyat Hospital with critical conditions, such information she had received from Mst. Aisha; that complainant and his wife reached the hospital where Muhammad Jauhar and his wife Mst. Aisha were present and his son Zaugh Nafees was lying on bed where doctor informed that child was brought in dead condition; complainant alleged that on examination he found that his son was injured from head to the toe thus he asked about his condition from Muhammad Jauhar and his wife Mst. Aisha as to what had happened to his son, both of them failed to give any reply, hence complainant lodged FIR of murder of his son due to torture caused by Muhammad Jauhar and his wife Mst. Aisha.

3. During the course of investigation both nominated accused were arrested, wife of complainant Mst. Nasreen Khan was also found involved in murder therefore she was also made accused but could not be arrested and later declared to be proclaimed offender. Charge was framed against accused to which they pleaded not guilty and claimed trial. Prosecution examined PW-1 Teresa, school teacher of deceased boy at exhibit 5, PW-2 SIP Wilayat Hussain at exhibit 6 who produced entries No.36 and 62 at exhibits 6/A and 6/B, inquest report and memo of dead body inspection at exhibits 6/C and 6/D, certificate of cause of death at exhibit 6/E, letter to MLO at exhibit 6/F, receipt of handing over dead body at exhibit 6/G, statement u/s 154 CrPC at exhibit 6/H. Accused Mst. Aisha expired and such statement of SIP Umeed Ali who conducted enquiry in this regard was recorded at exhibit 7 and proceedings against her were abated vide order dated 01.04.2017. Complainant expired later on; Mst. Samina Arzo left her job from the school and shifted to some unknown place. PW-3 Dr. Suresh

Kumar MLO (exhibit 9), PW-4 I//O SIP Muhammad Iqbal (exhibit 7), PW-5 Dr. Pervez Ahmed Makhdoom (exhibit 8) and PW-6 MLO Dr. Afzal Ahmed (exhibit 7) were also examined.

4. Trial court framed and answered issues as under:-

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| 1 | Whether on 6.01.2011 at about 1515 hours inside house situated in Gali No.17, Punjab Colony, Karachi, deceased boy Zaug Nafees sustained injuries due to which he expired his unnatural death? | In affirmative |
| 2 | Whether on the aforesaid date, time and place, present accused Muhammad Jauhar alongwith his wife/expired accused Mst. Aaisha caused murder of deceased boy Zaug Nafees aged about 4 years while torturing him, as alleged? | In affirmative |
| 3 | What offence, if any, has been committed by the present accused? | Answered accordingly |
| 4 | What should the order be? | Present accused convicted u/s 265-H(2) Cr.P.C. |

5. I have heard learned counsel for appellant and learned Assistant Prosecutor General Sindh. Learned counsel for appellant has relied upon 2008 SCMR 1221, 2016 SCMR 274, 2020 SCMR 128, 2010 SCMR 1029, 2010 SCMR 846, 2017 PLD Lahore 737, 2019 PLD 527, 2015 PCrLJ 1153 and 2020 YLR 470.

6. The perusal of the available record as well the judgment of conviction has compelled me to *first* insist upon the settled principles of ***Criminal Administration of Justice*** which every Criminal Court has to keep in mind while evaluating the evidences for recording the concluding judgment (s) which are:-

> *Asia Bibi v. State* PLD 2018 SC 64
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> 41. All these contradictions are sufficient to cast a shadow of on the prosecution's version of facts, which itself entitles the appellant to the right of benefit of the doubt. It is a well settled principle of law that for the accused to be afforded this right of benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainity.

> If a single circumstance creates reasonable in a prudent mind about the apprehension of guilt of an accused then **he/she sall be entitled to such benefit not as a matter of grace and concession, but as of right....**
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> *Azeem Khan & another v. Mujahid Khan & ors* 2016 SCMR 274
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> 32. It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption **in the absence of strong evidence of unimpeachable character and legally admissible one**. Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In the event the justice would be casualty.
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> In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same………… To justify the inference of guilt of an accused person, the circumstantial evidence must of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, **it would be highly dangerous to rely upon the same by awarding capital punishment**. The better and safe course would be not to rely upon it in securing the ends of justice.

Having reaffirmed the well-settled principles on which the ***Criminal Administration of Justice*** rests, I would say that the instant case was an unseen incident and was / is entirely based on ***circumstantial evidence*** and ***medical evidence.*** Such fact shall stand clear from referral of the relevant portion of the impugned judgment *itself* which reads as:-

> Page-12 Para-4 :-
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> "Perusal of evidence brought on record by the prosecution shows that there is eye witness of the alleged murder of the deceased, **however, the prosecution has relied upon the circumstantial and medical evidence."**

I, however, find nothing to agree with view of learned trial court judge that there had been any ***eye-witness*** of the alleged murder because the available witnesses, shown in the charge sheet (challan) does not show that any one of them ever claimed to have seen the incident.

7. Here, it is also worth reminding with reference to available record that the claim of leaving the deceased child in the custody of the accused/convict was entirely based on words of the complainant; except that there had not been any single examined witness, claiming that the deceased child was seen in custody of the accused / convict or that he (deceased child) was residing with the accused / convict for studying / tuition purpose. Such position shall stand evident from referral to examination-in-chief of the examined witnesses:-

> **PW-1 Terasa:**
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> "The child name Zouq-e-Nafees son of Lutuf Amin Shibli were (was) student in the school ………… under my supervision being its headmistress. ….. Usually said Zouq-e-Nafees were (was) being brought in the school in the first shift at about 11.00 and his school timing usually were in the evening **therefore I enquired the matter and called the mother of Zouq-e-Nafees**. I made telephone calls to mother of baba but she did not turn up and responded that due to her preoccupations she will unable to attend me in the school. Baba Zouq-e-Nafees were (was) found fit in his health, however, he were found under inferior complex."
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> **PW-2 SIP Willayat Hussain.**
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> "On 06.01.2011 I was posted as SIP at PS Frere. On the same day I was duty officer from 0800 hours to 2000 hours. MLO Raja Afzal got noted that a baba aged about 04 years has been brought into hospital in a dead position and further directed to depute a Sr. Police Officer to attend hospital. I made entry No.36 and went to JPMC Karachi. I found baba Zooq-e-Nafees lying in mortuary. I initiated 174 Cr.P.C proceedings, prepared memo of dead body, got postmortem through MLO Dr. Raja Afzal and thereafter handed over the dead body of Baba to Uncle of Zooq-e-Nafees. MLO reserved the cause of death and handed me over 3 jars in sealed position. I intimated the father of deceased Baba Zooq called him at hospital **but he refused to attend me on the pretext that he was ill.** I kept the enquiry pending and on 07.01.2011 I reached at the bungalow of father of Zooq-e-Nafees and recorded 154 Cr.P.C. statement of complainant. I came to PS incorporated the contents of 154 Cr.P.C statement in the FIR book and registered the same for the offences U/s 302/34 PPC against Mst. Aysha wife of Muhammad Jauhar and Muhammad Jauhar."

In the instant case, it is an undeniable position that complainant Lutuf Amin Shibli was not examined as he, reportedly, died hence his FIR was brought on record wherein he (complainant) had claimed that he had left his son (deceased child)

custody of the accused / convict. At this point, it is material to refer relevant portion of the case of <u>*Muhammad Zaman v. State*</u> 2014 SCMR 749 (Rel. Page-784) which reads as:-

> "It is for this reason that in its wisdom, repeatedly this Court has held that F.I.R. is not a substantive piece of evidence, but simply an information about the occurrence laid efore the law enforcing agecy to set the law into motion for the purpose of investigation. Therefore, narration of facts in the FI.R cannot be considered as a pice of testimony on that premise. At best F.I.R. can be considered as a piece of docuent to which the complainant, when he appears in the wintess box, can be confronted with its contents. In case any other course is followed, it will amount to laying very dangerous precedent in favour of the accused party. This legal position has been very aptly discussed and recorded by one of the member of this Bench (Ejaz Afzal Khan, J.) in the case of <u>*Muhammadullah v. The State*</u> (PLD 2001 Peshawar 132) in the following words:-
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> > "4. First of all we examine the F.I.R. and its probative value. As is clear from its content it was recorded on the basis of the statement made by the appellant. There is no cavil and quarrel with the proposition that the F.I.R. itself is not a substantive piece of evidence unless its content is affirmed on oath and subjected to the test of cross examination. It, as for as the provisions of section 154 of the CrP.C., Articles 140 and 153 of the Qanun-e-Shahadat Order, are concerned is a previous statement which can be used for the purpose of contradicting and corroborating its maker. So long as it is not proved in accordance with the law mentioned above, it is, as such, no evidence and, therefore, cannot be taken as a proof of anything stated therein. <u>But when it is based on a statement made by an accused, as in this case, before the police which tends to incriminate him with reference to the offence he is charged with, in that event</u>, <u>**it being inadmissible in evidence by virtue of Article 38 of the Qanun-e-Shahadat Order, is not even worth the paper it is written on, hence has to be left entirely out of account**</u>."

The above legal position seems to have entirely been ignored by the learned trial Court while believing that the accused / convict was having custody of the child at time of his (child's) death.

8. Be that as it may, even the FIR shows that remaining of the complainant (father and mother of the child) away from the child was because of preparation till admission of their child in **Cadet College Abbottabad** but per the PW-1 Terasa the child was got admitted in Prep. by his own father i.e complainant Lutuf Umim Shibli so is evident from admission made by such witness in her cross-examination as:-

> "Baba Zouq-e-Nafees were seen by me first time when he arrived alongwith his father at the time of admission in Prep."

She, even, had stated in her examination-in-chief that :

> "Usually the said Zouq-e-Nafees were being brought in the school in the 1st shift at about 11.00 a.m and this school timing usually were in the evening therefore, **I enquired the matter and called the mother of Zouq-e-Nafees. I made telephone calls to mother of baba but she did not turn up and responded that due to her preoccupations she will unable to attend me in the school."**

If both, examination-in-chief and cross-examination are read together, the same leaves nothing ambiguous that the child was being managed and looked after *directly* by his parents (mother and father). This was also not properly appreciated by the learned trial Court.

9. Be that as it may, there is another aspect which brings serious clouds over the conduct and attitude of the complainant Lutuf Umim that *later* his own wife was found involved in the murder but he never produced his wife. The relevant portion of the judgment (impugned) shall, *itself,* make it clear which reads as:-

> (Page-11 Para-3)
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> "The prosecution also examined investigating officer SIP Muhammad Iqbal at Ex.10, who deposed that on 20.06.2011, he was serving at PS Gizri and was given FIR NO.04/2011 U/s 302 PPC of that PS along with police papers including interim charge sheet by **SIP SIPMuneer Hussain Chandio** (he was never examined) on transfer of investigation of case. He contacted complainant Lutuf Ameen on phone and asked him to produce his witnesses in the matter before him but he told that he was ill. **He did not attend even after few days hence he issued him a notice U/s 160 Cr.PC, and sent it through courier service. He then visited the bungalow of complainant Lutf Ameen on 13.08.2011 but he did not meet him although watchman told them about his arrival**. After one week complainant met him and got his statement recorded wherein **he exonerated his wife accused Nasreen from the offence.** The complainant had also filed a writ petition before High Court of Sindh wherein he was directed to produce his wife in the trial Court. .."

*Prima facie,* the complainant, a father of murdered child, appeared to be not interested in the investigation of the murder of his own child; the mother of the murdered child never caused appearance although per complainant's FIR she was *first* informed about arrival of child in hospital in serious condition and they both (complainant and his wife) had gone to hospital.

10. It is also matter of record that investigating office of the instant case namely SIO / SIP Muneer Hussain Chandio was never examined by the prosecution who, while investigating, had found wife of the complainant involved in the matter. Such failure on part of the prosecution was / is not to be taken as *light* because it is always the investigation and not the FIR which matters. The prosecution (investigating agency) never enjoys a liberty to name anybody as ***culprit / accused*** unless it (investigation agency) collects such material. In the case of *Sughran Bibi v. State* PLD 2018 SC 595 it is held as:-

> Rel. P 628
> …Rule 25.2(3) which reads as under
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> > "(3) It is the duty of an investigating officer to find out the truth of the matter under investigation. **His object shall be to discover the actual facts of the case and to arrest the real offender or offenders**. He shall not commit himself prematurely to any view of the facts for or against any person"

Further, the PW-4 SIP Muhammad Iqbal, *prima facie,* conducted no investigation rather he continued his efforts in approaching the complainant to bring his witnesses who, however, produced **none.** These glaring aspects, causing serious dents towards involvement of the accused / convict, were never appreciated by the learned trial court while recording the conviction. The failure in bringing the investigating officer was / is always to reflect against the prosecution but this, *too,* was not appreciated by the learned trial court.

11. Be that as it may, the learned trial court while believing the custody of the child with the accused / convict placed reliance upon medical officers. The relevant portion of impugned judgment is reproduced hereunder:-

> "Evidence of PW-03 Dr. Suresh Kumar examined at Exh.09, discussed in point No.01, is also necessary in this point as said doctor specifically deposed that on 06.01.2011, he was serving as Casualty Medical Officer at Jamiyat Hospital Dehli Colony, Karachi when at about 1100 hours one boy aged about 08 years identified as Zauq Nafees was brought by a couple who did not disclose their names however male claimed himself to be father of the child and told that mother fo the child was coming. When he saw the child, he found that he was already dead having injuries on his head and trunk.
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> In order to corroborate evidence of said PW-03 Dr. Suresh Kumar in respect of bringing the deceased child to the hospital by accused Jauhar, the prosecution has also examined PW MLO Dr. Afzal Ahmed, who also deposed that on 06.01.2011, he was serving as MLO Jinnah Hospital Karachi when at about 04:30 P.M, dead body of a child namely Zauq Nafees son of Lutf Ameen Shibli aged about 04 years was brought to him by Muhammad Jauhar. Besides this, said MLO deposed regarding injuries which were found during examination of dead body fo said child, which has earlier been discussed in point No.01."

The above evidence (s) show that complainant and his wife, till such time, never accompanied the deceased child, however, the statement of the complainant (154 Cr.P.C.) speaks otherwise. The relevant portion thereof reads as:-

> "…..However, days remained going and on 6-1-2011 around 9:00 AM, I left my home and when I was coming back to home, my wife Nasreen called me on phone and told that she is at Beauty Parlor so reach there because Ayesha informed her that health of your son Zouq Nafees has been deteriorated and shifted at Jamiyat Hospital. **I picked my wife from Beauty Parlor and reached at Jamiyat Hospital where Jouhar and his wife Ayesha were present in emergency ward and my son Zouq Nafees was lying on bad. I asked both of them what has happened to my son Zouq Nafees and before their reply, doctor asked me that this child has been brought in dead condition. After listening, these words we shocked and did not understand further. However, after some moments, we witnessed our son Zouq Nafees was in injured condition from head till feet fingers.** My wife and me asked from Muhammad Jouhar and his wife Ayesha that what happened to our son Zouq Nafees but they did not give any reply. Hence, my complaint is against Muhammad Jouhar and his wife Ayesha on killing my son by violence. I do report and action may be taken. Heard statement & found correct."

Above statement leaves nothing ambiguous that the complainant and his wife themselves had reached there at Jamiyat Hospital but as per PW-2 SI Willayat Hussain they both were not found available at Jinnah Hospital. The consequence to this could be nothing but that either the complainant and his wife did not reach at Jamiyat Hospital else they must have remained with their child during whole process conducted at Jinnah Hospital because parents can't be believed to part from their dead child from such point of time. It is also surprising that PW Dr. Suresh

Kumar as well MLO Dr. Afzal Ahmed never claimed presence of complainant and his wife at hospital (s) which, otherwise, was specifically claimed by the complainant. Further, it is also matter of record that as per evidence of PW-2 SIP Willayat the relatives of the deceased child had reached at Jinnah Hospital where the accused / convict or his wife were not available. The admission, made during his cross, makes it clear as:-

> "Before my arrival at hospital the relatives of Baba Zooq-e-Nafees were in hospital. **Nobody from the accused were there."**

It is also worth adding that during whole proceedings, conducted at Jinnah Hospital, the witnesses or identifier of the dead body of child are not the accused / convict or his wife, therefore, words of the MLO Dr. Afzal to the effect that dead body of child was brought by accused / convict and his wife were / are never safe to be believed for holding conviction on a capital charge. This aspect was entirely ignored by the learned trial court judge while recording conviction. The prosecution, I am of the considered view, never successfully established circumstantial evidence which could prove that accused / convict was / is guilty of offence because there exists an unbroken chain of circumstances against him proving his guilt. In absence thereof, it is never safe to record conviction on a capital charge. Guidance is taken from the case of *Azeem Khan & another v. Mujahid Khan & Ors* 2016 SCMR 274 that:-

> "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."

Even otherwise, in the case of *Nazeer Ahmed v. State* 2016 SCMR 1628 it is held as:-

> "4. It may be true that when a vulnerable dependant is done to death inside the confines of a house, particularly during a night, there some part of the onus lies on the close relatives of the deceased to explain as to how their near one had met an unnatural death but where the prosecution utterly fails to prove its own case against an accused person **there the accused person cannot be convicted on the sole basis of his failure to explain the death**. These aspects of the

> legal issue have been commented upon by this Court in the cases of *Arshad Mehmood v. The State* (2005 SCMR 1524), *Abdul Majeed v. The State* (2011 SCMR 941) and *Saeed Ahmed V. The State* (2015 SCMR 710)."

Such principle was also not appreciated by the learned trial court Judge.

12. Now there remains the medical evidence. For this, it would suffice to refer enunciated principles of law regarding applicability of the **medical evidence** which, stood reiterated in the case *Ghulam Qadir v. State* 2008 SCMR 1221 that:-

> "So far as medical evidence is concerned, it is settled law that the medical evidence may confirm the ocular evidence with regards receipt of injuries, nature of the injuries, kind of weapons, used in the occurrence **but it would not connect the accused with the commission of the offence**."

In such eventuality, the learned trial Court was required to keep in view the legal position which, stood affirmed in the recent judgment by honourable Apex Court in the case of *Asia Bibi v. State* PLD 2018 SC 64 that:-

> 29. ... There is no cavil to the proposition, however, it is to be noted that in absence of any plausible explanation, **this Court has always considered the delay in lodging of FIR to be fatal and castes a suspicion on the proseuction story, extending the benefit of to the accused**. It has been held by this Court that a FIR is always treated as a cornerstone of the proseuction case to estabish guilt against those involved in a crime ; thus, it has a significant rle to play. If there is any delay in loging of a FIR and commencement of investigation, it gives rise to a doubt, **which, of course, canot be extended to to anyone else excpet to the accused**. Furthermore, **FIR lodged after conducting an inquiry losses its evidentiary value**.
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> 47. .. **The mere presence of the appellant as well as the witnesses at the place of alleged occurence alone is not sufficient to prove the occurence of the offence**. ….

Even otherwise, mere taking of a child (injured or even dead to hospital alone) shall never be sufficient to hold him guilty of murder / injuries of such person, taken to hospital, unless the other evidences, connecting the person, with such injuries / death are brought on record by the prosecution

while discharging it bounden obligation i.e ***proving guilt by unimpeachable evidence which, too, beyond reasonable doubts.*** The case of prosecution against the accused / convict was / is full of dents hence was never strong enough to hold capital punishment.

13. These had been the reasons for the short dated 01.04.2021 whereby captioned appeal was allowed.

**J U D G E**

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