IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

Criminal Appeal No.D-223 of 2019
[Confirmation Case No. 53 of 2019]

***Before*:**
Mr. Justice Muhammad Karim Khan Agha
Mr. Justice Khadim Hussain Tunio

Appellant:	Ghulam Hussain through Mr. Farhad Ali Abro, Advocate.
Respondent:	The State through Shewak Rathore, DPG Sindh.
Date of hearing:	16.11.2023
Date of decision:	23.11.2023

J U D G M E N T

KHADIM HUSSAIN TUNIO, J.- Through instant criminal appeal, the appellant has challenged the judgment dated 03.12.2019, passed in S.C No. 262/2018 ("**impugned judgment"**), by the learned Additional Sessions Judge-I (MCTC), Shaheed Benazirabad ("**trial Court**") emanating from FIR No.91/2018 registered at PS B-Section Nawabshah for the offence punishable under sections 302, 376 and 449 of the Pakistan Penal Code ("**PPC**"). By way of the impugned judgment, the appellant was convicted for the offences punishable under section (i) 302(b) PPC for murder and 376 PPC for rape and sentenced to death on both counts separately (conviction for murder set aside with subsequent acquittal due to compromise) with fine of Rs. 200,000/- (rupees two lac) on each count to be paid to the legal heirs of deceased Shumaila as compensation u/s 544-A of the Criminal Procedure Code ("**CrPC**") and in default whereof, the appellant was to undergo simple imprisonment for six months,

and (ii) 449 PPC for criminal trespass and sentenced to rigorous life imprisonment with fine of Rs. 200,000/- (rupees two lac), defaulting in payment whereof he was to suffer further simple imprisonment for six months. The appellant was extended benefit of section 382-B CrPC.

2. The appellant Ghulam Hussain stands charged with the death and murder of a nine year old girl named Shumaila ("**deceased**") daughter of Muhammad Niaz, the complainant in this case. Shumaila's mother, Mst. Zainab served as a nurse in Indus Hospital and was at work on the fateful day whereas the complainant along with his brother Muhammad Hussain had left for some work of their own, leaving their daughter alone at home. On their return, they heard screams of their daughter from the house and when they rushed back, they were greeted with the barbaric sight of their daughter left uncovered on the ground with the appellant allegedly overpowering her who on seeing the complainant approach slashed Shumaila twice with the knife, ending her life and then escaping.

3. Following the lodging of the FIR, investigation ensued where the Investigating Officer examined the dead body in presence of mashirs; got the postmortem conducted, visited the place of incident, took blood stained clothes of the deceased and blood stained earth recovered from the place of incident along with a quilt (*rilhi*). He arrested the appellant Ghulam Hussain, recovered his blood stained clothes along with the blood stained knife and then the appellant Ghulam Hussain's confession statement before the concerned Judicial Magistrate was recorded.

4. Following conclusion of the investigation, challan was submitted before the competent Court against the appellant where cognizance was taken and then a formal charge was framed to which he pleaded not guilty and claimed trial. In order to substantiate the charge, prosecution examined in all eight

witnesses namely, Dr. Aneela (conducted postmortem of deceased), Dr. Aftab Ahmed (obtained DNA samples), complainant Muhammad Niaz, witness Muhammad Hussain, SIP Khan Muhammad (investigating officer), Tapedar Mehar Ali, Mashir Muhammad Riaz and lastly the Judicial Magistrate responsible for recording confessional statement of the appellant Safdar Ali Jatoi, thereafter prosecution closed its side.

5. Statement of accused u/S. 342 CrPC was recorded, in which he denied the case of prosecution, claimed his false implication and shifted the blame on one Asghar, nephew of the complainant, claiming he had been caught in an improper position in their house, prior in time.

6. After hearing the respective parties, learned trial Court convicted and sentenced the appellant, in the manner provided above, which stands challenged by way of this appeal.

7. The arguments of the learned counsel for the appellant are two-fold. The first part of his contentions regarding merits of the case are limited towards the confessional statement of the appellant which he claims was on oath and cannot be relied on. To support this, he cited the case of Taj Wali Shah v. The State (2014 PCrLJ 323), Muhammad Israr and another v. The State (2002 PCrLJ 1072) and State v. Asfandyar Wali and 2 others (1982 SCMR 321). The second part of his contentions related to the belated recovery of the crime weapon from an open place, which he contends, cannot be relied upon either and besides that, he states that the witnesses are all interested and that the medical evidence did not support the prosecution case. He relied on the case of Muhammad Yousaf alias Fayyaz Hashmi v. The State (2003 YLR 1327) and Muhammad Shahid and others v. The State and others (2016 YLR Note 72) in support.

8. Conversely, learned DPG Sindh supported the impugned judgment while stating that prosecution established the case against the appellant by ocular, medical and circumstantial evidence, as such, learned trial Court rightly

convicted and sentenced the appellant. However, learned DPG confirmed that the parties had compromised the matter of murder. Nonetheless, in support of his assertions, while supporting the impugned judgment, he cited the case reported as Jumaraz v State (2021 YLR 955).

9. Submissions of the parties were heard by us and record was perused with their assistance.

10. The prosecution case, as set out in the FIR finds support by (i) medical evidence i.e. the post-mortem report proving the factum of injuries, the forensic examiner's report proving the commission of rape with the minor, then (ii) circumstantial evidence in the shape of recovery of the crime weapon on being pointed out to the police by the appellant, the recovery of blood stained clothes of the deceased and then appellant, both found to be covered by the blood of the minor, then (iii) ocular account as furnished by the witnesses namely Muhammad Niaz and Muhammad Hussain, and lastly (iv) the confessional statement. It would be prudent to first dispense with the contention raised by the counsel for the appellant regarding the confession being on oath. There is no cavil to the proposition that due care and caution is to be exercised and often no material reliance is to be given to a confessional statement that is recorded after oath being tendered to an accused *by the court*. The expression by the court italicized for emphasis earlier can be better explained by a perusal of the controlling provision provided in the Oaths Act, 1873 and a perusal of the confessional statement which will be translated in English, as closely as possible, below:-

> "I recognize Allah as omnipresent and omniscient and in all my senses, without any duress, admit my guilt. Yes, I committed the crime and I seek forgiveness from Allah. That is all I have to say."

Section 8 of the Oaths Act, 1873 provides that it is for the Court to tender these oaths to any party of the proceedings, therefore

the appellant stating something on oath on his own volition while confessing his guilt has no bearing on the case nor shall the victim's family suffer for such an ambiguity. While there can be no cavil to the fact that the phraseology adopted by the appellant while confessing his guilt strongly suggests that he stating everything on oath, this oath was not administered to him by the Judge and even during cross-examination, PW-8 Safdar Ali Jatoi, the Judicial Magistrate, denied such claims. Assuming arguendo, if this Court concludes that the confession was on oath, it would not be an alien concept to still rely on the same if it is found to be truthful and supported, strongly, by other pieces of evidence.[1] However, with certainty and peace of mind, we find that the confessional statement of the appellant is true and there certainly was no prejudice caused to the appellant at the trial. Even if this confessional statement is thrown out, the complainant's deposition alone is convincing, to a sufficient degree, to hold the appellant guilty of the offence and even his statement alone can be considered sufficient to warrant conviction.[2]

11. Now coming to the contention of the counsel for the appellant regarding the eye-witnesses being interested, this assertion was made on the basis that the complainant is the father of the minor whereas the other eye-witness was her uncle and brother of the complainant. Mere relationship with the deceased is ***never*** a ground to discard otherwise trustworthy evidence provided that there is no ill will between the witnesses and the accused; *Nasir Iqbal v State*[3]. If anything, the relationship of the complainant with the deceased, of a father and daughter, is a strong presumption against the appellant as

[1] See Nazeer alias Wazeer v. The State, PLD 2007 SC 202
[2] See Niaz-ud-Din v. The State, 2011 SCMR 725
[3] 2016 SCMR 2152

no father can reasonably be expected to implicate someone falsely in the murder of his daughter.[4]

12. Besides the ocular evidence and confessional statement, the investigation officer also recovered the crime weapon viz. the knife which was recovered after it was pointed out by the appellant. Learned counsel for the appellant asserted that the recovery was affected after considerable delay as such could not be given any importance. This assertion is incorrect because it would be illogical to think that the police just came across the crime weapon which was found to have blood stains from the deceased. In a rather similar situation in a case involving a missing child, albeit with respect to the discovery of the body and not the crime weapon, the august Supreme Court in the case of *Abdus Samad v State*[5] observed that:-

> "... but accepting the fact that the remains were found from a very lonely place where no person would ordinarily go to search for clues to the child missing from the town four miles away, a reason has to be found why the Police went to the place at all, and no other reason is offered than that the accused himself led them to that place."

13. Besides the crime weapon, the clothes of the appellant were recovered by the investigation officer which were also found to be stained with the blood of his victim. Then the DNA report which suggested that the appellant was a possible contributor of the semen sample collected after the medical examination of the minor and then the post-mortem which too corroborates the version as set out in the FIR. These disparate evidentiary elements coalesce to form an indomitable case against the appellant, leaving no room for entertaining a possibility of his innocence or substitution. The absence of motive is nothing but another testament to the barbaric, lustful and insufferable nature of the appellant. In such like cases of

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[4] See Islam Sharif v. The State (2020 SCMR 690) and Shamsher Ahmed v. The State (2022 SCMR 1931)

[5] PLD 1964 SC 167, authored by A.R Cornelius, C.J (as his lordship then was)

rape with minor victims, motive often plays a negligible role as these crimes are driven by lust and passion, not by some hatred. The defence plea taken by the appellant is that the victim had been found along with her cousin namely Asghar in "compromised positions" which is a deplorable attempt by the appellant, left unproven.

14. Now for the last consideration, only for the safe administration of justice, of the possible conversion of death sentence to the alternative i.e. life imprisonment in light of the compromise between the parties. Although the prosecution case is strongly structured, viewed from every angle suggesting the appellant's culpability, the only mitigating circumstance available on the record is the compromise between the parties as the appellant has been forgiven for the sake of the Almighty and as such his conviction u/s 302(b) PPC has been set aside. In the case of *Ghulam Mohiuddin v State*[6], it was observed by the august Supreme Court that even a single mitigating circumstance can be sufficient for converting a death sentence to life imprisonment while placing emphasis on respect for human life, as far as possible, which sadly the appellant did not have. Nonetheless, whether compromise between the parties could be taken as a mitigating circumstance or not has been answered positively by the august Supreme Court already.[7] Similarly, even an incomplete compromise was held to have relevance in a case for reduction in the case of *Muhammad Amin v State*[8] while in the case of *Muhammad Nawaz v State,*[9] again compromise, although not directly accepted as a mitigating circumstance, was made basis for reduction in sentence. A long line of precedents follow

[6] 2014 SCMR 1034
[7] See Kareem Nawaz Khan v. The State, 2019 SCMR 1741
[8] 2016 SCMR 116
[9] PLD 2014 Supreme Court 383

suit where compromise has been taken as a mitigating circumstance to convert death sentences to life imprisonment.[10]

15. The prosecution has, beyond any reasonable doubt, proven the allegations that it raised against the appellant; of raping and murdering young Shumaila. Following the above discussion, all the remaining convictions awarded to the appellant Ghulam Hussain are sustained, the impugned judgment is upheld however with modification to the death sentence awarded to Ghulam Hussain u/s 376 PPC which is, pursuant to the above discussion, converted to life imprisonment with benefit of S. 382-B CrPC being maintained. As a direct consequence, captioned criminal appeal is disposed of in the above terms and the death reference filed is answered **NEGATIVE**.

JUDGE

JUDGE

Hyderabad
Dated: __.11.2023

[10] See Tariq Mehmood v. The State (2011 SCMR 1880), Muhammad Anwar v. The State (2008 SCMR 987), Fatima Bibi v. Mahmood Hassan (1998 SCMR 1921) and Abdul Rehman v. The State (1989 SCMR 176).