Rape not proven: murder proven by Confession 632

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Before:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

Cr. Jail Appeal No.D- 18 of 2014
[Confirmation Case No.06 of 2014]

Muhammad Wajid

Versus

The State

Appellant Muhammad Wajid	through Mian Taj Muhammad Keerio Advocate
Respondent the State	through Miss Safa Hisbani, A.P.G. Sindh
Complainant Muhammad Javed	through Miss Safa Hisbani, A.P.G. Sindh
Date of hearing	22.06.2021
Date of judgment	29.06.2021

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.-This criminal jail appeal is directed against the judgment dated 28.01.2014, passed by learned IInd Additional Sessions Judge, Hyderabad, in Sessions Case No.57 of 2012 (Re: The State V Muhammad Wajid), emanating from Crime No.61 of 2011, registered at Police Station Fort Hyderabad, under sections 302 / 376 PPC, whereby the accused / appellant has been convicted u/s 302(b) PPC and sentenced to death as Ta'zir, however, subject to confirmation by this Court. He was also sentenced to life imprisonment u/s 376 PPC. He was also directed to pay compensation of Rs.200,000/- to the heirs of the deceased. In default thereof, the appellant shall suffer simple imprisonment for six months more. He was also extended the benefit of section 382-B Cr.P.C, if permissible in the circumstances.

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2. The facts of the prosecution case as stated in the F.I.R, registered by complainant Muhammad Javed at Police Station Fort Hyderabad are that, on 17.12.2011 at 06:45 p.m, Baby Malaika aged about 5½ years left the house for purchasing something. On the way, however, she was taken away by accused / appellant Muhammad Wajid to his house; there she was raped and then killed by the accused / appellant. Then accused / appellant threw her dead body out of his house. Subsequently, the dead body was seized and brought at the hospital for examination. According to medical evidence, the deceased lost her life due to asphyxia and respiratory failure. The swabs were taken out and sent for chemical examination in order to ascertain if the deceased was raped before her death. Thereafter, complainant lodged FIR.

3. Police arrested the accused / appellant and after usual investigation, submitted the challan before the concerned court. After completing necessary formalities, learned trial court framed charge against the accused / appellant, to which he pleaded not guilty and claimed trial.

4. In order to prove its case the prosecution has examined 07 witnesses, who exhibited numerous documents and other items and thereafter prosecution side was closed. The statement of the accused / appellant was recorded under Section 342 Cr.P.C in which he denied the allegations leveled against him and claimed his false implication due to enmity. He also examined himself on oath however, he did not call any DW's in support of his defence case.

5. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the accused / appellant as mentioned earlier in this judgment vide Judgment dated 28.01.2014 hence the appellant has filed this appeal against his conviction.

6. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 28.01.2014 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

7. Learned counsel for the appellant has contended that he is innocent of any wrong doing and that he has been falsely implicated in this case by the complainant party on account of enmity; that there was an unexplained delay of over 24 hours in lodging the FIR by the complainant during which period a cooked up case was made against the appellant by the complainant; that there is no eye witness to the murder

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which was an unseen incident; that it was not possible for PW 2 Muhammed Nasir who was the last seen witness to have identified the appellant as it was too dark and that he was a put up witness; that the confessional statement of the appellant was tutored, is not supported by the medical evidence, is not in line with the prosecution case and also suffers from many procedural defects and as such it cannot be relied upon; that the medical evidence cannot be believed; that the cause of death is unknown as no post mortem was carried out on the dead body; that the chemical report was not put to the appellant at the time when his S.342 Cr.PC statement was recorded and thus no reliance can be placed on it and for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on the cases of **Muhammad Ismail and others V The State** (2017 SCMR 898), **Mehmood Ahmad and 3 others V The State and another** (1995 SCMR 127) and an unreported judgment passed by the Honourable Supreme Court of Pakistan in **Cr. Appeals No.24-K, 25-K** and **26-K of 2018**.

8. On the other hand learned Addl. Prosecutor General who was also representing the complainant on his instructions has fully supported the impugned judgment and contended that the delay in lodging the FIR has been explained; that it is a case of circumstantial evidence whereby the prosecution has proved its case beyond a reasonable doubt against the appellant through the appellant's judicial confession which was made voluntarily and was truthful, is line with the prosecution case and was carried out in accordance with law and can be relied upon; the last seen evidence; the medical evidence; the recovery of the dopata from the house of the appellant and as such the prosecution had proved its case beyond a reasonable doubt against the appellant and as such his appeal should be dismissed and his conviction and sentence maintained. In support of her contentions she has placed reliance on the case of **Imran Ali V The State** (2018 SCMR 1372).

9. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant's counsel, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

10. Based on our reassessment of the evidence of the PW's, especially the medical evidence of PW 4 Dr. Shahida we find that the prosecution has proved beyond a reasonable doubt that on or about 17.12.2011 at 18.45 hours and 18.12.2011 at 8.30 am hours at Street Mukhi Narrandes Bolshi Mohalla Hyderabad minor baby Malaika aged about 5 years and 6 months (the deceased) was murdered due to cerebral

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insufficiency (due to lack of blood supply into brain) that caused asphyxia and respiratory failure, caused by pressure of both nestles and compression of main blood vessels alongwith neck, that led to suffocation and ultimately caused death in ordinary course of nature. In layman's terms she died on account of suffocation.

11. The appellant apart from the murder of the minor baby at the time, date and location as mentioned above had also been charged with the rape of the minor baby punishable under S.376 PPC for which he was also convicted vide the impugned judgment.

12. As is well known and was recently emphasized by the Supreme Court in the case of **Naveed Asghar V State** (PLD 2021 SC 600) judges when deciding such horrific cases as the instant case which concern for example the abduction, rape and murder of a minor child have to put their emotions aside and decide the case on the evidence before them and the relevant law.

13. With regard to the offence of rape we find that the prosecution has **NOT** proved its case against the appellant beyond a reasonable doubt for the following reasons as such the appellant is acquitted of the offence under S.376 PPC by being extended the benefit of the doubt;

(a) PW 4 Dr. Shahida who was the MLO stated in her evidence as under in material part regarding the rape.

> *"**No any mark of violence or blood seen over genital, however, swabs were taken out and preserved for chemical examination to ascertain if the deceased was raped**..... I sent the vaginal swabs to chemical examiner. Subsequently I received the report of chemical examiner, which I produce as Ex.09/B. On the basis of said report, I issued final report, which I produce as Ex.9/C and say that it is same, correct and bears my signature. **According to my report, which is based on the report of chemical examiner, there was an attempt to commit rape over the deceased.**"* (bold added)
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> Thus, it is apparent that there was no rape (penetration) and only a case of attempted rape **based on the chemical report** which found semen on the vaginal swabs. The chemical report however was not put to the appellant for his explanation during the recording of his S.342 Cr.PC statement and as such it is well settled that evidence not put to an accused during the recording of his S.342 Cr.PC statement cannot be used to from a basis of his conviction. Thus, the chemical report is excluded from consideration.

(b) That no DNA test was carried out to show that the semen which was found on the body of the deceased matched with that of the appellant.

© The only other evidence of the rape is the judicial confession of the appellant which we shall come to later whereby the appellant apologies for his "mistake" which although indicative of a sexual act against the child when the confession is read as a whole is not conclusive proof of the same and as such in this respect the prosecution has not been able to prove the charge of rape

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(or attempted rape) of the child against the appellant beyond a reasonable doubt and as such by extending the benefit of the doubt to the appellant the appellant is acquitted of the charge of rape under S.376 PPC.

14. Returning to the murder of the deceased, the only question left before us therefore is whether the prosecution has proved beyond a reasonable doubt whether it was the appellant who murdered the deceased by suffocation at the aforesaid time, date and location.

15. After our reassessment of the evidence we find that the prosecution has proved beyond a reasonable doubt the charge against the appellant for the offence of murder of the deceased under S.302 (b) PPC for which he was convicted under the impugned judgment for the following reasons;

(a) The FIR was lodged on 18.12.2011 at 7pm. The incident is stated to have occurred between 6.45pm on 17.12.2011 and 18.12.2011 at 08.30am and thus technically the FIR has been lodged after a delay of 24 hours. PW 1 Muhammed Javed who is the father of the missing girl and the complainant in this case states in his evidence that his daughter went out at 6.45pm and did not return after an hour i.e 7.45pm where after he and his brother Muhammed Younis started their search for the missing girl. During the search he reported the incident at PS Fort and announcements were made through loud speakers of the mosque. The search continued throughout the night and at about 4.30am he went home and at 8.30 am on 18.12.2011 he was informed that a dead body had been found at Katchra Kundi. He went to Katchra Kundi which was only 40/50 places from his house and identified the dead body of his daughter who was taken to hospital where medical examination was carried out and then the dead body was delivered to him and thereafter buried the body and then lodged the FIR. We find that in cases of minor children going missing it is not unusual for there to be a delay in lodging the FIR as the first priority is for the parents to search and try and find the missing child as happened in this case. In this respect reliance is placed on **Rahat Ali V State** (2001 P.Cr.LJ P.98) When the complainant found his dead child his priority was to take her to the hospital and on the return of the dead body his concern shifted to lodging the FIR. Even otherwise during the search a few hours after the incident the complainant had already reported the matter to the concerned PS. Thus, we find that based on the particular facts and circumstances of this case the delay in lodging the FIR has been explained and such delay is not fatal to the prosecution case.

(b) The accused is named in the FIR as a suspected person on the basis that PW Nasir had last seen the accused with the minor child. Neither the complainant nor PW Nasir had any enmity with the appellant and had no reason to falsely implicate him in this case. Even other wise the appellant is only named as a suspect for whom it is for the police to investigate whether or not he is involved in the crime. The complainant's evidence reflects that of his FIR with no material improvement as such we have no reason to doubt the evidence of the complainant.

© On 18.12.11 at 2200 hours shortly after the registration of the FIR PW 7 Muhammed Aijaz who was the IO in the case arrested the appellant. On his arrest during his personal search 11 keys were recovered from him. The

appellants arrest and recovery is corroborated by PW 6 Muhammed Hayat who was an ASI and Mashir and memo of arrest and recovery.

(d) On 19.12.11 at 2100 hours (one day after his arrest) the appellant took PW 7 Muhammed Aijaz who was the IO in the case and PW 6 Muhammed Hayat who was an ASI and Mashir to his closed house where he had not been living for some time and opened the door of the house with one of the keys which were recovered from him. On search of the house the dopata which belonged to the deceased was recovered from the house of the appellant which had previously been locked and was not in use as the appellant was living elsewhere nearby. Mashirmanan of recovery of the dopata was exhibited at trial along with dopata which PW 2 Muhammed Nasir the last seen evidence witness along with PW 3 Muhammed Umair recognized.

(e) On 20.12.11 (2 days after his arrest) the appellant was produced before PW 5 Miss Robab Fatima who was a civil Judge and judicial magistrate who recorded the confession of the appellant which is reproduced as under for ease of reference;

> *"On 17.12.2011, it was the Sunday. I saw Maliaka and she was sitting in the street. I am residing at Balu Shahi Muhallah. Her age was about 5/6 years and she was alone. I called her and she followed me voluntarily. I had lost my conscious and I had made a mistake. I want to make sorry from the baby girl and from her parents. I may kindly be excused.* ***I took the baby girl and went to my old house which I had left from last 08 days which is situated in the same street. I sat her and mistakenly did this work. I want forgiveness. The baby girl started crying and I closed her mouth with my hand. When I took off my hand, the baby girl was made unconscious. I sat her beside the window, but she was unconscious and so being started self-moving and fell down where the garbage was lying.*** *Thereafter, I went to my house Balu Shahi Muhallah. I feel shame and did the mistake. I am shameful upon my mistake and need forgiveness"* (bold added)

16. **Significantly,** this judicial confession was not said to be retracted or not made voluntarily during cross examination of the judicial magistrate. During the recording of the appellants S.342 Cr.PC statement firstly he states that the confession was made but without his consent and then in the same breath states that he did not give any such confession before the magistrate. In his evidence under oath he does not retract his judicial confession and does not even mention it.

17. It is well settled by now that even a retracted confession before a magistrate can be the basis of convicting in a capital case provided that it is made;

(a) **Voluntary** i.e. without threat or inducement and

(b) **Its object must be to state the truth;** assistance for which can be ascertained from (i) whether the confession appears truthful within the context of the prosecution case and (ii) whether there is any other evidence on record which tends to corroborate the truthfulness of the confession **and**

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(c) **Only minor irregularities regarding the rules concerning the recording of judicial confessions can be permitted** ***as determined on a case to case basis*** the main criteria being that such irregularities have not adversely effected the voluntariness or truthfulness of the confession.

18. In this respect the examination in chief of PW 5 Miss Robab Fatima who recorded the judicial confession is set out below for ease of reference;

EXAMINATION IN CHIEF OF PW.5 MISS ROBAB FATIMA (Ex.10).

"On 20.12.2011, I.O of Crime No.61 of 2011, under Section 302 PPC, of Police Station Forte, Hyderabad moved an application before me for recording confessional statement of accused Muhammad Wajid. I produce photo copy of said application at Ex.10/A. Accused Muhammad Wajid son of Muhammad Hanif was also produced before me. The accused was made to sit in the chamber and placed in the custody of Court staff. The I.O. and other police officials were directed to leave the premises. The accused was warned that he was not bound to make confessional statement and in case, he made any statement, would be taken into writing and subsequently used against him. After which, he was given time from 12-00 noon to 2-00 pm for reflection. It was made sure that the police had no access, during the course of said time, to the accused. After passing the time, the accused was informed that he was present before the Magistrate of First Class with powers to record his confessional statement and he was asked if he dispose still to make confessional statement on his own freewill or not. With his consent, through the help of Court staff, his body was examined, however, no mark of violence was found. On inquiry, the accused disclosed that he was with the police since 18.12.2011. On a question that had he been induced or issued threats or promise by police or anybody else to make confession, the accused replied in the negative. He was asked if he was beaten up, tortured or maltreated by the police for the purpose of confessional statement. He replied that no. On inquiry, the accused disclosed that none of his family member or relatives male or female were sent to him by the police to pressurize him to make confessional statement. He replied that he was deposing as wanted mercy. On a question, he stated that I was a Magistrate and if he made confessional statement, I was required to record it. He was specifically asked that were he aware that if he made confessional statement, it would be used against him and on the basis of which, he might be convicted and sentenced for committing the offence. He said yes. The accused was informed that if he made or not confessional statement, in both cases, he would be remanded to jail and not given back to the police. He said yes. After satisfying myself I recorded confessional statement of the accused. The accused stated that on 17.12.2011, which was Sunday. He saw baby Malika standing in a street. He used to reside in Baloo Shahi Mohallah. Malaika was aged about 5/6 years and she was alone at that time. On his calling, she came behind him. At that time, he lost control over him and as such committed mistake. He stated that he asked for pardon from baby Malaika and also from her parents to be excused. He further stated that he brought Malaika to his old house, where 08 days passed away. He made her sit and committed mistake, due to which, baby Malaika started weeping. He put his hands on her mouth. When he took back the same, baby Malaika lost her senses. The accused further stated that he sat her near the window but still she did not regained her senses and fell down in garbage near the house. Thereafter he went to his house at Baloo Shahi Mohallah. The accused also stated that he was shameful on the act, which he committed, therefore, asked to be excused. The confessional statement was read over to the accused, who admitting its contents to be correct, put his signature

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and LTIs on each page of his statement. I then remanded him to judicial custody. I produce the confessional statement of the accused at Ex.10/B, and say that it is same, correct and bears my signature. On a request of the I.O., I also recorded the statement of PW Muhammad Nasir on 21.12.2011, which I see at Ex.6/B, and say that it is same, correct and bears my signature. The accused present in the Court is same."

19. The evidence of PW 5 Miss Robab Fatima who was the judicial magistrate who recorded the judicial confession of the appellant who was not even dented in cross examination let alone damaged makes it clear that the confession of the appellant was voluntary and with the object of telling the truth as it ties in with the prosecution case and there were few, if any, procedural irregularities and thus we rely on the judicial confession against the accused.

What other supportive/corroborative evidence is there to support/corroborate the judicial confession of the appellant?

(f) As already discussed above the recovery of the keys to the appellants old house from the appellant on his arrest which opened the locked door of his old house where inside the deceased dopata was recovered on the pointation of the appellant. There would be no logical reason for the deceased dopata to be found in the appellant's former locked house to which only he had the keys unless the appellant had taken her there to fulfill his carnal urges.

(g) The medical evidence of PW 4 Dr. Shahida who was the MLO who found the cause of death of the deceased due to cerebral insufficiency (due to lack of blood supply into brain) that caused asphyxia and respiratory failure, caused by pressure of both nestles and compression of main blood vessels alongwith **neck,** that led to suffocation and ultimately caused death in ordinary course of nature. In layman's terms she died on account of suffocation. This fits in with the confession of the appellant where he states as under in his confession in material part;

> *"**The baby girl started crying and I closed her mouth with my hand. When I took off my hand, the baby girl was made unconscious. I sat her beside the window, but she was unconscious** and so being started self-moving and fell down where the garbage was lying"* (bold added)

The appellant placing his hand over the mouth of the deceased to such an extent that it caused the deceased to lose consciousness and suffocate would also be consistent with the findings of the medical evidence of PW 4 Dr. Shahida who on external examination of the dead body found the following injuries;

"1. **Bruise over both nostrils 4cm x 4cm x skin deep with bleeding from nose.**
2. Bruise over right side of **neck** 3.5cm x 2.8cm x skin deep.
3. Faint urea abrasion over front of **neck** 3cm x 0.5cm x skin deep.
4. Bruise with abrasion over right knee joint 5cm x 3cm x skin deep.

Such injuries were also observed by PW 3 Muhammed Umar who was at the scene and saw the dead body and PW 6 Muhammed Asif who was a first

responder along with duly exhibited Danisnatnama and inquest report.

(h) PW 2 Muhammed Nasir gives evidence that on 17.12.2011 in the evening he had seen the deceased at a shop of Qaseem situated at Fakir Ka Pir Hyderabad with the appellant who he knew. He lived in the locality and was not a chance witness and was an independent witness and thus we have no reason to disbelieve his evidence of his identification of the appellant and the deceased. Within one to 12 hours of this citing the deceased was found dead. He was an independent witness and had no reason to attempt to falsely implicate the appellant in this case. Although the instant case does not meet the strict legal requirements of last seen evidence as laid down in **Fayyaz Ahmed V State** (2017 SCMR 2026) and **Muhammed Abid V State (PLD 2018 SC 813)** we are of the view that **some weight** can be given to it in this case based on the particular facts and circumstances of this case based in particular on the confession of the appellant which we are placing reliance on and wherein he state as under in material part;

> *"I took the baby girl and went to my old house which I had left from last 08 days which is situated in the same street."*

(i) That all the PW's are consistent in their evidence and even if there are some contradictions in their evidence we consider these contradictions as minor in nature and not material and certainly not of such materiality so as to effect the prosecution case and the conviction of the appellant. In this respect reliance is placed on **Zakir Khan V State** (1995 SCMR 1793) and **Khadim Hussain v. The State** (PLD 2010 Supreme Court 669).The evidence of the PW's provides a believable corroborated unbroken chain of events from the deceased going missing, the discovery of her dead body to the lodging of the FIR, the arrest of the appellant from whom was recovered the key to his old house where from on his pointation the deceased doperta was found to his confession before the magistrate.

(j) That the police PW's (in fact none of the PW's) had no enmity or ill will towards the appellant and had no reason to falsely implicate him in this case by for example making up the place of his arrest or foisting the dopata on him and in such circumstances it has been held that the evidence of the police PW's can be fully relied upon. In this respect reliance is placed on **Mustaq Ahmed V The State** (2020 SCMR 474).

(k) That it does not appeal to reason, logic or commonsense that a father would let the real murderer of his baby daughter go scot free by substituting him with an innocent person (the appellant).In this respect reliance is placed on **Allah Ditta V State** (PLD 2002 SC 52).

(l) Undoubtedly it is for the prosecution to prove its case against the accused beyond a reasonable doubt but we have also considered the defence case to see if it at all can caste doubt on or dent the prosecution case. The defence case is simply one of false implication which has not been substantiated whatsoever by the defence. Thus, for the reasons mentioned above we disbelieve the defence case as an afterthought.

20. Thus, based on the above discussion, although this was an unwitnessed incident which was largely based on a judicial confession and other circumstantial evidence, we have found that that the prosecution has proved its case beyond a reasonable doubt against the appellant based on reliable circumstantial evidence

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where **all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused and hereby up hold the conviction of the appellant in respect of the murder of the deceased. In this respect reliance is placed on Fayyaz Ahmed V State** (2017 SCMR 2026)

21. With regard to sentencing. In such like cases where young children are abducted for sexual assault and are later murdered before they have even reached the prime of their life and the pain, trauma and anguish caused to their parents is unimaginable we find that the only appropriate sentence is a deterrent one. Thus, we uphold the conviction for murder of the minor baby under S.302 (b) PPC and also up hold the death sentence handed down by the trial court.

Summary.

1. The appellant's appeal against his conviction in respect of his conviction under S.376 PPC is allowed and he his acquitted of the charge under S.376 PPC and his sentence in respect of that offence is set aside.

2. The appellant's appeal against his conviction under S.302 (b) PPC is dismissed, his conviction and sentences handed down to him in respect of that offence in the impugned judgment are maintained and as such the confirmation reference is answered in the affirmative.

22. The appeal stands disposed of in the above terms.