

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE EJAZ AFZAL KHAN.

MR. JUSTICE QAZI FAEZ ISA.

MR. JUSTICE MAQBOOL BAQAR.

CRIMINAL APPEAL NO. 178-L OF 2009.

(On appeal against the judgment dated 30.04.2009 passed by the Lahore High Court, Lahore in Criminal Appeal No. 739 of 2006 and M. R. No. 69-T of 2006).

Nasir Javaid and another.

...Appellant(s)

VERSUS

The State.

...Respondent(s)

For appellant No. 1: Syed Iftikhar Hussain Gillani, Sr. ASC

For appellant No. 2: Mr. Jalees Ahmed Meer, ASC.

For the State : Ch. Zubair Ahmed Farooq, Addl. P. G. Pb.

Date of Hearing: 15.03.2016 (Judgment Reserved)

J U D G M E N T

EJAZ AFZAL KHAN, J.- This appeal with the leave of the Court has arisen out the judgment dated 30.04.2009 of a Division Bench of the Lahore High Court, Lahore whereby it dismissed the appeal filed by the appellants and answered the Capital Sentence Reference No. 69 of 2006 in the affirmative.

2. Brief facts of the case, as can be culled from the FIR and the statements of the PWs recorded in the Court are that on 23.09.2004 at about 1:30 PM, Husnain Riasat a son of the complainant who was 4 years old left his house to purchase toffees but did not come back. The complainant went far and wide in search of his son, made announcements on loudspeakers of the mosques and also reported the matter in Police Station, Dhulla, District, Gujranwala but

of no avail. On the night intervening 24 and 25.09.2004 when the complainant alongwith his brother while searching Husnain Riasat, reached a street adjoining his residential house, he noticed a nylon bag lying near the gate of his factory wherefrom blood was oozing. The brother of the complainant on opening the bag found the dead body of the latter's son soaked in blood. It was without footwear. "Asif is a dog; it is the result of his cruelty; my blood boils when I see him" were the words written on the bag. Nasir Javed and Qaisar Javed the appellants alongwith their two brothers, Tariq Javed and Asif Javed, the acquitted co-accused, were charged for committing the gruesome murder in a case registered against them under Sections 302/34/364A PPC and 7(a) ATA vide FIR No. 318 of 2004 dated 23.09.2004 at Police Station Dhulla, District Gujranwala. The motive for the occurrence is that the complainant supported one Muhammad Nadeem in a case of murderous assault registered against Nasir Javed appellant and purchased a shop the latter was working in, which also resulted in exchange of threatening words in between the complainant and the appellants a few days before the occurrence.

3. During the course of investigation the appellants and their acquitted co-accused were found linked with the commission of the crime. After the completion of investigation, they were forwarded to the Court of the learned Judge Anti-Terrorism Court No. 1, Gujranwala for trial who on its conclusion convicted and sentenced the appellants to death on three counts under Section 364-A, 34, 302(b) PPC and 7(a) ATA and to pay compensation of one lac each or in default to undergo six months S.I., acquitted the co-accused vide judgment dated 25.4.2006 and sent the capital

sentence reference to the High Court for its confirmation. The appellants preferred an appeal before the High Court against the conviction and sentence which was dismissed while the capital sentence reference was answered in the affirmative.

4. Learned ASC appearing on behalf of the appellants contended that the occurrence is blind and un-witnessed; that the circumstantial evidence collected during the course of investigation does not form a chain as could link the appellants with the crime; that the last seen evidence, appears to be concocted because of its belated appearance; that the evidence relating to disposal of the dead body at 11:00 PM near the workshop also appears to be concocted when no source of light near or around the place has been indicated in the site plan nor any recovery thereof has been made. Extra-judicial confessions, the learned ASC argued, have been attributed to the appellants and the acquitted co-accused but they being of weak probative worth cannot be used as either evidence or corroborative of the charge, that too, when no reason much less plausible has come forth for making such confession before Ghulam Ahmed, Basharat Ali and Muhammad Zaman. Discoveries so called, the learned ASC argued, cannot boost up the case of the prosecution when none of the pieces of evidence commands credence.

5. Learned ASC appearing on behalf of the respondents contended that motive, last seen evidence, extra-judicial confession, recoveries and evidence relating to disposal of the dead body not only form a chain but connect the appellants with the dead body of the deceased. He next contended that these pieces of evidence when linked together rule out the hypothesis of innocence of the

appellants, therefore, both the Courts have rightly convicted and sentenced them. Such finding, the learned ASC maintained, being in line with the principles laid down by this Court for appraisal of evidence in criminal cases is not open to any exception.

6. We have gone through the entire record carefully and considered the submissions of the learned ASCs for the appellants as well as the learned Addl. P. G. Punjab for the State.

7. This case, so to speak, hinges on circumstantial evidence. What tempts the Court to believe this type of evidence is the maxim that men may lie but circumstances don't. We don't nor can we doubt and dispute its centuries old well tested wisdom. We rather use it as a touchstone for assessing and evaluating the evidentiary worth of the circumstantial evidence. It enables us to reason unknown from the known if the circumstances are reported fairly and faithfully. Deduction about the guilt of the accused could well be drawn from the circumstances as are well authenticated. But where the circumstances so reported are tinkered and tampered with, or contrived and conjured up, they cannot be accepted without careful and critical analysis. Circumstantial evidence can form basis of conviction if it is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This case thus has to be analyzed and adjudged in this perspective.

8. The first significant piece of evidence in this case is motive. The motive for the occurrence is that the complainant supported one Muhammad Nadeem in a case of murderous assault registered against Nasir Javed appellant and purchased a shop the latter was working in, which also resulted in exchange of threatening

words in between the complainant and the appellants a few days before the occurrence. The statement that the complainant supported the said Muhammad Nadeem remained unproved. In case it is true, it was not of a nature as could drive the appellants to go to such an extreme when the matter between the said Muhammad Nadeem and the appellant Nasir Javed ended in a compromise? How could purchasing of the shop incense any of the appellants to commit such a gruesome crime, when the shop was admittedly purchased by Muhammad Arif, a cousin of the complainant? When, where and in whose presence the appellants exchanged the threatening words with the complainant remained unproved and unsubstantiated. We, thus, don't think such a tragic incident could be a fall out of a motive of this type.

9. The other evidence in the sequence is that of last seen which has been furnished by PW-11. According to this witness, he and Mohammad Akhtar the abandoned PW saw the deceased in the company of the appellants on a motorbike at 2:00 PM on the day of occurrence. But strangely enough he did not inform the complainant about this episode nor did he report it, notwithstanding, disappearance of the child became talk of the town on the same day on account of its having been proclaimed through the loudspeakers of the mosques in the village. When questioned as to why he remained silent for three days, he replied that he went to Lahore. Accepted, for a while that he went to Lahore and came back three days later. But what about Muhammad Akhtar who did not go anywhere? Why did he choose to be silent? We don't find any answer to the aforesaid questions. The story of going to Lahore is thus nothing but a lie to lend crutches to another lie. The PW stated

that he saw the deceased sandwiched in between the appellants on a motorbike from the shop of Abdul Razzaq. What business this witness had in the village when he is a landlord of village Alipur Chatha and Hafiz Abad. He stated that he came to the Dairy Farm of Zafarullah to purchase a buffallow but he was not available. Did he meet anybody on the Dairy Farm? Did he inquire from anybody about Zafarullah? If not how did he come to know that Zafarullah was not available? Answers to these questions and examination of the person informing him about Zafarullah could have proved his presence in the village but his failure to answer the questions mentioned above and failure on the part of the prosecution to examine the witness would negate his presence in the village. Given that he was in the village, what brought him to the shop of Abdul Razzaq? His reply was that Muhammad Akhtar wanted to purchase cigarettes. But neither Muhammad Akhtar nor Abdul Razzaq has been examined as PWs. Their examination could have established the presence of the PW and his companion in the shop but failure on the part of prosecution to examine them not only belied his presence in the shop but also gave rise to an adverse inference against it under Article 129(g) of the Qanoon-e-Shahadat Order, 1984. Given that he was present in the shop of Abdul Razzaq, but how could he see the deceased and the appellants when according to the site plan, gate of the house of the appellants as well as the street across it are not visible from the shop. He craned his presence to the veranda of the shop and then to the corner of the street but this addition appears to be an afterthought as neither the veranda nor the corner of the street has been indicated in the site plan. Given that street as well as the gate were visible from the shop, but what

was that extraordinary or unusual which attracted the PW to watch the events with such an amount of keenness particularly when it is not the case of the prosecution that the child was crying or resisting his carriage on the motorbike. Why should the appellants carry the child so openly on a motorbike and thereby expose their identity when their ultimate aim was to do away with him? Both the questions, in the absence of any explanation, raise serious doubt about the veracity of the witness. Testimony of this witness with all his deftness and dexterity does not inspire confidence. We, therefore, don't feel inclined to place any reliance thereon.

10. Then comes the evidence relating to disposal of the bag containing the dead body of the child. PW-10 furnished the evidence of this episode. According to the PW, he visited workshop of Muhammad Riaz situated at Mohallah Tufail Town, Rajkot District Gujranwala at 11:00/11:15 p.m. but the workshop was closed. He, thus, went to the residence of Muhammad Riaz which was lying on the back of the workshop. He after knocking at the door of the residence was waiting for the response, that he saw the appellants on a motorbike dispose of a nylon bag. The statement accounting for the presence of the witness at the alleged place of disposal of the dead body of the child is not free from doubt when there is absolutely nothing in the statement to show any emergency necessitating such a dash to the workshop located at a distance of 38/40 kilometers, at such odd hours, notwithstanding, the desired spare parts could be had from the nearby market on the following day. How could he see and identify the appellants when the tube-lights which were allegedly lit at the relevant time have not been indicated in the site plan nor have they been recovered. The

testimony of this witness appears to be unnatural and even unconformable to common human experience and observation and thus does not inspire confidence. We, therefore, leave it out of account.

11. Next is the evidence of extra-judicial confessions. Evidence of this type because of its being concocted easily is always looked at with doubt and suspicion. It could be taken as corroborative of the charge if it, in the first instance, rings true and then finds support from other evidence of unimpeachable character. If the other evidence lacks such attribute, it has to be excluded from consideration. Extra-judicial confessions of the appellants when examined in this light neither ring true nor agree with truth nor fit in with the surrounding circumstances of the case. The circumstances disclosed therein that the complainant made their lives miserable, implicated them in criminal cases and insulted their mother are not supported by the prosecution evidence. According to the statement of PW-13, the appellants were driven by their immense sense of guilt to make extra-judicial confessions. But why should they make extra-judicial confessions before PW-13, who being closely related to the complainant was expected to do them more harm than good. Why should they make such confessions before the said witness who did not hold any authority nor did he wield any influence as could hold out any hope to the appellants and thereby tempt them to make any confessions. We don't find any answer to the aforesaid questions nor any other justification for believing them. We are rather amazed to note as to why did the Trial Court and the Court of Appeal believe the extra-judicial confessions of the appellants and discard those of the acquitted co-accused.

Notwithstanding all of them suffering from alike infirmities deserve alike treatment. We don't find any plausible reason to treat them differently. We, thus, hold that the extra-judicial confessions are not worthy of reliance and cannot be taken even as corroborative of the charge.

12. The medical evidence, too, does not support the prosecution version as the swelling on the anus of the victim has not been accounted for. This injury on the face of it would tend to point the accusing finger to some maniac or sadist who derives pleasure from an act of this type. Withholding of the original report of the chemical analysis would give added strength to the inference. We, therefore, don't think the medical evidence supports the prosecution version.

13. The last piece of evidence consists of recoveries. This evidence at its best can be taken as corroborative rather than evidence of the charge. The reason is that it, per se does not name or nominate any accused, nor does it prove or point to his guilt. It simply supplements the other evidence on the record, if it, in its own rights, inspires confidence. Having thus analyzed, the evidence of recoveries does not inspire confidence as the witnesses attesting them being closely related to the complainant are highly interested. Such recoveries also appear to be contrived and conjured up when nothing incriminating came forth, pursuant to the first raid of the appellants' house made soon after the occurrence and then everything incriminating so-called popped up from the same places of the house pursuant to another raid made 10/15 days later. The evidence of recoveries against this background has little evidentiary worth. So is the case with the evidence of the handwriting expert

whose opinion, that specimen handwritings have been executed cautiously and consciously, not only speaks for itself but takes it far off precision and accuracy. This is but natural because the techniques of this branch of expertise have not been perfected to a level where opinion based on comparison could be treated as unerring and infallible. It thus follows that none of the pieces of evidence discussed above, either individually or collectively, is compatible with the guilt of the appellants nor is it incapable of explanation on any other reasonable hypothesis than that of the guilt of the appellants. It would not thus be safe to maintain the finding of conviction on this evidence.

14. For the reasons discussed above, we allow this appeal, set aside the conviction and sentence of the appellants and acquit them of the charges. They be set free forthwith, if not required in any other case.

Judge

Judge

Judge

Announced in open Court at Islamabad on _____

Judge

'Not approved for reporting'

M. Azhar Malik