

Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Crl. Appeal No. 71 of 2017

Ali Jan

Vs

The State

Appellant by : M/s Syed Gohar Ali Zaidi, Asghar Haider and Huma Jamil Babar Advocates.

Respondents by : Hafiz Ghulam Afzaal Raja Advocate, for the complainant/respondent.
Mr Zohaib Hassan Gondal, State Counsel.

Dates of Hearing : **23.07.2020 & 19.11.2020.**

ATHAR MINALLAH, C.J.- Through this judgment we will decide the instant appeal i.e. *Crl. Appeal no. 71/2017, titled "Ali Jhan v. the State"* and answer *Murder Reference No. 04 of 2017, titled "The State v. Ali Jan."*

2. Muhammad Sardar son of Khan Wali [hereinafter referred to as the "**Complainant**"] filed an application (Exh.PP) and pursuant thereto FIR no. 218, dated 06.07.2013, was registered at Police Station Golra, Islamabad (Exh.PA) [hereinafter referred to as the "**FIR**"]. The Complainant narrated in the application (Exh.PP) that his

mother namely, Ms Gujjar Bibi widow of Khan Wali [hereinafter referred to as the **"Deceased"**] was employed as a domestic worker. On 05.07.2013, the latter went to the place of her employment and one of her sons also contacted her on the cellular phone. The Deceased did not return from work and her cellular phone was not responding. On 06.07.2013, the Complainant received information that an unidentified body was found and was lying in the mortuary of Pakistan Institute of Medical Sciences [hereinafter referred to as the **"Hospital"**]. The Complainant identified the body as that of the Deceased. Ghulam Murtaza, Assistant Sub Inspector (PW-2) alongwith other police officials visited the crime scene pursuant to information received at the Police Station regarding presence of an unidentified body lying on a public path in Bhaikar Fateh Baksh. The latter collected blood on cotton wool and the same was taken into possession vide recovery memo (Exh.PB). Two empties fired from a 30-bore fire arm weapon were also collected vide recovery memo (Exh.PC). The footwear of the Deceased was also taken into possession vide recovery memo (Exh.PD). After preparing the inquest report (Exh.PE) the body of the Deceased was sent to the Hospital. The Investigating Officer namely, Ejaz Ali Shah, Sub Inspector (PW.13) received the sealed packets containing articles collected by Ghulam Murtaza, Assistant Sub Inspector (PW-2) from the crime scene. The Investigating Officer took in his possession the last worn clothes of the Deceased and the autopsy report Exh.PH/1-6. The autopsy was conducted by Dr Riffat Ramzan, CMO (PW-5) and the injuries described in the report were as follows:

"Injury No.1

Entry wounds measuring 1.5 cm x 1.5 cm, 51 cm from above and 13 cm from midline. Right iliac fossa region, blackening present (burning on cloths).

Injury No.2

Exit wound 1.5 cm x 1.5 cm irregular, circular inverted margin, averted margins, blood stained, 38 cm from above.

Injury No.3

Entry wound 2 x 1.5 cm circular, inverted margins, blood stained 24 cm from above, 6 cm from midline right back of chest.

Injury No.4

Exit wound 1 x 1 cm irregular averted margins blood stained 19 cm from above 10 cm from midline right front of chest. Rigor mortis and postmortem lividity present."

3. The Investigating Officer visited the crime scene and prepared unscaled site plan (Exh.PR). During the course of investigation, Ali Jan son of Ali Muhammad [hereinafter referred to as the "**Appellant**"] was interrogated but not treated as a suspect. The Appellant was married to the sister of the Deceased while his sister was latter's daughter-in-law. The Complainant recorded a supplementary statement after twenty one days from the date of occurrence and registration of the FIR. The Appellant was nominated as a suspect and he was arrested on 31.07.2013. On 03.08.2013, the Appellant led to the recovery of the crime weapon i.e. 30-bore pistol.

The fire arm weapon was taken into possession vide recovery memo (Exh.PJ). The statement of the Appellant under section 164 of the Criminal Procedure Code, 1898 [hereinafter referred to as the "**Cr.P.C.**"] was recorded by Malik Farrukh Nadeem, executive Magistrate 1st Class (PW-10). The blood stained cotton wool and the empties collected from the crime scene were sent to the Punjab Forensic Science Agency and the National Forensic Science Agency, respectively. The fire arm weapon recovered on the basis of information provided by the Appellant was sent to the National Forensic Science Agency on 04.09.2013. The Punjab Forensic Science Agency vide report, dated 16.09.2013 (Exh.PV) confirmed that the blood on the cotton wool was that of a human. Likewise, the National Forensic Science Agency vide its report, dated 11.09.2013 (Exh.PW) recorded its opinion that the fire arm weapon and the empties had matched. Aamir Shahzad, Draftsman (PW-11), after inspecting the crime scene, had prepared the scaled site plan (Exh.PN). The charge was framed on 10.09.2013 and was later amended on 10.12.2016.

4. During the trial, the prosecution produced thirteen witnesses. The Appellant recoded his statement under section 342 of Cr.P.C. and he was also examined under oath. After recording of evidence and affording an opportunity of hearing to the parties the learned trial court vide judgment, dated 03.05.2017, convicted the Appellant and sentenced him to 'death' by way of Ta'zir. In addition rupees 3,00,000/- [three lac] was also directed to be paid to the legal heirs of the Deceased under section 544-A of Cr.P.C. and default would attract six months' simple imprisonment. The learned trial

Court has referred to us Reference No. 04/2017, titled "The State v. Ali Jan" for confirmation of the 'death' sentence. The Appellant has preferred the instant appeal i.e. Crl. Appeal no. 71/2017, titled "Ali Jan v. The State" challenging the conviction and sentence handed down on conclusion of the trial.

5. The learned counsel for the Appellant has, inter-alia, contended that; the learned trial court has misread and non-read the evidence; the prosecution had failed to establish its case beyond a reasonable doubt; confessional statement under section 164 of Cr.P.C. was neither voluntary nor factually correct; the Investigating Officer had coerced the Appellant to falsely admit having murdered the Deceased; the confessional statement contradicts the evidence brought on record; the learned Magistrate who had recorded the confessional statement had failed to fulfill the mandatory requirements prescribed under the law; the medical evidence does not support the prosecution's story; the motive could not be proved by the prosecution; the testimonies of the prosecution witnesses are not reliable and confidence inspiring.

6. The learned counsel for the Complainant and the learned State Counsel have argued that; the prosecution had established its case beyond a reasonable doubt; the recovery of the crime weapon and its matching with the empties established the guilt of the Appellant; the prosecution had brought on record trustworthy evidence while the confessional statement was sufficient to establish the guilt and hand down capital punishment.

7. The learned counsels for the parties and the learned State Counsel have been heard and the record perused with their able assistance.

8. The crime relating to murder of the Deceased was unseen and blind. The Complainant had nominated the Appellant through a supplementary statement which was recorded after twenty one days from the date of registration of the FIR. The motive described by the Complainant in his supplementary statement could not be proved during the trial. The Appellant in his confessional statement, recorded under section 164 of Cr.P.C. had given a different version relating to the motive and that too did not corroborate with the evidence brought on record by the prosecution. The Appellant in his confessional statement had stated that he had fired twice from the fire arm weapon when the Deceased had her back towards him. This version contradicts the medical evidence because it describes two entry wounds, one on the back and the other on the front of the body of the Deceased. The learned Magistrate who had recorded the statement of the Appellant under section 164 of Cr.P.C. had not complied with the mandatory requirements prescribed under the law. The learned Magistrate i.e. Malik Farrukh Nadeem (PW-10) had deposed that he had dictated the statement to the Reader of the court. However, this fact is not mentioned in the statement nor the certificate recorded therein. Perusal of the certificate unambiguously shows that immediately after recording of the statement, the Investigating Officer had handcuffed the Appellant while the latter was inside the court room. The recovery of the fire arm weapon is

also a mystery and raises doubts. The unscaled site plan nor the scaled site plan show existence of bushes near the crime scene. The Investigating Officer has also not brought on record a site plan of the place from where the fire arm weapon was recovered. One of the witnesses of the recovery of the fire arm weapon namely, Kifayatullah, Head Constable (PW8) had deposed that the seal on the parcel of the pistol (Exh.PB) was not intact. He had also admitted during cross examination that he was known to the brother of the Deceased prior to the occurrence. The medical evidence definitely does not support the story of the prosecution to the effect that when the Appellant had fired twice, the Deceased had her back towards him. The entry wound on the front part of the body of the Deceased is unexplained and raises doubt regarding the prosecution's case.

9. The emphasis of the learned counsel for the Complainant was in the context of the confessional statement of the Appellant recorded under section 164 of Cr.P.C. The august Supreme Court in the case titled "Nasir Mehmood and another v. the State" [2015 SCMR 423], has held that statement of an accused recorded under section 342 of Cr.P.C. was more reliable as compared to a confessional statement made under section 164 ibid. In the case titled "Dadullah and another v. The State"[2015 SCMR 856] it has been observed and held that conviction cannot be handed down on the sole basis of a confessional statement and that the prosecution had to discharge the onus of proving its case beyond any shadow of doubt. Moreover, it has been held that notwithstanding the procedural defects in a confessional statement, it could still be relied

upon if it is found to be true, voluntary and confidence inspiring. In the case titled "Hashim Qasim and another v. The State" [2017 SCMR 986] the apex Court has held that two essential requirements must be met in order to rely on a confessional statement recorded under section 164 of Cr.P.C. Firstly, that the confession was made voluntarily and that it was based on true facts which had led to the commission of the crime and secondly, that the statement was proved at the trial. In the case titled "Azeem Khan and another v. Mujahid Khan and others" [2016 SCMR 274] it has been held that failure on the part of the Magistrate to put mandatory questions to the accused person could render the statement inadmissible.

10. On the touchstone of the principles and law highlighted by the august Supreme Court, the confessional statement recorded by the learned Magistrate in the case in hand has not been found to be confidence inspiring. The facts narrated therein have not been corroborated by the evidence brought on record by the prosecution. The statement rather contradicts the prosecution's story, particularly the medical evidence. Neither the motive described in the statement recorded under section 164 of Cr.P.C. nor the version stated in the supplementary statement belatedly recorded by the Complainant could be proved. The testimony of the Complainant does not inspire confidence. The prosecution had failed to establish its case beyond a reasonable doubt and, therefore, the benefit ought to have been extended in favour of the Appellant.

11. For the above reasons, we **allow** the appeal i.e. *Crl. Appeal No. 71/2017, titled "Ali Jan v. the State"* and set aside the

conviction and sentence handed down by the learned trial court vide judgment, dated 03.05.2017. Consequently, we answer the *Murder Reference No. 04/2017, titled "The State v. Ali Jan"* in the **negative**. If the Appellant is not required to be incarcerated in any other case, then he shall be released forthwith.

(CHIEF JUSTICE)

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court, on 24-11-2020

JUDGE

CHIEF JUSTICE

Tanveer Ahmed/*