

## JUDGMENT

**MOHSIN AKHTAR KAYANI, J.**---Through instant appeal, Muhammad Shafaqat/appellant has assailed judgment dated 22.09.2016, passed by learned Additional Sessions Judge, Islamabad, whereby the appellant was convicted in case FIR No.180/2012, dated 09.05.2012, under section 302/34, P.P.C., Police Station Tarnol, Islamabad and sentenced to life imprisonment as Tazir along with payment of compensation in the sum of Rs.100,000/- to the legal heirs of deceased under section 544-A, Cr.P.C. and in default whereof, the appellant has to further undergo 06 months simple imprisonment. The appellant was also extended benefit of section 382-B, Cr.P.C.

2. The facts in brief are that PW-8 Muhammad Sagheer/ complainant filed complaint/Exh.PH and alleged that on 09.05.2012, Sadaqat Ali informed him that his sister namely Asraj Bibi died due to fire and her dead body is lying in Alfalah Hospital Sangiani, whereupon he reached in the said hospital, where his brother-in-law namely Muhammad Shafaqat/appellant along with his brother namely Rafaqat and other people were present. The said Rafaqat told him that the appellant along with his wife (the deceased) and children while coming from Dhoke Ali Gohar in his car bearing registration No.DGA-7494 were intercepted by three (03) persons in the way and after robbing them they made two fire shots on the chest and neck of deceased, who was seated on rear seat of the vehicle, and succumbed to injuries later on. The robbers did not snatch the mobile phone of appellant as the same was with his sons namely Danish, aged 09 years and Waleed aged 07 years, who were seated on the front seat of vehicle. However, the complainant and his relatives belied the story as narrated by Rafaqat, brother of appellant and had the apprehension that Asraj Bibi has been murdered by her husband i.e. the appellant.

3. On the basis of complaint/Exh.PH, the case FIR No.180/2012 (Exh.PS) was registered and during the investigation of the case, the appellant was arrested and found involved in the commission of alleged offence, therefore, report under section 173, Cr.P.C. was submitted before the Court for trial. The charge was framed against the appellant on 20.11.2012, to which he pleaded guilty and placed himself at the mercy of Court, whereafter the appellant was convicted and sentenced. Feeling aggrieved thereby, the appellant filed Appeal No.188/2015 before this Court, which was allowed vide order dated 16.06.2016 and the impugned conviction and sentence was set aside and the matter was remanded to the learned trial Court for the reason that material evidence was not exhibited in the matter. After remand of the matter, the learned Trial Court conducted the trial and ultimately found the appellant guilty and sentenced him vide impugned judgment dated 22.09.2016. Hence, the instant appeal.

4. Learned counsel for the appellant contended that the learned Trial Court has acquitted two of the co-accused namely Tariq Mehmood and Gulfraz but convicted and sentenced the appellant on the same set of evidence; that learned Trial Court has failed to give reasons for difference amongst the role of co-accused with the appellant; that the only piece of evidence, which surfaced on record is the testimonies of defence witnesses Muhammad Sadaqat/D.W.1 and Danish Ali/D.W.2/ eye-witness/real son of the deceased, who have not attributed any overt act to the appellant rather denied the happening of the event as set up by the prosecution side; that entire case is of circumstantial evidence and there is no eye-witness except the appellant and his son Danish Ali/D.W.2; that recovery of crime weapon has been planted; that motive has not been established in any manner; that the prosecution has failed to prove its case beyond any shadow of doubt.

5. Conversely, learned counsel for respondent No.2 contends that he heavily relies upon statement of the appellant recorded at the time of framing of the charge, whereby the appellant pleaded his guilt that he has committed murder of his wife and the said statement was voluntary and without any duress or coercion; that the said confessional statement has to be taken into consideration while placing the other evidence in juxtaposition, which leads that the appellant has committed murder of his wife although the appellant has denied the alleged incident in his subsequent statement under section 342, Cr.P.C., which is an afterthought; that evidence of Danish Ali/D.W.2 has been managed by way of family pressure, which has no value in the eye of law; that the prosecution has successfully proved its case beyond any shadow of doubt that the appellant has murdered his wife.

6. I have heard the arguments advanced by learned counsel for both the parties as well as learned State Counsel and perused the record.

7. Perusal of the record reveals that PW-8 Muhammad Sagheer/ complainant also recorded his statement and reiterated his stance of complaint and perceived that his sister Mst. Asraj Bibi/deceased has been murdered by the appellant due to family dispute and belied the story that robbers shot her dead and looted the appellant of his belongings i.e. his ID card and money. PW-8 Muhammad Sagheer/complainant alleged the motive behind the murder that appellant was demanding money from deceased to purchase a tractor. PW-8 Muhammad Sagheer/complainant in his statement further stated that he joined the investigation and during the course of investigation, the appellant disclosed about the weapon of offence i.e., .32 bore revolver, which was recovered on 08.05.2012 vide recovery memo Exh.PF, whereas licence of the pistol was taken into possession vide recovery memo Exh.PG, whereas the vehicle (DGA-7494), Corolla white colour, was taken into possession vide recovery memo Exh.PB.

8. During cross-examination, PW-8 Muhammad Sagheer/ complainant acknowledged that he did not write date of occurrence in his complaint/Exh.PH and the incident appears to be without any witness and that he himself is not an eyewitness of the occurrence and even no eyewitness has ever contacted him. He conceded that inquest report was prepared by the police in his presence and Columns No.22 and 23 of the report are blank. He also conceded that he filed written application to the concerned police officer at about 01:40 a.m. in the mid night. He further conceded that Danish and Waleed were sitting on the front seat of vehicle at the time of occurrence. PW-8 Muhammad Sagheer/ complainant being brother of the deceased admitted that his sister neither came to his house during the period of her marriage in an infuriated position nor he filed any application to the police station against his brother-in-law i.e. appellant. He also acknowledged the most important fact that, "I have no evidence to the effect that all three accused, in connivance with each other, committed the murder of my sister". PW-8 Muhammad Sagheer/complainant during cross-examination further stated that when he reached Al-Falah Sangjani Hospital, 60/70 relatives were present there and he identified the dead body along with his close relative Shaukat in the hospital. He further acknowledged that he recorded his statement on 09.05.2012, in which he did not mention the fact that PW-3 Nazik Mehmood saw co-accused Tariq Mehmood and Gulfray at the place of occurrence. He also acknowledged that he conceded the stance of Rafaqat regarding the occurrence.

9. The other important piece of evidence is recovery of weapon of offence i.e. .32 bore revolver, bearing No.B4339, which was recovered from Barsati Nala on the pointation of appellant vide recovery memo Exh.PF on 19.05.2012. The said recovery was effected in presence of PW-8 Muhammad Sagheer/complainant and PW-7 Shakeel Akhtar/ constable.

10. PW-7 Shakeel Akhtar/constable stated that on 09.05.2012, Investigation Officer prepared recovery memo/Exh.PC of bloodstained soil and recovery memo/Exh.PD of last worn clothes etc. (P6 to P10). He is also witness of Sikka Goli (Exh.P11) given by the MLO to Investigation Officer through Exh.PE. He further stated that on 19.05.2012, .32 bore revolver (Exh.P12) was recovered from Barsati Nala on the pointation of Tariq Mehmood/co-accused. He further stated that two live cartridges (P13 and P14) were recovered on unloading the .32 bore revolver. However, during the course of cross-examination, PW-7 Shakeel Akhtar/constable conceded that engraved number near the barrel of revolver is illegible and the place of recovery is not a thoroughfare, rather is a field, where there is no population. He further acknowledged that the appellant was arrested on 13.05.2012 and revolver was recovered on 19.05.2012, which is registered in the name of Ghulam Farid son of Bostan. PW-7 Shakeel Akhtar/constable also conceded that "after recovery of license and pistol we straightaway came to the police station". Such statement clearly spells out that pistol was neither sealed nor its recovery memo was prepared on spot and such illegal practice makes the recovery inconsequential.

11. The last important witness in this case is the Investigation Officer namely Muhammad Idrees/S.I., who appeared as PW-11 and stated that on 08.05.2012, he reached to Al-Falah Sangjani Hospital on official vehicle when he received information of the alleged occurrence and witnessed the dead body of deceased on stretcher, whereafter he prepared memo of dead body vide Exh.PM. He further stated that he received written application from PW-8 Muhammad Sagheer/complainant for registration of FIR and taken into possession vehicle bearing registration No.DGA-7494 (white colour, Model-1974) vide recovery memo Exh.PB, whereafter he sent the dead body to PIMS Hospital for postmortem examination. He further

stated that he could not inspect the place of occurrence due to darkness, rather prepared the site plan (Exh.PO) in the morning as well as taken into possession bloodstained earth vide recovery memo Exh.PC along with two empties of .32 bore revolver vide recovery memo Exh.PJ. He also stated that the CMO handed over him sealed parcel of Sikka Goli (Exh.PE), which was recovered from the dead body of deceased. He further stated that on 13.05.2012, statements of three witnesses were recorded under section 161, Cr.P.C. and all three nominated accused i.e. appellant, Tariq Mehmood and Gulfaraz Khan were arrested and during the course of investigation, they were found guilty. He further stated that on 19.05.2012, Tariq Mehmood/co-accused got recovered the weapon of offence i.e. .32 bore revolver from a Naala leading towards cement factory. He also stated that on the pointation of Gulfaraz/co-accused, the licence of .32 bore revolver was recovered from clothes lying in the room of cement factory.

12. However, during the course of cross-examination, PW-11 Muhammad Idrees/I.O. conceded that Naeem Ullah/Moharrar informed him at about 10:55 p.m. that a victim has received bullet injury during dacoity and has been taken to Sangjani Hospital. He also conceded that he has not joined Sadaqat Ali in the investigation as well as the two minors due to their tender age, who were present with the appellant at the time of occurrence. He also conceded that he has not produced the accused persons before the Magistrate for recording of their statements under section 164, Cr.P.C. He further acknowledged that the blood-stained clothes of appellant were not taken into possession because he disappeared from the hospital. He also conceded that he neither mentioned about the presence of blood inside the vehicle nor took mobile numbers of PW-8 Muhammad Sagheer/complainant and Sadaqat Ali. He received Sikka/bullet from Dr. Nasreen Butt in sealed parcel for analysis but the same was not sent for the purpose of chemical analysis. He further conceded that .32 bore revolver was sent to the laboratory on 10.07.2012. He also acknowledged that empties remain inside after making fire shots from the revolver. He also stated that no person made statement before him that all three accused persons were seen together at the place of occurrence.

13. On the other hand, the prosecution has heavily relied upon the evidence of PW-2 Zaheer regarding motive, who stated that one month prior to the occurrence his sister/deceased came to his house and told him and her mother Zarmin Bibi that her husband/appellant is demanding Rs.250,000/- to purchase a tractor, who also extended life threats in case if she failed to manage the said amount. However, this stance of PW-2 Zaheer has not been corroborated through any independent source, therefore, the motive setup by the prosecution through PW-2 Zaheer has not been proved.

14. Essentially, the prosecution case mainly rests upon circumstantial evidence of the appellant and his son Danish Ali, whereas the former has been made an accused in this case, while the later was never associated by Investigation Officer. However, Danish Ali put appearance before the learned Trial Court as DW-2 and expressed his stance in the following manner:-

"That on 08.05.2012 we went to Dhok Aksar Khan and left our house at 8:30 p.m. We went to the house of a friend of my father whose name is Aksar Khan. We came back from there during the night time. In the way there was three men they stopped our vehicle. They deboarded my father and they were demanding money from my father. Then they also demanded vehicle from my father. My mother started shouting. Then they fired upon my mother, on hearing the voice of fire the men from the house where we gone as guest came and took my mother in the vehicle to Hospital. Me and my brother went home with a taxi wala. I went to police station two or three times after the occurrence. I also made my statement before the I.O.

xxxxxxxxxx by learned counsel for the complainant.

It is correct that my mother was murdered during the occurrence. After the occurrence till today I am residing at the home of my father. Me and my brother were sitting/boarding at the front seat of vehicle. It is correct that at the time of occurrence me and my brother were playing with the mobile of our father. Said mobile remained with us even after the occurrence. My mother was sitting right behind our seat and not behind driving seat. My mother did not go out from the vehicle. Two fire shots hit my mother. She did not speak any thing after being hit with the bullets as she became unconscious immediately. At the time of occurrence it was dark. I know that this case

was decided earlier and my father was awarded sentence of imprisonment by the court. During the previous trial proceedings I did not appear as defense witness. I cannot tell the reason why I did not appear during the first round and why I am before the court now. Police has not recorded my statement during the investigation of the instant case. I love both my mother and father. The murderer of my mother should be punished. It is incorrect to suggest that I have deposed falsely just to save the skin of my father."

15. Keeping in view the above background, I am of the view that PW-11 Muhammad Idrees/I.O. had not conducted the investigation in its true perspective. The weapon of offence i.e. .32 bore revolver was got recovered on the pointation of Tariq Mehmood/co-accused, who was acquitted on the basis of same evidence. Even otherwise, the recovered weapon of offence has not been matched as per report (Exh.PR) of Punjab Forensic Science Agency, conclusion of which is reproduced as under:-

- The item C1 cartridge case was eliminated as having been fired in the item R1 revolver.
- The item C2 cartridge case was examined and found to be not suitable for comparison.

16. As a matter of fact, a revolver has a cylinder that contains the bullet and does not automatically eject a spent casing, but surprisingly the Investigation Officer got recovered two firearm empties of .32 bore revolver from the place of occurrence through recovery memo Exh.PJ, whereas it is tolerable to a prudent mind that an offender while using revolver as his weapon of offence would manually eject spent cases at the crime scene. Nevertheless, the recovered two empties did not match with the recovered weapon of offence, hence, the recovery is inconsequential, especially when the revolver was sent to laboratory on 10.07.2012 with inordinate delay of two months.

17. This Court is mindful of the facts that appellant did not report the dacoity, while PW-8 Muhammad Sagheer filed complaint (Exh.PH) on the basis of verbal statement of appellant's brother, whereas the star witness of this case, i.e. Danish Ali, son of appellant, aged about 09 years at the time of occurrence, was not associated in the investigation and such best available evidence was withheld by the Investigation Officer without giving any reason, however, the said Danish Ali put appearance as DW-2 in defence and imposed liability upon three unknown persons.

18. On 20.11.2012, the appellant pleaded guilty at the time of framing of charge regarding murder of his wife, however the learned trial Court did not accept the stance of appellant and opined in the following manner:-

Accordingly, prosecution has produced evidence of 12 witnesses to bring guilt of the appellant home, however, the entire evidence is silent qua the connection of appellant with the crime, except that he was present at the place of occurrence and he was nominated by brother of deceased as accused. Although, PW-8 Muhammad Sagheer/complainant failed to place on record any evidence to connect the appellant with the commission of offence.

19. Since the case in hand is based on circumstantial evidence, the prosecution has failed to prove the same through cogent evidence and also failed to establish the chain of evidence in any manner, even otherwise, the learned trial Court acquitted Tariq Mehmood and Gulfaraz, co-accused persons on the basis of same set of evidence, which approach should have also been adopted to the extent of present appellant being an alleged co-accused as also held by the apex Court in judgments reported as 2018 SCMR 313 (Ulfat Husain v. The State), 2017 SCMR 1672 (Tariq v. The State), 2017 SCMR 1645 (Muhammad Afzal v. The State) and 2015 SCMR 137 (Muhammad Ali v. The State), wherein the following principles have been settled.

- i. acquittal of all co-accused persons having similar role as that of accused on the same evidence, also entitled the accused to same treatment.
- ii. Same set of evidence which was disbelieved qua involvement of co-accused persons could not be relied upon to acquit the accused on capital charge.

Keeping in view the above analogy, a doubt emerges on record in favour of the appellant, who has been nominated for murder of his wife in connivance with two co-accused persons, who have already been acquitted by the learned trial Court on the basis of same set of evidence, against whom no appeal has been filed by the prosecution side. Similarly, the weapon of offence was recovered on the pointation of Tariq Mehmood/co-accused, therefore, the recovery has nothing to do with appellant, whereas the role of commission of murder points towards the co-accused persons, and not towards the appellant.

20. On the other hand, it is trite law that interested and closely related witnesses cannot be called as independent witnesses and their statements cannot be relied upon unless their evidence is corroborated through an independent source. Whereas. PW-8 Muhammad Sagheer complainant and PW-2 Zaheer, being brothers of deceased are interested witnesses. have nominated the appellant for commission of murder of deceased, even otherwise, they are neither eyewitnesses of the occurrence nor they are able to relate any event to prove their alleged motive against the appellant regarding his demand of money to the tune of Rs.250,000/- for purchase of tractor, therefore, evidence of PW-8 Muhammad Sagheer/complainant and PW-2 Zaheer could not be taken as credible evidence to award capital punishment as also opined by the Hon'ble Supreme Court in judgment reported as 2017 SCMR 486 (Muhammad Asif v. The State).

21. On the contrary, learned counsel for respondent No.2 relied upon the confessional statement of appellant dated 20.11.2012. In my humble view, if the statement of appellant is accepted in toto, even then independent prosecution evidence was required to prove the charges against the appellant and the learned trial Court has rightly adopted the said course as provisions of section 265-E(2), Cr.P.C. provide recourse to the trial to convict the appellant or called for evidence and the word "may" is used along with discretion of the trial Court. The above referred order dated 20.11.2012 of the learned trial Court explain the reason for calling the evidence that the case is for the offence of murder under section 302/34, P.P.C.

22. Likewise, the apex Court has elaborated the requirements of confession in 2018 SCMR 495 (Intekhab Ahmad Abbasi and others v. The State and others), 2017 SCMR 986 (Hashim Qasim and others v. The State) and 2017 SCMR 713 (Muhammad Ismail v. The State). While relying upon the said judgments, I am of the view that the appellant was unable to understand the questions, especially when a question was put to him and recorded in English in the following manner:

Q.2. Do you plead guilty to the charge?

Ans. Yes, I plead guilty to the charge. "I myself had killed my wife - Siraj Bibi deceased with a ,fire arm due to my honour as I suspected her to be the lady of easy virtue. I am of the guilty of her murder and co-accused Tariq Mahmood and Gulfraz have no concern whatsoever with this case. I place myself at the mercy of the Court."

The above referred statement gives rise to the situation where the apex Court in the case of Intekhab Ahmad Abbasi supra highlighted the reasons for not accepting such kind of statement in the following words:

"Admittedly some of the accused were illiterate or not well educated and spoke the language the Magistrate could not understand - No translator/interpreter was appointed to record their statement in words exactly spoken by them."

23. Evidently, though the learned Trial Court followed other prerequisites while recording the statement of appellant but recorded the statement in English, which is not in line with the principles discussed above, therefore, such kind of confession on the part of appellant misses the element of voluntariness, especially such statement has been retracted in second round of litigation. This Court is also of the opinion that since the said alleged confession has not been corroborated through any independent evidence of reliable nature, the same could not be used for the purpose of conviction on capital charge. Reliance in this regard is placed upon 2017 SCMR 898 (Muhammad Ismail v. The State), 2017 SCMR 335 (Abdul Nabi v. The State) and 2016 SCMR 1617 (Muhammad Ashraf v. The State). It is also trite law that conviction could not be recorded on the sole basis of confessional statement, especially when the prosecution failed to prove its case beyond any shadow of doubt as also held in 2015 SCMR 856 (Dadullah and others v. The State).

24. Keeping in view the above background, the prosecution has failed to link the appellant with the murder of deceased, which results into a benefit of doubt in favour of appellant and it is trite law that if a slightest doubt emerges on record, benefit of the same shall be extended to the accused, therefore, the captioned Criminal Appeal No.180/2016 (Muhammad Shafaqat v. The State and others) is ALLOWED impugned judgment dated 22.09.2016 passed by learned Additional Sessions Judge, Islamabad is hereby SET ASIDE and the appellant is ACQUITTED from case FIR No.180/2012. dated 09.05.2012, under section 302/34, P.P.C., Police Station Tarnol, Islamabad, hence, he be released forthwith from jail, if not required in any other case.

Appeal allowed.

Uploaded By : Engr. Umer Rasheed Dar