

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Crl. Appeal No.123-2019

Muhammad Javed

versus

The State and others.

Appellant by: Raja Mazhar Hussain Bhatti, Advocate.

Respondents by: Mr. Qasim Iqbal, Advocate for respondents.
Syed Shahbaz Shah, State Counsel.
Nawaz, S.I
Accused persons namely Nasir Mehmood, Nasira Masud, Masud Khan and Mst. Nazia are present.

Date of Decision: 23.06.2022.

MOHSIN AKHTAR KAYANI, J: This appeal has been filed under Section 417 Cr.P.C against the order dated 12.04.2019, passed by learned Sessions Judge (West), Islamabad, whereby respondents No.2 to 6 were acquitted in terms of Section 265-K Cr.P.C. in case F.I.R No.255 dated 16.05.2013, under Sections 302, 376, 380, 411, 201/34 PPC, P.S Margalla, Islamabad.

2. Brief facts referred in the instant appeal are that the appellant has lodged the F.I.R with the allegation that he was residing with his brother in *Mouza Bangial*, Islamabad, however, on 15.05.2013 at about 09:00 pm, he was present in his house, when his brother Aurangzeb (deceased) received a telephonic call and then left the house by saying that he had to rent out the village house, so he was going out for that purpose on vehicle bearing registration No. MZ-603-XLI, Corolla, white colour. However, when he did not return home till late night and his mobile phone was also switched off and could not be contacted, whereafter he got registered the complaint regarding missing of his brother in the Police Station, Koral. However, on the next morning at about 04:00 a.m, the complainant has received information

from the Police Station, Koral about the dead body of the deceased lying in the back seat of the vehicle bearing No. MZ-603 and the said vehicle was parked in front of PIMS Hospital, after receiving this information, complainant alongwith his brother Muhammad Saghir as well as other relatives reached at PIMS Hospital, near *Ibn-e-Sina* Road, they saw dead body of the deceased brother lying in the back seat of the vehicle bearing registration No.MZ-603, white colour Corolla, where his brother was done to death with firearm, whose purse, cash amount, passport and driving license etc. were also missing. Apart from that, his mobile phone, license of pistol 9MM were also taken away by the accused persons. During the course of initial investigation, the complainant has nominated Zaheer Akhtar as co-accused through supplementary statement on suspicion, who fled away with family from his house and remained fugitive for five and half years till his arrest on 25.10.2018, who made disclosure for his involvement in the crime of murder of Aurangzeb (deceased) and got recovered the weapon of offence and disclosed the involvement of his ex-wife Nazia Bibi and his brother in laws, the present respondents, who have been challaned by the police in terms of Section 173 Cr.P.C. The trial Court has framed the charge and even recorded the evidence of Nimra Zaheer, PW-1, the real daughter of principal offender Zaheer Akhtar, but later on, all the accused were acquitted by the trial Court in terms of Section 265-K Cr.P.C., hence this appeal.

3. Learned counsel for the appellant contends that the trial Court has not recorded the complete evidence in this case, whereby other witnesses have yet to prove the case in favour of prosecution, but no such opportunity was extended; that the trial Court has not followed the legal spirit of law and decided the case in haste, despite the availability of overwhelming evidence; that the impugned order is based upon misreading and non-reading of the evidence, therefore, same is liable to be set-aside.

4. Conversely, learned counsel for respondents informed the Court that the principal accused Zaheer Akhtar had died during the pendency of the appeal and as such the criminal proceedings to the extent of said respondent stand abated, which factum has been verified by the Investigation Officer through his report submitted before this Court today i.e. 23.06.2022 on the direction of this Court vide order dated 15.06.2022. Copy of the same has been placed on record.

5. Learned counsel for the remaining respondents contends that respondents present before this Court have been involved in the instant case to the extent of conspiracy and no direct evidence is available on record to connect the respondents with the crime, which made basis of acquittal and no probability of conviction has been demonstrated by the prosecution, therefore, the trial Court has rightly acquitted the respondents in terms of Section 265-K Cr.P.C.

6. Arguments heard and record perused.

7. Perusal of record reveals that the appellant/complainant has lodged the criminal case F.I.R No.255 dated 16.05.2013, under Sections 302, 376, 380, 411, 201/34 PPC, P.S Margalla, Islamabad with the allegation that his brother Aurangzeb has left the house on vehicle bearing registration No. MZ-603, Corolla white colour after receiving the call on his mobile at about 09:00pm, but he did not come back, due to which the complainant/appellant has lodged the complaint in the Police Station Koral for missing of his brother, but later on, informed the complainant by Police Station Koral that dead body of his brother was lying in the back seat of vehicle bearing registration No. MZ-603, Corolla in front of PIMS Hospital near *Ibn-e-Sina* Road.

8. The police has investigated the crime after post-mortem of the deceased, whereby case was registered against unknown persons and later on Zaheer Akhtar was nominated by the complainant/appellant as accused

in this case, who is *Khala Zaad bhai*/cousin of the complainant, though the said accused Zaheer Akhtar was present at PIMS Hospital and also participated in the funeral ceremony of the Aurangzeb (deceased), but later on, fled away with family from his house, thereafter he has been challaned in terms of 512 Cr.P.C. and remained fugitive for five and half years. The said Zaheer Akhtar was taken into custody on 25.10.2018 by Ghulam Mustafa, S.I and during the course of physical remand, he made a disclosure that he committed the murder of Aurangzeb (deceased) with the help of his ex-wife Nazia Bibi and Shahid Pervez. In the police report, I.O has referred that the alleged murder took place at House No.77, Street No.05 Ghouri Town, at first floor of rented premises and all the present respondents are involved in the conspiracy of murder of the Aurangzeb (deceased), who after commission of murder of offence by principal offender Zaheer Akhtar, transported the dead body on his vehicle and left the same in front of PIMS Hospital.

9. During the course of investigation, alleged weapon of offence i.e. pistol .30 bore alongwith live bullets were recovered on the pointation of accused Zaheer Akhtar on 07.11.2018. The challan has been submitted in the Court and trial Court after supplying the copies to the accused, framed the charge on 15.04.2019 only against Zaheer Akhtar in terms of Section 302 PPC, rest of the accused persons were not charged, thereafter evidence of Nimra Zaheer, PW-1, daughter of Zaheer Akhtar (principal accused) was recorded.

10. While hearing this case, both the parties have informed the Court that principal offender Zaheer Akhtar had died during the pendency of the trial on 19.09.2019, therefore, I.O was directed to verify the credentials of the said accused, whereafter I.O has submitted the report today in the Court duly verified from relevant quarters alongwith death certificate of Union Council *Kirpa* and death certificate duly registered by the Government of Pakistan on

12.11.2019, which confirms that the deceased was murdered on 19.09.2019, therefore, the proceedings against the said acquitted accused Zaheer Akhtar stand abated.

11. Now adverting towards the role of other accused, which has been referred in the challan under Section 173 Cr.P.C. to the extent of *Salah Mashwara*. We have scanned the record as well as police report with the able assistance of learned counsel for the parties, it reveals that the Zaheer Akhtar (deceased) had suspicion and doubt qua the character of his ex-wife Nazia Bibi having illicit relationship with the Aurangzeb (deceased) and on this score, he was done to death allegedly in the house of Zaheer Akhtar accused (deceased), situated at Ghouri Town, rented out premises, but surprisingly this portion of the report is not supported with any of the statement of witnesses qua motive, who can narrate such factum in terms of Section 161 Cr.P.C. in favour of prosecution, hence there is no evidence of motive recorded by the I.O in the police challan.

12. Similarly the main offender Zaheer Akhtar remained fugitive for five and half years, who was arrested by the police on 25.10.2018, who allegedly made a disclosure that he committed the murder of Aurangzeb at last rented out premises, but the I.O has not recorded the statement of alleged owner of subject premises to justify this stance that principal accused or his ex-wife have never remained tenant in the subject premises, therefore, such disclosure has no meaning in faovur of prosecution.

13. We have also noticed that after five and half years, nothing incriminating was recovered to connect any of the accused with the commission of offence of murder as disclosed by the accused Zaheer Akhtar (deceased) before the police. On the other hand, I.O was unable to place on record the finger prints or DNA recovered from the vehicle from where dead body of deceased was recovered near PIMS Hospital. The entire record is

silent qua any such report, though fingerprints were taken from the vehicle alongwith ladies *shalwar*, but same was not verified, even no CDR was collected by the I.O to demonstrate that Aurangzeb (deceased) was at particular place in connection with the principal accused Zaheer Akhtar or Nazia Bibi, though one pistol and a license of Aurangzeb (deceased) was recovered on the pointation of accused Zaheer Akhtar (deceased) from the native village, which is the only incriminating evidence to connect the principal accused with the hideous crime of murder of Aurangzeb (deceased), but it lost the legal value, when no fire empty was available to match with the recovered gun.

14. Now adverting towards the statement of Nimra Zaheer, PW-1, the real daughter of Zaheer Akhtar accused under Section 161 Cr.P.C recorded by the Investigation Officer, which disclosed the involvement of his father in the murder of Aurangzeb, but surprisingly young lady while recording her testimony as PW-1, has denied the entire incident, rather became hostile and nothing fruitful has been achieved on record. It is also known fact that ex-wife of the accused Zaheer Akhtar was divorced by the said accused after the alleged occurrence. However, at this stage, when the principal offender Zaheer Akhtar was murdered during the pendency of the matter, the principal charge against the said accused stand abated due to his death and only case left to the extent of conspiracy and abatement of present respondents in helping out the principal offender, though there is neither direct evidence available on record nor I.O has collected any evidence, even the same has not been mentioned in final report under Section 173 Cr.P.C. Similarly not a single allegation in the statement recorded under Section 161 Cr.P.C has been leveled against any of the accused person regarding involvement in the instant case.

15. In such scenario, learned Trial Court has rightly issued the notice under Section 265-K Cr.P.C, which provision is meant to cater any situation, where the charge against the accused has been declared groundless or case of no evidence or where probability of conviction is not visible in terms of Section 265-K Cr.P.C. as held that 1998 SCMR 1840 (Zahoor-Ud-Din vs. Khushi Muhammad and 06 others), PLD 2009 SC 102 (Ajmeel Khan vs. Abdur Rahim and others), PLD 2004 SC 364 (Rasool Khan and others vs. Haji Banaras Khan and others).

16. In order to exercise the powers by the trial Court, there is no need to file separate application, rather the Court can consider the special and peculiar circumstances of the case that charge is groundless or no probability of conviction is available. Even there is no bar upon the trial Court to exercise such powers of suo-moto as held in 2017 PCrI/JN 162 [Lahore (Multan Bench)] (Muhammad Asif Khan vs. Aftab Ahmed, Regional Manager (Retd.) National Bank of Pakistan and another) as such trial Court has exercised its powers in terms of Section 265-K Cr.P.C after framing of charge and even after recording of statement of star witness i.e. Nimra Zaheer, PW-1, the real daughter of principal offender Zaheer Akhtar (deceased), who has initially recorded her statement under Section 161 Cr.P.C. being witness of the murder, but later on resiled from her statement, all these facts clearly conclude that there was no probability of conviction and trial Court has rightly acquitted the respondents from the charge, though the order passed by the trial Court is not up to the standard required in such type of cases.

17. It is also settled law that privacy and secrecy of an agreement, might be oral or written, to enter into a criminal conspiracy was the essence to establish that prior to the commission of the offence two or more persons had entered into a conspiracy for committing an unlawful wrong as held in

2021 YLR Note 88 (Qari Ahmed Khan and others vs. The State). It is also settled law that two or more persons were members of the conspiracy and conspiracy consisted not merely in the intention of two or more persons to do an unlawful act as held in 2021 SCMR 873 (The State through P.G Sindh and others vs. Ahmed Omar Sheikh and others).

18. We have perused the entire record and have also gone through the report and statement of witnesses with the able assistance of learned counsel for the parties, concur with the findings of the trial Court, therefore, instant appeal is meritless and same is hereby DISMISSED.

(SARDAR EJAZ ISHAQ KHAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

RAMZAN