

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 101-M/2017

Naseeb Zada son of Hayat Gul (Appellant)
Versus

The State & another (Respondents)

Present: *M/s Bakht Nawaz Khan and Abdul Sattar Khan,*
Advocates for the appellant.

Mr. Rahim Shah, Asstt: Advocate General
for the State.

Date of hearing: **01.10.2018**

JUDGMENT

SYED ARSHAD ALI, J.- This criminal appeal is directed against the judgment dated 12.04.2017 rendered by the learned Additional Sessions Judge/Izafi Zila Qazi Chakdara Camp Court at Timergara in case F.I.R No. 628 dated 27.11.2013 under sections 302,364,109,34 PPC registered at Police Station Balambat District Dir Lower, whereby the appellant Naseeb Zada was convicted under section 302 (b) read with section 109 PPC and sentenced to life imprisonment alongwith payment of compensation of Rs.10,00,000/- (ten lacs)

payable to the legal heirs of the deceased under section 544-A, Cr.P.C, or in default thereof, he was ordered to undergo further 6 months simple imprisonment. However, the accused-appellant was extended the benefit of section 382-B Cr.P.C.

2. The complainant through FIR No. 628, Ex-PW-17/1 registered on 27.11.2013 at 17:00 hours had charged the present accused/appellant for abetting the murder of his wife namely Mst. Salma Bibi and daughter of the complainant.

3. On 29.11.2013 co-accused namely Nausherawan, cousin of the present accused-appellant, Sherin Zada and Bakht Munir, brothers of the accused were arrested. On 04.12.2013 the acquitted accused Bakht Munir confessed his guilt before the Judicial Magistrate wherein he has also implicated the present appellant to have abetted him for the murder of deceased Mst. Salma Bibi and had further implicated the other acquitted co-accused Hazrat Wali and Gul Zada. On

01.12.2013 the dead body of the deceased was recovered by PW-22, Ihsan-ur-Rehman, S.I. within the jurisdiction of Police Station Risalpur, he has also preserved her cloth in shape of *Qameez*, Ex. PW-19/8 and pictures, Ex. PW-19/10 to 19/12. The pictures of the dead body of the deceased Mst. Salma Bibi were made by Maqbool Hussain alias Ashiq, PW-16, however, in the present case the said pictures of the dead body of the deceased were produced before the complainant on 03.12.2013, who had identified that the said pictures were of ~~the~~ her deceased daughter through identification memo Ex. PW-14/1 on 03.12.2013. The dead body of the deceased was medically examined by lady doctor Mahnaz Khan, PW-21 on 01.12.2013 at 12:30 P.M. The acquitted accused Nausherawan, Sherin Zada and Bakht Munir on 03.12.2013 made pointation of the graveyard of the deceased. *Challan* against the accused was placed before the trial Court on 24.01.2014. In the said proceedings the present appellant



Naseeb Zada, Khaista Gul, Hazrat Wali and Gul Zada were proceeded under section 512 Cr.P.C. However, at the trial, the complainant-party effected compromise with the then arrested accused Nausherawan, Sherin Zada and Bakht Munir on 04.08.2014 and as such on the basis of compromise they were acquitted by the trial Court on the same date.

4. On 09.9.2015 the accused-appellant Naseeb Zada alongwith Khaista Gul and Gul Zada had obtained bail before arrest from the competent Court, however, the said application was dismissed on 18.9.2015, consequently they were arrested and supplementary *challan* was submitted against them before the trial Court on 14.10.2015.

5. During trial, the prosecution has produced as many as 22 witnesses whose statements were recorded and placed on file. On closure of the prosecution evidence, the accused were examined under section 342, Cr.P.C, wherein they denied the charges,

claimed innocence and stated to have falsely been implicated in the case.

6. On conclusion of the trial, the learned trial Court convicted the appellant vide judgment impugned herein, whereas the co-accused Gul Zada and Khaista Gul were acquitted of the charges by extending them the benefit of doubt.

7. We have heard arguments of learned counsels for the accused/appellant, learned Asstt: Advocate General appearing on behalf of the State and gone through the record with their able assistance.

8. It is evident from record that the local police took cognizance of the offence on registration of FIR, Ex. PW-17/1 by the complainant Mst. Dil Hasiyat on 27.11.2013, wherein on the said date at 17:00 hours she had reported that her daughter Mst. Salma Bibi was married to the present

appellant some 8 years back, out of the wedlock they had two children. The present appellant was working for gain at Saudi Arabia for the last 6/7 months. Her daughter Mst. Salma Bibi was not on good terms with the appellant and therefore for the last 6 months she was residing with the complainant. On 22.10.2013 when she had gone to the house of her father-in-law Khoona Gul. on her return at 12:15 hours to her house, the younger daughter of the deceased namely Sony informed her that the accused Nausherawan (acquitted accused), who was the cousin of the appellant took along Mst. Salma for medical treatment and collecting of money sent by Naseeb Zada (appellant) for her. However, till evening when her daughter could not come back, she started inquiry about the whereabouts of her daughter from the

hospital at Timergara and the in-laws of her daughter, however, no clue of Mst. Salma was traced. On the following day i.e. 23.10.2013, the present appellant called her through her cell number and assured her that Mst. Salma is safe, however, after few days, he once again called her that on the direction of the appellant the accused Nausherawan took along Mst. Salma on pretext of medical treatment, however, later with the help of the brothers of the appellant namely Sherin Zada and Bakht Munir killed her. She had also recorded her conversation with the appellant, therefore, charged the accused Nausherawan, Sherin Zada and Bakht Munir for the murder of deceased and the present appellant Naseeb Zada for the abetment. Motive was that the appellant suspected the deceased being involved in illicit relations with other men.

9. The prosecution case against the present appellant rests on the statement of the complainant, PW-5, the conversation recorded wherein the appellant had confessed his guilt, the confessional statement of his brother acquitted accused Bakht Munir and the recovery of the dead body of the deceased.

10. Allegedly, the deceased went along with the acquitted accused Nausherawan on 22.10.2013. When the complainant appeared before the Court as PW-5, she had reiterated the story narrated by her in the FIR that the deceased was taken along by acquitted accused Nausherawan and she had a first conversation with the appellant on the following day i.e. 23.10.2013 and subsequently after 7 days the appellant had informed the complainant that the deceased was killed by Nausherawan and his brothers



Sherin Zada and Bakht Munir on his direction, however, despite this fact/disclosure on behalf of the appellant she did not lodge any report/FIR till 27.11.2013, the said FIR was registered after almost 35 days of the occurrence and after 28 days when she (complainant) was informed by the present appellant about his role of abetment, therefore, there is inordinate considerable delay in registration of the FIR, which remained unexplained during the trial proceedings. In case of such unexplained delay in lodging of FIR creates serious doubt on the authenticity of the prosecution version. It was laid by the august Supreme Court of Pakistan in "Muhammad Akram vs the State" (2009 SCMR 230). *"Conduct of the father of the abductee, who knew the accused, lodged the FIR after an ordinate delay of six*

months of the abduction and recovery of his son, had cast heavy doubt on the veracity of the FIR.

11. However, the most important fact, which is fatal to the prosecution case is the alleged recovery of the dead body of the deceased Mst. Salma by local police of police station Risalpur on 01.12.2013. The recovery of dead body was reported through FIR No. 688, Ex. PB dated 01.12.2013. According to the said FIR, the dead body of an unidentifiable woman was recovered from field, who was slaughtered. On the same date i.e. 01.12.2013 at 12:30 hours the dead body of the deceased was medically examined by lady doctor Mahnaz Khan, PW-21 whose report Ex. PW-21/1 contained the following observations in respect of the dead body of the deceased:-

" Half of the neck was cut extending from one ear to another. Decomposed body wearing blue colored printed shirt and plain shalwar. The whole body was swollen and peeling of skin present. Maggots were also present. Due to putrefaction changes face and organs were distorted. In my opinion cause of death was asphyxia due to cutting down of neck organs and blood vessels."

In view of the above report, the probable time between the death and postmortem of the deceased was 48/72 hours. PW-21 in her cross-examination has stated that the face of the dead body of the deceased was distorted and not identifiable. PW-16 Maqbool Hussain alias Ashiq had caught pictures of the dead body of the deceased, which are placed on record as Ex. PW-16/1 to Ex. PW-16/8. Similarly, PW-22 the then Sub Inspect of police station Risalpur had also confirmed that the face of the dead body of the deceased was not identifiable. According to the prosecution case i.e. statement of the

complainant, PW-5 that the deceased was killed on 23.10.2013 and in the confessional statement of the acquitted accused Bakht Munir he had also confessed that on the following day of 22.10.2013 at *Isha Vela* the deceased was killed, however, the dead body was recovered on 01.12.2013 after 36/37 days of the occurrence and according to the medical report the approximate time between death of the deceased and postmortem was 48/72 hours. Therefore, the dead body of the lady, which was recovered on 01.12.2013 might have been killed on 29.11.2013 and not before that. Hence, in the aforesaid circumstances, it is established on record that the dead body which was recovered and has been considered to be the dead body of Mst. Salma, cannot presumed to be her dead body in view of the above-referred contradiction

between the version of prosecution and the medical evidence, therefore, the death of Mst. Salma could not be established before the trial Court.

12. Although, Bakht Munir, the acquitted co-accused has confessed his guilt during the investigation on 04.12.2013 before the Judicial Magistrate, PW-18, wherein he has also charged the present appellant for abetting the murder of the deceased, however, in order to prove the said confession against its maker, it must be established that the said confessional statement was voluntary and true. In the present case, the maker of the confession was arrested on 29.11.2013 and the alleged confession was made 04.12.2013 after delay of 5 days. Thus, recording confession at such belated stage when the accused remained in police custody for about 5 days, the said

confession does not appear to be true because the identity of the deceased could not be established.

Even otherwise, the confession of accused is a circumstantial evidence against the co-accused under Article 43 Qanun-e-Shahadat Order, 1984, which need strong corroboration. In this regard reliance is placed on "Mushtaq and others vs the State (2012 SCMR 109)", wherein it was held by the august Supreme Court of Pakistan:- *"As the accused did not admit to have killed the deceased, therefore, he could not be held responsible for killing on the confessional statements of co-accused."*

The same ratio further reflects in "Abdur Rehman's case reported as 2018 YLR 1629", wherein it was held by the Hon'ble High Court:- *"Confession made by*

accused could not be used as a substantive piece of evidence to make the same basis of conviction of co-accused. Confessional statement could be used a corroborative piece of evidence, if corroborated by independent evidence."

13. Admittedly, at the time of missing of the alleged deceased, she was in the house of her parents and the present appellant was at Saudi Arabia, therefore, his alleged role was only that of abatter, who has confessed his guilt before the complainant on cellphone and the said statement was recorded. The said recording was produced before the Court, however, it is still a mystery that who has recorded the said conversation as the complainant herself is an illiterate woman and no expert evidence has been procured by the prosecution to establish that the voice so

recorded was that of the present appellant or otherwise. True, that under Article 164 of the Qanun-e-Shahadat Order, 1984 the Court may allow prosecution of any evidence that may have become available because of modern devices/techniques etc, however, the prosecution has failed to establish that indeed the voice so recorded was that of the appellant and even the person who has made the recording was also not produced before the Court by the prosecution, therefore, this evidence is also not worth reliance.

14. The gist of the whole discussion is that the prosecution case against the accused/appellant is pregnant with doubts and it is settled principle of law that in case of doubt, the benefit thereof must accrue in favour of the accused as a matter of right and not of grace.

15. In view of the above discussion, we are of the absolute view that the prosecution has failed to prove its case against the accused/appellant beyond any shadow of doubt; nevertheless the death of alleged deceased could not be established, therefore, his conviction cannot be maintained, resultantly, we accept this appeal by setting aside his conviction and sentence recorded by the learned trial Court through the impugned judgment dated 12.04.2017 and acquit him of the charge levelled against him. He be set free forthwith, if not required in any other case.

16. These are the reasons of our short order of even date.

Announced
01.10.2018


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Office
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