

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE JAMAL KHAN MANDOKHAIL
MR. JUSTICE MALIK SHAHZAD AHMAD KHAN

Criminal Appeal Nos. 23-Q & 24-Q of 2020

(On appeal from the judgment dated 31.7.2018
passed by the High Court of Balochistan, Quetta in
Criminal Appeal No.401/2017, Criminal Appeal
No.415/2017 and Criminal Appeal No.442/2017)

Rehmatullah (In Crl.A.23-Q/2020)
Naseer Ahmad and Muhammad Younas (In Crl.A.24-Q/2020)
...Appellant(s)

VERSUS

The State (In both cases)
...Respondent(s)

For the Appellant(s) : Mr. Gohar Yaqoob Yousafzai, AOR
Mr. Inamuallah, ASC (In both cases)

For the State : Mr. Ameer Hamza Mengal, Additional
P.G. Balochistan (In both cases)

Date of Hearing : 29.07.2024

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.- Appellants were

tried by the learned Sessions Judge, Quetta pursuant to a case registered vide FIR No. 02/2015 under Sections 302, 34 PPC at Police Station Saddar, District Quetta. The learned Trial Court vide its judgment dated 29.11.2017 convicted the appellants under Section 302(b) PPC read with Section 34 PPC as Ta'zir and sentenced each of them to suffer imprisonment for life. They were also directed to pay compensation amounting to Rs.200,000/- each to the legal heirs of deceased. In default, the appellants were directed to further undergo simple imprisonment for a period of

one year each. Benefit of Section 382-B Cr.P.C. was also extended in favour of each appellant. In appeal, the learned High Court upheld the judgment of the learned Trial Court.

2. As per brief allegations levelled in the FIR by Muhammad Hasssan (complainant), on 03.01.2015 at about 12:00 noon his younger brother Mustafa aged about 18/19 years, who was a plumber by profession, went out of his house on his motorcycle to Liaquat Bazar Quetta. He (Mustafa) had a Nokia Mobile Phone with him having SIM No.0311-1842119 and in the way he met with his friend Abdul Latif volunteer at police blockade at A-One City and told him that he was going to Bazaar and if his phone number was found to be switched off, then he may contact him on his other mobile SIM number No. 0313-2280082. It is further averred in the FIR that when at about 4.00 pm he (complainant) made a call on his brother's phone i.e. 0311-1842119, the same was found to be switched off, therefore, he contacted his relatives and friends of his brother. The friend of his brother namely Abdul Latif, volunteer, told him that at about 12:00 noon Mustafa came at A-1 City Police Blockade and gave another SIM number to him. He (complainant) contacted at the second SIM number, but the same was also found to be switched off. The complainant at his own started search, but the whereabouts of his brother could not be traced out. On 08.01.2015, he (complainant) saw a publication in the Daily Newspaper Mushriq, whereupon, he alongwith his relatives went to the mortuary of Civil Hospital Quetta and there he found the dead body of his brother. Strangulation mark was visible on the neck of his brother and his right eye was also removed. It was further averred that one day

earlier the dead body of his brother was brought in the hospital by the police authorities of P.S. Saddar from Killi Araban field. On the basis of aforesaid allegations, the FIR of the instant case was registered against unknown accused. The appellants were later on implicated in this case on the basis of circumstantial evidence. After completion of investigation, the Police submitted challan before the learned Trial Court.

3. In order to prove its case, the prosecution produced 07 witnesses as well as documentary evidence. In their statements recorded under Section 342 Cr.P.C, the appellants pleaded their innocence and refuted all the allegations levelled against them. However, they neither made their statements on oath as envisaged under Section 340(2) Cr.P.C. nor produced any evidence in their defence.

4. Arguments heard. Record perused.

5. Since there is no direct evidence and the prosecution case hinges upon the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled by now that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, reference may be made to the cases of Ch. Barkat Ali vs. Major Karam Elahi Zia and another (1992 SCMR 1047), Sarfraz Khan Vs. The State (1996 SCMR 188), Asadullah and another vs. The State (PLJ 1999 SC 1018) and Altaf Hussain vs. Fakhar Hussain and

another (2008 SCMR 1103). In the case of Ch. Barkat Ali *supra*, this Court held as under:-

"...Law relating to circumstantial evidence is that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj vs. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused."

In the case of Sarfraz Khan *supra*, this Court held as under:-

"It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other to the neck of the accused thereby excluding all the hypothesis of his innocence."

In the case of Altaf Hussain *supra*, this Court laid down as under:-

"7....Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the body of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain."

Keeping in view the parameters laid down in the above mentioned cases, we proceed to discuss the evidence produced in this case.

6. We have noted that there is neither any last seen evidence nor evidence of *waj takkar* available on the record against the appellants. The prosecution case is based on alleged confession of Muhammad Younas, appellant before the police while in custody, the evidence of recovery of mobile phone and motorcycle of the deceased on the pointation of Muhammad Younas,

appellant. There is also evidence of pointing out of place of occurrence and place of recovery of dead body of the deceased against the appellants. The prosecution has also produced the medical evidence and the evidence qua the alleged motive that the appellants intended to commit sodomy with the deceased and on the refusal of the deceased, they committed the occurrence.

7. It is pertinent to mention here that Muhammad Hassan, complainant was real brother of Mustafa (deceased) but he did not enter appearance in the witness box. According to the prosecution, he shifted to some unknown place, therefore, non-bailable warrants of his arrest to compel him to appear before the learned trial court, could not be executed.

We have further noted that there is no extra judicial confession of Rehmatullah and Naseer Ahmad, appellants. Insofar as the alleged extra judicial confession of Muhammad Younas, appellant is concerned, in this respect, the prosecution has produced two witnesses namely Mansoor Ahmad, SI (PW-2) and Naseebullah, ASI (PW-3). According to the statement of Mansoor Ahmad, SI (PW-2), Naseer Ahmad appellant made extra judicial confession on 17.01.2015 before Sarblund Khan, DSP, whereas according to the statement of Naseebullah, ASI (PW-3), Muhammad Younas, appellant made extra judicial confession before Sarbuland Khan, DSP on 22.01.2015 and as such there is conflict in the statements of witnesses of extra judicial confession of Naseer Ahmad, appellant regarding the date of making of said confession. Although according to the statement of Investigating Officer namely Abdul Rahim Khokhar, I.P. (PW-6), Muhammad Younas, appellant was arrested on 22.01.2015 but Mansoor

Ahmed, SI (PW-2) has stated that Muhammad Younas, appellant made extra judicial confession before the DSP on 17.01.2015. It is not understandable that if Muhammad Younas, appellant made extra judicial confession about the murder of Mustafa, deceased, before the Police party then as to why he was not arrested by the Police on the said date i.e. on 17.01.2015 because according to the statement of Abdul Rahim Khokhar, I.P/I.O, Muhammad Younas, appellant was arrested on 22.01.2015. We have further noted that Mansoor Ahmed, SI (PW-2) has also stated that after confession of Naseer Ahmad, appellant, he (appellant) was taken to Jinnah Town, Quetta in handcuffs for the recovery of motorcycle etc which shows that even on 17.01.2015, the said appellant was under the custody of police at the time of making of his alleged extra judicial confession. It is by now well settled that the confession of an accused before the police while in custody is inadmissible in evidence. Reference in this context may be made to the case of Saeed Ahmad Vs. The State (2011 SCMR 1686).

We have further noted that the police did not make any effort to produce Muhammad Younas, appellant before the concerned Magistrate for recording of his judicial confession in accordance with the law.

8. It is also noteworthy that according to the medical evidence produced by the prosecution through Dr. Ali Mardan, (PW-7), the right eye of Muhammad Mustafa, deceased was missing and the same was removed with a sharp edged weapon but there was no mention of removing the right eye of the deceased with sharp edged weapon in the alleged extra judicial confession of Muhammad Younas, appellant. It is further noteworthy that no

sharp edged weapon has been recovered from any of the appellants during the investigating of this case. In the light of above, the evidence of alleged extra judicial confession of Muhammad Younas, appellant is of no avail to the prosecution.

9. Insofar as the alleged recovery of mobile phone of the deceased from the possession of Muhammad Younas, appellant is concerned, we have noted that no proof of the ownership of above mentioned mobile phone in the name of Muhammad Mustafa, deceased has been brought on record. The SIM numbers i.e. 0311-1842119 and 0313-2280082 of mobile phone of the deceased were mentioned in the FIR. The said SIMs of the deceased were not recovered from the possession of the appellants. Naseebullah, ASI (PW-3) who was recovery witness of mobile phone of the deceased from the possession of Muhammad Younas, appellant has candidly conceded during cross-examination that no SIM was present in the recovered mobile phone. Although, it was the case of the prosecution witnesses namely Mansoor Ahmed, SI (PW-2) and Naseebullah, ASI (PW-3) that Muhammad Younas, appellant also got recovered motorcycle of the deceased from his house but the registration number of the said motorcycle of the deceased was not mentioned in the FIR. No documentary proof was produced in the prosecution evidence to show that the motorcycle allegedly recovered from the possession of Muhammad Younas (appellant) was owned by Muhammad Mustafa, deceased or the same was in the name of his any family member. Even, Muhammad Hassan, complainant who was brother of the deceased did not appear in the witness box to identify that the motorcycle allegedly recovered from the possession of Muhammad Younas, appellant was the same

motorcycle, which belonged to Muhammad Mustafa, deceased. We are, therefore, of the view that the above mentioned alleged recoveries of motorcycle and mobile phone of the deceased from the possession of Muhammad Younas, appellant are not helpful for the prosecution case.

10. We have further noted that Call Data Record (CDR) of the SIMs of the deceased and accused persons were also produced in the prosecution evidence but as mentioned earlier no documentary evidence was produced before the learned trial court to establish that the SIMs mentioned in the call data record (Exhibit-6-D to 6-Q) were in the name of the deceased or appellants. Moreover, no phone recording or its transcript was produced in evidence to show the nature of the conversation between the appellants and the deceased. We are, therefore, of the view that the evidence of CDR produced in this case is inconsequential for the prosecution. Reference in this context may be made to the case of Azeem Khan Vs. Mujahid Khan (2016 SCMR 274).

11. Insofar as the prosecution evidence about the pointing out of the place of occurrence and the place of recovery of dead body by the appellants is concerned, it is noteworthy that no incriminating material like blood stained earth etc was recovered from the place of occurrence allegedly pointed out by the appellants whereas the place of recovery of dead body was already in the knowledge of the prosecution because according to the prosecution case, the dead body was recovered from the above-mentioned place by the police on 07.01.2015 whereas the said place was pointed out by the appellants on 22.01.2015. Under the

circumstances, the above-mentioned prosecution evidence cannot be used against the appellants.

12. The prosecution has also produced the medical evidence through Dr. Ali Mardan (PW-7). The said medical evidence has also not supported the prosecution case because according to the said evidence, the right eye of Muhammad Mustafa, deceased was missing, which was removed with a sharp edged weapon but neither the said injury was mentioned in the alleged extra judicial confession of Muhammad Younas, appellant nor the same was explained by any other prosecution witness. As mentioned earlier no sharp edged weapon has been recovered from any appellant. According to the medical evidence, there was only two injuries on the body of the deceased out of which one was due to strangulation on the neck of the deceased whereas according to injury No.2, the right eye of the deceased was missing and the said injury was caused by a sharp edged weapon and no other injury was noted on the entire body of the deceased to support the motive part of the prosecution case. According to the prosecution case, the appellants attempted to commit sodomy with the deceased before committing his murder and when the deceased refused and raised hue and cry, then the appellants committed the occurrence. There is no mention of presence of any injury on the buttocks or on the anal area of the deceased in the medical evidence and as such the alleged motive of the prosecution has also not been supported by the medical evidence. Hence, the alleged motive of the prosecution has not been proved in this case.

13. We have, therefore, come to this irresistible conclusion that the circumstantial evidence produced in this case is not

worthy of reliance and the prosecution has miserably failed to prove its case against the appellants beyond the shadow of doubt. It is by now well settled that even a single circumstance, which creates reasonable doubt in the prosecution evidence, is sufficient to discard the prosecution case whereas the instant case is replete with number of circumstances, which have created serious doubts about the prosecution story. Reference in this regard may be made to the cases of Mst. Asia Bibi Vs. The State (PLD 2019 SC 64), Abdul Jabbar vs. State (2019 SCMR 129), Ayub Masih v. The State (PLD 2002 SC 1048) and Tariq Pervaiz v. The State (1995 SCMR 1345).

14. In the light of above-discussion, these appeals are allowed and the impugned judgment is set aside. The appellants are acquitted of the charges. They shall be released from jail forthwith unless required to be detained in any other case.

Sd/- Justice Yahya Afridi, J

Sd/- Justice Jamal Khan Mandhokhai, J

Sd/. Justice Malik Shahzad Ahmed Khan, J

QUETTA:

29.07.2024

NOT APPROVED FOR REPORTING

Sarfraz