

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH
(Judicial Department)**

JCr.A No. 179-M/2014
Murder Reference No.7-M/2014

JUDGMENT

Date of hearing: **10.10.2017**

Petitioners: (Suleman) by
Mr. Aurangzeb, Advocate

Respondents: (State and on other) by
Mr. Rafiq Ahmad, Assistant A.G.

ISHTIAQ IBRAHIM, J.- Through this appeal, sent by the appellant through Superintendent District Jail, Timergara, the appellant has challenged the judgment dated 24.06.2014 rendered by learned Additional Sessions Judge, Swat at Kabal, in case F.I.R No. 520 dated 25.10.2013 registered under Section 302/377 PPC at Police Station Kanju, District Swat, whereby the appellant was convicted and sentenced as under:-

- 1) Under Section 302(b) PPC to death with payment of Rs.2,00,000/- as compensation to legal heirs of the deceased or in default thereof to suffer further 06 months S.I.
- 2) Under Section 377 PPC to rigorous imprisonment of five

**years with fine of Rs.50,000/- or in
case of default to suffer further 06
months S.I.**

2. The learned trial Court has also sent **Murder Reference No. 07-M/2014** to this Court for confirmation of the death sentence under Section 374, Cr.P.C.

3. Abstract of the prosecution case as set out in the first information report is that on 25.10.2013, on receiving information from Army personnel on duty in village Koza Bandai, Akbar Zeb Khan, S.H.O of Police Station Kanju, accompanied by police contingents rushed to the place of occurrence where he found the body of an unknown boy aged 11/12 years. At that time complainant Muhammad Tariq also reached to the spot and made a report to the effect that on the same day his brother went out of his house at morning but did not return for taking lunch, so search was started for him. At the time of *Isha* prayers information was received that dead body of a boy is lying in Doghalgo Banda. For confirmation, the complainant alongwith his

maternal uncle namely Amanullah reached to the spot and saw that dead body of his brother was lying there and Police as well as Army personnel were also present on the spot. During search and probe the children informed the complainant that his deceased brother Attaullah had gone with Suleman on his donkey-cart. The complainant examined his brother and found that accused had killed the deceased by pressing his neck as well as hitting his head with something apart from subjecting him to sodomy. May be the occurrence have been witnessed by someone. The complainant charged accused Suleman for the offences.

4. The S.H.O prepared injury sheet of the deceased and sent the dead body for post-mortem. He recorded the report of complainant in Murasila (Ex.PW-8/1) on the basis of which F.I.R (Ex.PA) was registered against accused Suleman son of Jannat Gul.

5. The accused was arrested on the same day i.e. on 25.10.2013 and after

conducting usual investigation, the local police put complete challan in Court for trial of the accused. The learned trial Court framed formal charge against the accused to which he pleaded not guilty and opted to face the trial. Prosecution produced and examined as many as thirteen (13) witnesses in support of its case whereafter statement of the accused under Section 342, Cr.P.C was recorded wherein he denied the allegations of prosecution, however, he neither recorded his statement on oath in terms of Section 340(2), Cr.P.C nor wished to produce evidence in his defence. At conclusion of the trial, the trial Court vide judgment dated 24.06.2014 found the accused guilty of offences under Sections 302 and 377 PPC and sentenced him as mentioned in Para No.1 of this judgment. Being aggrieved, the appellant-convict has sent this appeal through Jail authorities whereby he has challenged his conviction and sentence vide the impugned judgment.

6. Learned counsel for the appellant engaged on State expenses, *inter alia*, contended that the appellant was below 18 years at the time of occurrence. Further contended that the learned trial Court has not duly exercised the jurisdiction vested in him under Section 7 of the Juvenile Justice System Ordinance, 2000 according to which the trial Court was under obligation to hold an inquiry before conducting the trial in order to settle the question of age whether the accused at the time of occurrence was above 18 years or otherwise. Learned counsel further contended that opportunity of fair trial has not been afforded to the appellant, therefore, the impugned conviction is not legally sustainable. He added that the alleged confessional statement of the accused is the result of pressure and severe torture which has not been considered in light of well settled principles of criminal justice. Learned counsel concluded that in view of serious illegalities as well procedural irregularities, the impugned

judgment, on no touch stone, could be considered to have been delivered according to law. He submitted that the impugned judgment be set aside and the appellant be acquitted in the interest of justice.

7. As against that learned Assistant Advocate General, appearing on behalf of State, *inter alia*, contended that the appellant has recorded his confessional statement which is duly corroborated by circumstantial as well as ocular account produced by the prosecution, therefore, the impugned judgment, being well-reasoned, is legally correct. Further contended that the appellant has committed heinous offences, therefore, the impugned judgment cannot be legally set aside merely on the basis of formal defects.

When confronted with the question regarding determination of age by the trial Court, learned A.A.G. opposed the same and contended that the plea was never raised before the trial Court.

8. Complainant was present in person before the Court on the last date of hearing and stated that he will rely on the arguments of learned Assistant Advocate General.

9. We have gone through the record in light of valuable assistance of learned counsel for the appellant as well learned A.A.G.

10. In the card of arrest (Ex.PW-8/4), age of the accused was mentioned as 18/19 years, in his medical examination the doctor showed the accused 18/20 years of age whereas in charge-sheet the trial Court mentioned the age of accused as 19 years. Thereafter, statement of the accused under Section 342, Cr.P.C was recorded after 8 months but even then his age was mentioned by the learned trial Court as 19 years.

11. The appellant, in the present appeal, has taken the plea of his age with the contention that he was hardly 17 years of age at the time of the alleged offence. No doubt,

the appellant was sent by this Court to Standing Medical Board and as per report dated 03.11.2015, the Board opined that age of the accused is more than 23 years but record of the Medical Board would not be a conclusive proof of determination of age unless the doctors who gave the opinion are brought to the witness box by affording opportunity to the parties of cross-examination. In addition to the opinion of Medical Board, the trial Court was supposed to make efforts to clarify the anomaly of age by summoning the NADRA officials and school record, if any, to ascertain whether the appellant was above 18 years or otherwise at the relevant time but no such effort by the trial Court appears on the face of record. Hence, it is held that the trial Court has not made the compliance of Section 7 of the Juvenile Justice System Ordinance, 2000 which reads as:-

“7. Determination of age.” If a question arises as to whether a person before it is a child for the

purpose of this Ordinance, the Juvenile Court shall record a finding after such inquiry which shall include a medical report for determination of the age of the child".

While deciding the case titled "Muhammad Aslam and others V/s. The State and another" (**PLD 2009 Supreme Court 777**), the Hon'ble apex Court laid down some principles for regulating the determination of age of accused and inter alia observed that:-

"(f) proper compliance of the said provisions of Section 7 would be to call upon the parties to lead their evidence – oral or documentary in accordance with the provisions of Qanun-e-Shahadat Order of 1984 with a right to the other party to test the veracity or the genuineness of the same in accordance with law and then to arrive at a judicial decision in terms thereof".

12. The contention of learned counsel for the appellant that the accused was not afforded the opportunity of fair trial and reference was made to media hype as well as to Order Sheet No. 05 dated 12.12.2013 which reads as:-

ملزم زیر حراست پولیس حاضر۔ بیانی ہے کہ تقری وکیل کی نسبت کوئی قدم نہیں اٹھایا ہے۔ وجہ عدم تعاون منجانب وکلا تحصیل کبل و معاشی کمزوری بتلاتا ہے۔

مسئلہ کی نوعیت کے پیش نظر معزز سیشن نج صاحب سے درخواست نسبت فراہمی فہرست Pauper Counsel کی جائے گی تاکہ حسب ضابطہ بذریعہ مجاز ادارہ تقری وکیل کے لیے مناسب قدم اٹھایا جاسکے۔ ملتی ہو کر مسل برائے مزید کارروائی آئندہ مورخہ 19.12.2013 کو پیش ہو۔

We are in agreement with learned

counsel for the appellant that Courts should not be influenced by heinousness of the offence or public pressure. The Courts are under obligation to administer justice under the law and the right of fair trial cannot be taken away from an accused through any extraneous grounds and especially when the case is of capital punishment. Perusal of the order sheet would reveal that in Tehsil Kabal none of the advocates was ready to defend the accused and thereafter two lawyers were engaged for him through an N.G.O namely SHARP. Here in our view if the lawyers were not experts in criminal cases then it was the duty of the trial Court to engage a counsel

having expertise on criminal law under the High Court Rules and Orders.

Notwithstanding the nature of the offence whether heinous, brutal or sensational every accused has inalienable constitutional right to have a fair trial before a competent Court.

Reliance in this regard is placed on the judgment of the **Supreme Court of India** in the case titled "*Muhammad Hussain alias State (Govt. of NCT), Delhi* (2012 SCMR 1610) wherein it has been held that:-

"In my view, every person, therefore, has a right to a fair trial by a competent Court in the spirit of the right to life and personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of charge in a criminal case".

In case when an accused is unable to engage a counsel then in such situation heavy duty lies on the shoulders of the trial Court to adjudge the matter and appreciate the prosecution evidence with care and caution. If the witnesses are not duly

cross-examined then the trial Court can put questions to the witnesses for ascertaining the real facts for the just and proper decision of the case. In the present case the accused was unrepresented and was defended by counsels engaged by the Court through an N.G.O, in such like circumstances, in our view, proper justice has not been done to the accused appellant especially when death sentence was awarded to him which required utmost care and caution.

13. Keeping in view the above mentioned situation of the present case, remand of the case has become inevitable. Therefore, this appeal is allowed, the impugned judgment of the trial Court is set aside and the case is remanded and entrusted to the Court of Sessions Judge, Swat at Gulkada who shall himself conduct proceedings in the case. The learned Sessions Judge shall first engage a counsel for the accused under High Court Rules and Orders and thereafter shall hold an inquiry under

Section 7 of the Juvenile Justice System Ordinance, 2000. If it is established after the inquiry that at the time of occurrence the accused was juvenile then denovo trial of the accused be conducted under the *ibid* Ordinance otherwise the learned Court, either on the request of the accused or on its own motion, shall re-summon the material witnesses in order to enable the accused to further cross-examine them. Needless to mention that the accused shall be treated as under trial prisoner by the Court as well by jail authorities. Murder Reference No. 07-M/2014 is answered in Negative.

Announced
10.10.2017

Mohammad Ibrahim Khan
JUDGE

Ishmaq Ibrahim
JUDGE

Office
14/10