

Judgment Sheet

PESHAWAR HIGH COURT, PESHAWAR.

(JUDICIAL DEPARTMENT)

Cr.A.No.1268-P/2022.

Muhammad Abid Vs. Bakht Wali.

JUDGMENT.

Date of hearing ----- 14.06.2023.

Appellant by --- M/s Khaista Muhammad & Faizul Ahmad, Advocates.

State by --- Mr.Jalal-ud-Din Akbar Azam Gara, A.A.G.

Complainant by --- Jehangir Alam, Advocate.

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SAHIBZADA ASADULLAH, J:- Appellant

Muhammad Abid, through Cr.A.No.1268-P/2022

has impugned the judgment dated 25.11.2019 of
the learned Additional Sessions Judge-VI/Judge

Child Protection Court, Mardan delivered in

case FIR No.426 dated 15.08.2018 under

sections 302/109/34 PPC of Police Station

Choora, Mardan, whereby he has been

convicted under section 302 (b) PPC and

sentenced to imprisonment for life on two counts

and to pay compensation amounting to

Rs.200,000/- to the legal heirs of the deceased

under section 544-A Cr.P.C recoverable as

arrears of land revenue or in default whereof to

undergo simple imprisonment for six months with

benefit under section 382-B Cr.P.C, whereas

through the same judgment in the same case, respondent-accused Mushtaq and Farman Ali have been acquitted of the charge by the learned trial court. Complainant Bakht Wali, through Cr.A.No.36-P/2023 has assailed acquittal of accused Mushtaq and Farman Ali, whereas through Cr.R.No.10-P/2023 he sought enhancement of the sentence awarded to convict/appellant Muhammad Abid. Since the three matters are the off-shoot of one and the same judgment, therefore, these are proposed to be disposed of by this single judgment.

2. Brief facts of the case are that on 15.08.2018, complainant Bakht Wali (P.W.5) brought the dead body of his sister Mst.Janha to police post Dubai Adda in private Datsun and reported the matter to the effect, that on the eventful day he was present in his house and about 1400 hours Aman Ali s/o Farman Ali came to his house and informed him that his sister Mst.Janha had died due to illness. He, thereafter rushed to the place of occurrence and found his sister lying dead in her house. He, on the basis of his personal satisfaction, came to know that his sister was killed by the accused/appellant by

strangulation at the instigation of Mushtaq and Farman Ali (co-accused). Consequently, on the report of complainant, present case was registered against the accused/appellant. Motive behind the occurrence was stated to be strained relations between the husband and wife as well as the appellant and her father-in-law.

3. On arrest of the appellant and completion of investigation, challan was submitted before the court of competent jurisdiction, charge was framed to which he did not plead guilty and wished for trial. As such the learned trial court was pleased to direct the prosecution to produce its evidence. In order to prove its case, prosecution produced and examined as many as 10 witnesses, whereafter statement of the accused was recorded, where the accused professed his innocence but did not opt to record his statement under section 340 (2) Cr.P.C. On conclusion of trial, the learned trial court held him guilty and as such he was convicted and sentenced, whereagainst he has filed the instant appeal.

4. Heard. Record perused.

5. It was on . 15.08.2018, when the deceased died in the house of her husband and the dead body of the deceased was shifted to the police post Dubai Adda, for reporting the matter. The complainant reported the matter to one Rab Nawaz, SI who prepared the injury sheet and inquest report, thereafter the dead body was sent to the hospital for post mortem examination. The complainant while reporting the matter charged the appellant, the husband of the deceased namely, Mushtaq and her father-in-law for the murder of the deceased. The dead body was examined by the doctor where the cause of death and the nature of injuries on her body were explained. The investigating officer, after receiving copy of the FIR, visited the spot and on pointation of the complainant prepared the site plan. The accused was arrested, his physical custody was requested, which was granted and it was during investigation that the accused/appellant led the police party to the spot and on his pointation addition in the site plan was made. The other co-accused were also arrested as they were charged for the abetment of the offence. It is pertinent to mention that the convict/appellant

was produced before the court of learned Judicial Magistrate on 18.08.2018 where he confessed his guilt. The trial commenced and the learned trial court provided opportunity to the complainant to produce the relevant witnesses. On conclusion of the trial, the learned trial court was pleased to convict the appellant and to acquit the co-accused, charged for abetment, vide the impugned judgment.

6. The learned trial court, after hearing the parties, applied its judicial mind to the collected evidence and the statements of the witnesses and thereafter convicted the appellant for the murder of the deceased and acquitted the co-accused. This court is to see as to whether the learned trial court was justified to convict the appellant and to acquit the acquitted co-accused and as to whether while passing the impugned judgment the learned trial court applied its judicial mind to the evidence on file and to the statements of the witnesses. As this court is seized of the matter, so it is obligatory that we must go through the statements of the witnesses and the material available on file so that to appreciate as to whether the prosecution

succeeded in bringing home guilt against the appellant. True that in the incident Mst.Janha lost her life in the house of her husband and equally true that apart from her husband the appellant and her father-in-law were also charged for the commission of the offence. True that when a lady dies an unnatural death in the house of her husband, then some of the responsibility is shifted to the shoulders of her husband and that the husband must convince the courts of law for the circumstances in which the deceased dies an unnatural death. As in this particular case, it is not the husband who is charged for killing of the deceased, rather it is the brother-in-law of the deceased who is charged and the husband along with another for abetment. As nobody saw the incident and that the complainant came forward to report the matter, when he received information regarding the death of the deceased. In this particular case, this court is conscious of the fact that when the active role of killing has been given to the appellant and not to her husband, so in such eventuality, the prosecution is to shoulder the major portion of the responsibility and the accused/convict is

shouldering the lesser portion. In order to avoid miscarriage of justice, we feel it essential to revisit the evidence on file and to re-appreciate the statements of the witnesses.

7. The moot questions to be determined by this Court are; as to whether the incident occurred in the mode, manner and at the stated time; as to whether it was the accused/appellant who killed the deceased and that these were the co-accused who facilitated; as to whether the accused/appellant was arrested in the mode and manner and as to whether he confessed his guilt before the court of competent jurisdiction. This court is further to determine as to whether the medical evidence supports the case of the prosecution qua the death of the deceased.

8. There is no denial to the fact that the unfortunate deceased lost her life in the house of her husband and that the matter was reported by the complainant who happens to be the brother of the deceased. True that soon after the death neither the husband, nor the father-in-law of the deceased took the dead body of the deceased either to the hospital or to the concerned police station for registration of the case, but the same

is not the determining factor, rather the prosecution is under the obligation to prove that it was the appellant who killed the deceased and that these were the co-accused who facilitated. In order to unearth the real cause of death, we deem it essential to go through the statements of the witnesses. The complainant was examined as P.W.5 who stated that on the day and time of occurrence, he was present in his house; that he was informed by Aman Ali at about 03:00 PM who told him that his sister had died because of ailment; he rushed to the house of his sister and found her dead; that on searching her body, he found bruises and injuries and got satisfied that she was murdered by the convict/appellant who was abetted by his co-accused namely, Mushtaq (husband of the deceased) and Farman Ali (father-in-law of the deceased); that motive for the offence was strained relation between the accused facing trial and the deceased; that he reported the matter and that it was on his pointation that the investigating officer prepared the site plan. When the statement of the complainant is taken into consideration, this court reaches nowhere, but to hold that the

complainant was not the eyewitness of the incident. As at the time of occurrence the complainant was available in his house and that it was the co-accused Farman Ali who informed him regarding the death of the deceased, so the very information by the father-in-law of the deceased is a circumstance, which tells of bona fide on part of the co-accused and which tells that the co-accused never abetted the convict/appellant, in killing the deceased. As in the instant case, no witness from the house came forward and even the investigating officer did not record the statement of an independent person from the house, so the prosecution case is hinging upon the circumstantial evidence. There is no denial to the fact that when a case rests upon the circumstantial evidence, then the prosecution is under the obligation to collect independent pieces of evidence and to weave them in a net forming an organic whole. It is the foremost duty of the prosecution, in case of the circumstantial evidence, to create a chain where all the links are link together and its one end touches the body of the deceased and the other must touch the neck of the accused. As in this

particular case, the investigating officer could not collect independent evidence and even no circumstantial evidence could be collected to create a chain, so in the instant case, the only evidence in possession of the prosecution is the confessional statement of the appellant and the medical evidence. Reliance can be placed on

"Naveed Asghar and 2 others Vs. The State"

(P L D 2021 S.C 600), which reads as follows:-

"Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined. In cases like the present one that rest entirely on circumstantial evidence, it is of the utmost importance that the circumstances should be ascertained with minute care and caution, before any conclusion or inference adverse to the accused person is drawn. The process of inference and deduction involved in such cases is of a delicate and perplexing character, liable to numerous causes of fallacy. This danger points the need for great caution in accepting proof of the facts and circumstances, before they are held to be established for the purpose of drawing inferences therefrom. A mere concurrence of circumstances, some or all of which are supported by defective or

inadequate evidence, can create a specious appearance, leading to fallacious inferences. Hence, it is necessary that only such circumstances should be accepted as the basis of inferences that are, on careful examination of the evidence, found to be well-established. A high quality of evidence is, therefore, required to prove the facts and circumstances from which the inference of the guilt of the accused person is to be drawn”

9. This is a must for this Court to know as to whether the death of the deceased occurred in the manner as was given by the complainant and as to whether the medical evidence supports the stance of the complainant. For this particular purpose, we deem it essential to go through the statement of the doctor who was examined as P.W-9 who stated that on 15.08.2018, she conducted autopsy on the dead body of deceased Mst.Janha wife of Mushtaq brought by constable Tariq identified by Sartaj s/o Ahmadullah and Qasim Khan s/o Zarawar and found the following on examination:-

“External Examination:

Marks of ligature on neck and dissection etc. Bruises all around neck.

Condition of subject: stout fresh body.

Injuries:

1. **Bruises on neck, face with bluish discoloration synopsis.**
2. **Bruises on upper chest, shoulders and back.**
3. **A lacerated wound about 4 to 6 cm on chin and right side of jaw."**

The statement of the doctor left no ambiguity regarding the manner in which the deceased was done to death. Whether the sole medical report by itself would be sufficient to hold the appellant responsible for the death of the deceased or the prosecution must bring on record more evidence in that respect. As the complainant was not the eyewitness and as no other witness came forward to testify in favour of the prosecution and against accused, so we deem it essential to read the confessional statement of the appellant in juxtaposition with the medical report of the deceased. The appellant was arrested, his physical custody was requested and during investigation he opted to confess his guilt and as such he was produced before the court of competent jurisdiction. The learned counsel for the appellant questioned the very nature of the confessional statement and also the manner in which the same was

recorded. We went through the formalities taken into consideration by the concerned Magistrate and we also went through the questionnaire prepared for the purpose. Apparently, we did not come across any illegality to have been committed, by the Magistrate, while recording the confessional statement of the appellant but mere procedural correctness would not guarantee that the confessional statement was free from influence and was voluntary. In order to appreciate as to whether the appellant confessed his guilt and as to whether he was provided the needed opportunity to think, consider and to make up his mind for recording the same. For this purpose, the learned Judicial Magistrate was examined as P.W-10, who stated that during the days of occurrence he was posted as Judicial Magistrate, Mardan. On 18.08.2018, accused facing trial Muhammad Abid was produced before him in case FIR No.426 dated 15.08.2018 under sections 302/109/34 PPC registered with police station Choora, Mardan by the investigating officer vide application already Ex.P.W.7/3 for recording his confessional statement at 01:00 hours; the handcuffs were

removed and all the police officials including APP and Naib Court were directed to leave the court, so that the accused should not feel under pressure; the accused was made to sit and he introduced himself to the accused and after getting satisfaction regarding the will of the appellant, to confess, his confessional statement was recorded. The Magistrate was examined on different aspects of the case, more particularly, the manner in which the accused/appellant was produced and the manner his statement was recorded. We cannot forget that during the days of occurrence, the convict/appellant was 15/16 years of age and that in such eventuality it was the obligation of the learned Judicial Magistrate to have facilitated him to have a meeting with his counsel and that the nearest relative must have been provided an opportunity to visit him a little before his confessional statement was recorded. The record is silent in that respect and as such this court is confident in holding that the requisite formalities could not be fulfilled. As in case of major accused the obligations of the Judicial Magistrate are all together different than the minor accused, as in case of minor accused

every step and every pre-caution must be taken to satisfy itself that the minor was feeling at home and that he was free from pressure and influence, but in the instant case the learned Magistrate adopted a casual approach as is adopted in case of the major accused. In such eventuality, this attitude of the court by itself is a circumstance, which raises an eyebrow over the legality and the voluntary character of the confessional statement. In order to know as to whether the convict/appellant accepted the guilt and as to whether he narrated the events as it occurred and that he disclosed the same. For this particular purpose, we deem it essential to reproduce the relevant portion of the confessional statement of the appellant, which reads as follows:-

"On the day of occurrence, I came from the fields to my house. I was about to have lunch in the courtyard of my house. My sister-in-law Mst.Janha approached me from the back side and grab my testicles. I got her by throat/neck and applied pressure resultantly she died at the spot."

The confessional statement of the appellant runs in conflict with the medical evidence and the physical circumstances of the

case as well. As on one hand, the age of the deceased was declared 25 years, by the doctor with further observations that the deceased was blessed with a stout body, whereas on the other the appellant was hardly 15/16 years of age. When the strength of both i.e. the deceased and the appellant is compared, this Court is not in a happy mood to accept that the appellant had such a strength, which led to the death of the deceased. The medical evidence negates the confessional statement of the appellant, as the deceased had bruises, laceration and even the marks of ligature. The attending circumstances of the present lead this court nowhere, but to hold that apart from the appellant other able bodied persons also participated but the prosecution failed to charge. As the confessional statement is in conflict with the medical evidence and the circumstantial evidence as well, so the same cannot be taken into consideration. When the story narrated by the appellant, while confessing his guilt, does not appeal to a prudent mind then the same can neither be considered nor can be taken into consideration for the conviction of an accused charge. Reliance in this

regard is placed on "SADI AHMAD and another Vs. The State", (2019 S C M R 1220), which reads as follows:-

"Adverting to confessional statement of Mukhtar Ahmad alias Bari recorded on 14.1.2019, we do not feel persuaded to rely upon the disclosure; it is not in line with prosecution case set up in the crime report; so diametrically different that one cannot be accepted without exclusion of other and vice versa; it is exculpatory in nature as Mukhtar Ahmad is reticent about his individual role and liability in the crime. According to him, the deceased was blind folded, thrown in a sugarcane field with his hands tied with a rope, whereas as per autopsy report cause of death is asphyxia. Motive behind sudden move by the appellant, Mukhtar Ahmad alias Bari during the trial is far from clear; disclosure is certainly not a truthful account of event leading to deceased's death. When confronted during his examination under Section 342 of the Code of Criminal Procedure, 1898, he denied to have confessed his guilt; he repudiated pangs of conscience, mistakenly observed by the learned trial Judge.

Prosecution has not been able to drive home the charge beyond reasonable doubt, therefore, in the absence of reliable evidence appellants' conviction on moral satisfaction alone cannot sustain; they are extended the benefit of the doubt. Criminal Appeal 107-L/2017 is allowed, impugned judgment is set aside; they shall be released forthwith, if not required in any other case."

10. We cannot forget that the incident occurred in the courtyard of the house at 02:00 PM and admittedly, in the said house apart from the appellant the husband of the deceased namely, Mushtaq, the co-accused and father-in-law of the deceased were also residing. Had the incident occurred in the manner and at the stated place, then the inmates of the house would have come to rescue of the deceased, but the silence in that respect is a circumstance, which tells that the incident did not occur in the manner. As the deceased was having injuries on her body and that the same were not possible in such a short interval, rather the material facts were either concealed or were not brought on record. If we accept for a while that the story narrated by the convict/appellant was correct then we are to say

goodbye to rest of the evidence on file and in that eventuality, we would discard the medical evidence on file. If such exercise is undertaken, then we are afraid that the prosecution would be left with the sole confessional statement of the appellant and the same alone would not be sufficient to ask for conviction. If we take it otherwise and discard the confessional statement of the appellant and take into consideration the medical evidence and the circumstantial evidence, then in that eventuality, the prosecution is left with the evidence, which is not corroborative and, thereto, the prosecution would suffer. Both the pieces of evidence i.e. the confessional statement of the appellant and the medical evidence are in conflict and despite efforts no harmony can be created between them, when such is the state of affairs, this Court is confident in holding that the confessional statement is not in accordance with law and that no opportunity was provided to the appellant to recompose and consult the people of his choice, so in such eventuality this Court is confident in holding that this piece of evidence is not worth reliance. When the very statement is in conflict

with the physical circumstances of the present case, then in isolation this piece of evidence would hardly play the role to determine the fate of the appellant. In the attending circumstances of the present case, this Court lurks no doubt in mind that the prosecution could not succeed in connecting the appellant and the acquitted co-accused with the murder of the deceased.

11. As this was the choice exercised by the complainant where he attributed the active role of killing to the convict/appellant and the role of abetment to the husband of the deceased and to her father-in-law, so this is the complainant to run with his choice and this court is to determine as to whether every individual character does fit in the circumstances of the present case. We are not hesitant in holding that the choice exercised by the complainant has damaged the prosecution case, had this been the husband to whom the active role of killing was attributed, then in that eventuality the appreciation of the circumstances before this Court would be different, but as the male members are charged for abetment/facilitation, that too, with no evidence on record, so this Court is of the

opinion that the prosecution failed to bring home guilt against the appellant.

12. The motive was disclosed as the strained relation between the husband and wife as well as the appellant and her father-in-law, but surprisingly no independent witness came forward to support the stance of the complainant and even nothing was collected by the investigating officer in that respect. If the relation was strained, then it would have been between the husband and wife and the appellant would play a little role, but if we accept that the incident occurred as was disclosed by the appellant in his confessional statement, then the husband and father-in-law of the deceased had no interest, rather the tragic incident then occurred at the spur of the moment. The prosecution failed to convince us regarding the alleged motive and as such on this score too, the prosecution would suffer. True that weakness or absence of motive is hardly a ground to acquit, but equally true that once the motive is the cause to kill, then the prosecution is under obligation to prove the same and its failure will favour the accused.

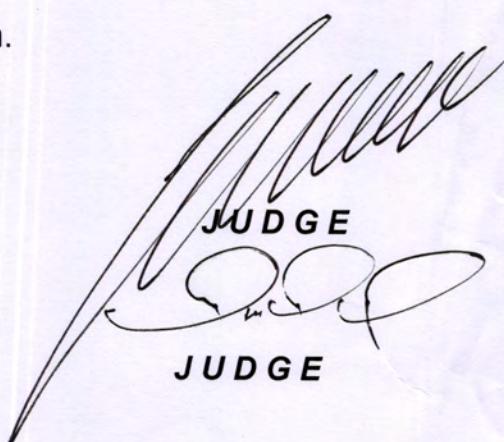
13. The cumulative effect of what has been stated above leads this court nowhere, but to hold that the prosecution failed to bring home guilt against the appellant. The impugned judgment is suffering from errors and legal infirmities, which calls for interference. The learned trial court while handing down the impugned judgment misdirected itself both in law and on facts of the case. The impugned judgment is set aside and the appellant is acquitted from the charge levelled against him. He be released from jail forthwith if not required to be detained in any other case.

14. Now diverting to Cr.A.No.36-P/2023, which has been filed by the complainant against acquittal of accused-respondents Mushtaq and Farman Ali. The record tells that the accused-respondents have not been directly charged by the complainant in the FIR for commission of the offence, rather they were nominated in the case as accused for abetting the offence and no corroboratory material has been brought by the prosecution showing their alleged role with the case. Mere nomination of someone for abetment of an offence would not be a ground to convict

him. Moreover, there is no cavil with the proposition that an accused is presumed to be innocent unless proven guilty and once the court of competent jurisdiction acquits an accused from the charge, then double presumption of innocence is credited to his account and extra ordinary circumstances are needed to upset the same and the instant case is no exception. As the main accused is acquitted of the charge, therefore, instant criminal appeal against acquittal is lacking substance, failed to proceed and is dismissed as such.

15. Now turning to Cr.R No.10-P/2023, where the complainant has asked for the enhancement of sentence, but as the appeal is allowed and the appellant stood acquitted, so the instant criminal revision has lost its utility, the same is dismissed as such.

Announced.
Dt. 14.06.2023.


The image shows two handwritten signatures of the word "JUDGE" in black ink. The top signature is larger and more fluid, while the bottom one is smaller and more stylized.

HON'BLE MR.JUSTICE ISHTIAQ IBRAHIM &
HON'BLE MR.JUSTICE SAHIBZADA ASADULLAH.

(A-K-KHAN Court Secretary)