

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

Cr.A No. 19-M/2017

(1) Muhammad Parvaiz son of Allah Bakhsh (Appellant)

Versus

(1) The State through A.A.G. K.P.K.

(2) Muhammad Zahir Shah son of Fazal-e-Elahi
(Respondents)

Present:

M/S. Aftab Alam Yasir and Salman Ijaz, Advocates.

Sahibzada Baha-ud-Din, State counsel.

*Barrister Dr. Adnan Khan, Advocate, for the
respondent/complainant.*

Date of hearing:- 03.12.2018

JUDGMENT

SYED ARSHAD ALI, J.- This criminal appeal is directed against the judgment dated 01.02.2017 rendered by learned Additional Sessions Judge/Izafi Zila Qazi Matta Swat in case F.I.R No. 1309 dated 28.12.2015 under sections 365-B, 494, 496-A, 496-B PPC registered at Police Station Matta District Swat, whereby the appellant was convicted under section 365-B PPC and sentenced to life imprisonment alongwith payment of fine of Rs.100,000/- (one lac) and in default thereof to further undergo 6 months. However, the

appellant was extended the benefit of section 382-B Cr.P.C.

2. As per contents of the FIR, the complainant Muhammad Zahir Shah, PW-1 initially reported the matter to the DSP Matta through an application in respect of missing of his sister Mst. Musarrat Shaheen. The said report was initially incorporated in *Mad* No. 17 of the daily diary dated 12.12.2015. Thereafter, an inquiry was initiated under section 157 (1) Cr.P.C, wherein the complainant and son of Mst. Musarrat Shaheen namely Shah Fahad recorded their statements under section 164 Cr.P.C on 28.12.2015, thereby the present accused/appellant and other acquitted co-accused have been charged. Thereafter, 'Murasila' Ex. PW-14/6 was drafted which culminated into FIR *ibid*, Ex. PW-14/14.

3. Investigation in the case was entrusted to Aman Khan, Sub Inspector, PW-13, who obtained permission for initiation of investigation in the case vide application Ex. PW-13/1. On 31.12.2015, the SP

Investigation had given formal permission to the Investigation Officer for initiation of investigation through letter Ex. PW-13/2, therefore, he visited the spot i.e. Rajanpur, Punjab on 02.01.2016 alongwith other police 'Nafri'. He has recovered mobile phone of the accused Mst. Musarrat Shaheen (X-202) vide recovery memo Ex. PW-8/1 (already exhibited). On 04.01.2016 the accused Muhammad Pervaiz was arrested from his house alongwith accused Mst. Musarrat Shaheen vide card arrest memo Ex. PW-13/3 and in this regard he has prepared recovery memo Ex. PW-13/4. The Investigation Officer has recovered mobile phone Nokia 105 (Ex.P-1) from possession of accused Muhammad Pervaiz. He has prepared identification memo of the accused Mst. Musarrat Shaheen Ex. PW-11/1 (already exhibited) alongwith list of children of the accused Mst. Musarrat Shaheen Ex. PW-13/5. He had obtained transit custody of both the accused from the Court of Judicial Magistrate



Jampure vide orders Ex. PW-13/8 & Ex. PW-13/9. Vide application Ex. PW-13/10 the accused Muhammad Pervaiz was produced before the doctor concerned for medical examination. Through another application Ex. PW-13/11 two (2) days custody of the accused Muhammad Pervaiz was obtained. Vide application Ex. PW-13/12 the accused Muhammad Pervaiz was produced for recording of his confessional statement but the accused refused to record his statement, therefore, he was sent to judicial lockup. Vide application Ex. PW-13/14 the accused Mst. Musarrat Shaheen was produced before the Court for recording of her confessional statement, who got recorded her confessional statement in presence of the witnesses before the Magistrate concerned at Swat. He has taken into possession the *Nikah-Nama* of the accused Mst. Musarrat Shaheen and her husband Mian Jamal vide recovery memo Ex. PW-11/2 and upon receipt of copy of CDR Ex. PW-13/17, the same was placed on court



file. The Investigation Office has also placed on record the swab report Ex. PW-13/22. Upon completion of the investigation, complete *challan* was forwarded to the SHO concerned for onward submission.

4. During the course of trial, the prosecution examined as many as 14 witnesses, whose statements were recorded and placed on file. On closure of the prosecution evidence, 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.

5. On conclusion of the trial, the learned Additional Sessions Judge/ Izafi Zila Matta Swat convicted and sentenced the accused/appellant Muhammad Pervaiz vide the judgment impugned herein, whereas the co-accused Mst. Musarrat Shaheen was



acquitted from the charges by extending her the benefit of doubt, hence the present appeal.

6. Arguments heard and record of the case was perused with the able assistance of learned counsels for the parties as well as the learned Law Officer representing the State.

7. It is the case of prosecution incorporated in *Naqal Mad* No. 17 dated 12.12.2015, wherein the complainant Muhammad Zahir Shah and Shah Fahad had filed an application for the recovery of Mst. Musarrat Shaheen wife of Mian Said Jamal, the acquitted accused, who went missing on 08.12.2015 at 01:00 P.M at Nazir market Matta. It was further reported in the *Mad* report that Mst. Musarrat Shaheen is the sister of applicant No. 1 Muhammad Zahir Shah whereas mother of the applicant No. 2

Shah Fahad, who on the eventful day had gone to the hospital for treatment alongwith her other son Ishfaq. Both of them alighted from the vehicle at *Chuprial Adda*, there she sent her son Ishfaq for bringing some food, however, when he came back her mother was not available there. Since the acquitted accused as per prosecution case had a mobile phone, therefore, her mobile phone was traced through CDR and accordingly the said *Mad* report was incorporated into '*Murasila*' Ex. PW-14/6 on 12.12.2015 wherein the present accused/appellant Muhammad Pervaiz and Mst. Musarrat Shaheen alongwith other co-accused were charged by the complainant. On the strength of the said '*Murasila*' FIR *ibid* was registered against the accused at PS concerned.

8. On 04.01.2016 the said Mst. Musarrat Shaheen, the acquitted accused was recovered by the police from the house of present accused/appellant situated at Rajanpur, Punjab and on the same day after obtaining transit custody from the competent Court of the Judicial Magistrate she was transferred to District Swat alongwith accused/appellant Muhammad Pervaiz. On the following day i.e. 05.01.2016 Mst. Musarrat Sheheen was produced before the Court wherein she recorded her statement under section 164 Cr.P.C confessing her guilt. In the said confession she has stated that she was married to Mian Said Jamal and out of said wedlock she had four sons and two daughters. Mian Said Jamal her husband was working for gain at Saudi Arabia, however, his attitude was not good with her. She got fed up from

that life and thus started contacting the appellant through his mobile phone. She with her sweet will went to the house of Muhammad Pervaiz at Rajanpur, Punjab and narrated her story to him, who offered Mst. Musarrat Shaheen to marry him (appellant) and accordingly she contracted marriage with the appellant because some five (5) years back she was divorced by her husband Mian Said Jamal.

9. The present appellant Muhammad Pervaiz is charged under section 365-B of the Pakistan Penal Code ("**PPC**") for inducement of Mst. Musarrat Shaheen, the acquitted co-accused in order to compel her for illegal marriage against her will during subsistence of her earlier *Nikah* with one Mian Said Jamal. The entire prosecution case is based on the oral testimony of the

complainant Muhammad Zahir Shah, PW-1, Ishfaq Ahmad, PW-2, Mst. Kharoo, PW-3, Shah Fahad, PW-5, Mian Said Jamal PW-10, CDR reports, recovery of the said Mst. Musarrat Shaheen from the house of the accused/appellant situated at Rajanpur, Punjab and the alleged confession of the acquitted co-accused.

10. A bare look of the testimony of the complainant Muhammad Zahir Shah, PW-1 it would reveal that her sister Mst. Musarrat Shaheen was married to one Mian Said Jamal. On 08.12.2015 at 13:00 hours she had gone to Matta hospital for treatment. On return, son of the abductee namely Ishfaq informed the complainant about missing of her mother, therefore, in this respect he had lodged a report on 12.12.2015 at 13:55 hours to the DSP Matta alongwith other son of the

abductee Shah Fahad. Later, the said report was incorporated in *Naqal Mad* No. 17 of the daily diary dated 12.12.2015 and inquiry was initiated in the matter. During course of inquiry, the complainant recorded his statement under section 164 Cr.P.C and charged the present appellant Muhammad Pervaiz for contracting illegal marriage with Mst. Musarrat Shaheen during subsistence of her earlier *Nikah* with one Mian Said Jamal, whereas the other co-accused have been charged for abetment.

11. The other PWs related to the acquitted co-accused Mst. Musarrat Shaheen had also recorded somewhat similar statements before the Court in respect of guilt of the accused/appellant, however, it is an admitted fact surfacing on the record that none of above-referred witnesses have

witnessed the occurrence in person or for that matter no one has come forward as witness to have seen the appellant abducting/inducing the co-accused Mst. Musarrat Shaheen for the purpose of illegal marriage, therefore, their testimony are based on hearsay evidence, which cannot be made basis for conviction of the present accused/appellant.

12. Regarding the CDR report, Ex. PW-14/5, which has been given much weight by the learned trial Court in respect of the guilt of the present accused/appellant to the effect that allegedly the appellant and the acquitted co-accused Mst. Musarrat Shaheen had communicated with each other through their cell phones 38 times from 07.12.2015 to 09.12.2015. In respect of the CDR data, suffice it to say, that the same is of no importance to the prosecution on various

counts. As initially, it was the duty of the prosecution to have received the C.D.R with an endorsement of the Cellular Company concerned, having stamp and signature thereupon of the concerned authorized officer, then while taking into possession the CDR, through a recovery memo, at least a concerned person should have been associated from the Cellular Company to independently prove the recovery or at least, recorded the statement of representative of the Cellular Company to the effect of issuance and receipt of C.D.R. but no such evidence have been collected. The perusal of CDR also demonstrates that there is not even a single signature of authorized officer of the said Company, thus, it cannot be safely relied upon in any manner. Similar is the situation regarding the cell No. 033244952582. There



is no record that the said cell number was registered in his name or whose name the said Sim was registered.

13. Another incriminating evidence in the account of accused/appellant is the retracted judicial confession made by the acquitted co-accused Mst. Musarrat Shaheen.

It discerns from record that the co-accused Mst. Musarrat Shaheen was recovered from the house of appellant situated in Rajanpur, Punjab on 04.01.2016 and on the same date after obtaining transit custody from the competent Court of the Judicial Magistrate she was transferred to District Swat alongwith accused/appellant Muhammad Pervaiz. On the following day i.e. 05.01.2016 Mst. Musarrat Sheheen was produced before the Court wherein she recorded her confessional statement, Ex. PW-12/3 confessing her guilt



before the Judicial Magistrate Matta, PW-12.

However, without rendering further findings in respect of merit or demerit of the confession, suffice it to say, that the said confession was retracted by the principal i.e. Mst. Musarrat Shaheen, the acquitted co-accused, therefore, the same cannot be used against the present appellant. 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 statement 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.”*

14. In context of the present case, the confession so made by the acquitted co-accused Mst. Musarrat Shaheen was not only later on retracted by her but from bare perusal of the said confession it appears that she with her own sweet will went to the house of the accused/appellant and the elements of force, pressure and coercion on behalf of the appellant were missing in the said confession.

Rather she has stated in her confession that she was divorced by her husband some 5 years back, therefore, she had contracted marriage with the appellant. Hence, in no way, this confession could be used in respect of conviction of the accused/appellant, which is discarded accordingly.

15. The learned counsel has given much emphasis on the leading question/admission by the learned counsel representing the accused and has stated that in cross-examination he has almost admitted the occurrence by giving a positive suggestion to the prosecution witnesses, however, we cannot agree with such assertion of learned counsel for the complainant for obvious reasons that it is settled law that the accused is not bound by admission made his counsel during cross examination of prosecution witnesses. In this regard, reliance is place on the judgment

of august Supreme Court of Pakistan cited as

“Abdul Khaliq vs the State” (1996 SCMR

1553), wherein it was held:- *“This statement*

was sought to be used by learned Additional

Advocate-General against the appellant, as

his admission to the effect that he had fired

at the deceased. Even if putting of such

question in cross-examination by the defence

counsel amounts to an admission, the same

cannot bind the appellant. In a criminal case

an accused is not bound by the admissions

made by his counsel.”

16. The gist of the whole discussion

is that there is no direct oral evidence against

the guilt of the present appellant and the

circumstantial evidence is not well chained to

connect the appellant with the commission of

offence. Indeed, in order to award conviction

to the accused on the basis of circumstantial

evidence it is settled law that great care and caution must be exercised by Court. In this regard, reliance can be placed on the judgment of august Supreme Court of Pakistan cited as *"Imran alias Dullay and another vs The State and others" (2015 SCMR 155)*, wherein it was held:- *"Case resting entirely upon circumstantial evidence. Caution to be exercised by court. When any case rested entirely on circumstantial evidence then, each piece of evidence collected must provide all links making out one straight chain where one end of its noose fitted in the neck of the accused and the other end touched the dead body. Any link missing from the chain would disconnect and break the whole chain and in that event conviction could not be safely recorded and that too on a capital charge. Courts had to exercise more and more caution before accepting and resting their opinion of being guilty on circumstantial evidence collected apparently in a dishonest, dubious and rough manner."* Where as

in the present case the evidence that the lady was recovered from the house of the appellant is neither based on confidence inspiring evidence nor the same is further corroborated with other circumstantial evidence to connect the appellant with the allegation that he had illegally induced the acquitted co-accused Mst. Musarrat Shaheen for marriage despite having already married.

17. 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; therefore, his conviction cannot be maintained, resultantly, while extending him the benefit of doubt, we accept this appeal by setting aside his conviction and sentence recorded by the learned trial Court through the impugned judgment and acquit him of the

charge levelled against him. He be set free
forthwith, if not required in any other case.

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

Announced
Dt. 03.12.2018


JUDGE


JUDGE

Office
15/01/2019
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