

**2018 Y L R 2610**

**[Balochistan]**

**Before Naeem Akhtar Afghan and Abdullah Baloch, JJ**

**SHAFEE MUHAMMAD---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No.112 and Murder Reference No. 6 of 2015, decided on 22nd June, 2018.

**(a) Penal Code (XLV of 1860)---**

---Ss. 302(b), 354, 449, 452 & 34---Qatl-i-amd, assault or use of criminal force to woman with intent to outrage her modesty, house-trespass after preparation for hurt, assault or wrongful restraint---Appreciation of evidence---Sentence, reduction in---Complainant as prosecution witness had correctly narrated the story as contained in the FIR and nowhere he was derailed from his previous deposition---Statements of the most important and star witnesses, the daughter and widow of the deceased, were similar with each other---Said witnesses had correctly identified accused in the Trial Court and correctly stated the date, time, the place of occurrence and the manner in which the occurrence had taken place---Said witnesses being dwellers of the house where occurrence took place, their presence in the house could not be doubted, rather their presence at the relevant time, was natural---Other prosecution witness, the neighbour of the deceased, had also identified the accused in the court---All prosecution witnesses were reliable, trustworthy and credible---Identity of accused, could not be doubted as prior to the incident, accused remained Buzgar of deceased's family---Defence had cross-examined the witnesses at sufficient length, but had failed to give any dent or damage to their testimony---Some minor discrepancies in the evidence of prosecution witnesses, were not substantive enough to create reasonable doubt in the case of prosecution about the involvement and guilt of accused---Recovery of crime weapon i.e. T.T. Pistol, was effected on the pointation of accused---Accused had confessed his guilt by disclosing the names of absconding accused persons who persuaded him for committing the murder of deceased---Case of prosecution, had further been strengthened by the confessional statement of accused under S.164, Cr.P.C.---Such statement was recorded without any coercion, pressure, torture or blackmailing---No reason existed to disagree or disbelieve such confessional statement---Plea of 'alibi' taken by accused, was not of worth credence---Prosecution had succeeded in proving the charge against accused through direct, circumstantial and medical evidence---No major contradiction or dishonest improvement had been pointed out by the defence---Accused, throughout the proceedings, had not taken any specific plea with regard to his false implication, nor he had brought any ill-will or ulterior motives for his false implication by the witnesses---Trial Court had discussed and dilated upon each and every aspect of the case and rightly convicted accused.

Muhammad Amjad v. The State PLD 2003 SC 704 and Hashim Qasim v. The State 2017 SCMR 986 ref.

**(b) Penal Code (XLV of 1860)---**

---S. 302(b)---Qatl-i-amd---Awarding of capital punishment---Eight accused persons including the accused had been booked in the crime and except accused, all accused persons were absconding; their pleas were yet to be brought on record---Accused, his two sons and two other absconding accused persons, being armed with Kalashnikov and T.T. pistol had made indiscriminate firing upon the deceased, but the fact remained that the deceased had only received two bullet injuries and it was not certain that whose bullet hit the deceased---Awarding of capital punishment to accused was unwarranted, in circumstances---While upholding the conviction of accused, his sentence of death was converted into rigorous imprisonment for life---Amount of compensation and remaining sentence of accused were maintained with benefit of S.382-B, Cr.P.C.

Shah Muhammad Jatoi for Appellant.

Habib Ullah Gul, Additional P.G. for the State.

Date of hearing: 28th May, 2018.

## JUDGMENT

**ABDULLAH BALOCH, J.**---This common judgment disposes of Criminal Appeal No.112 of 2015 filed by the appellant Shafee Muhammad son of Ali Sher, against the judgement dated 22nd April 2015 (hereinafter referred as, "the impugned judgment") passed by the learned Additional District and Sessions Judge, Kalat (hereinafter referred as, "the trial Court"), whereby the appellant was convicted under Section 302(b), P.P.C. and was sentenced on capital punishment of death as Tazir and was directed to be hanged by neck till he is dead and to pay compensation of Rs.200,000/- (rupees two lacs) to the legal heirs of deceased Abdul Jabbar as provided under Section 544-A, Cr.P.C. or in default thereof to further suffer six months S.I. The appellant has also been convicted under Section 354, P.P.C. to suffer two (02) years' R.I. with fine of Rs.10,000/- or in default thereof to further suffer six (06) months S.I.; under Section 449, P.P.C. to suffer R.I. for ten (10) years with fine of Rs.10,000/- or in default thereof to further suffer six (06) months S.I.

The Murder Reference No.06 of 2015 has been forwarded by the trial Court for confirmation of death sentence of appellant or otherwise.

2. Facts of the case are that on 5th July 2014, at about 2.30 a.m. the complainant Muhammad Siddique, lodged FIR No.47 of 2014 at Police Station City Kalat, under Section 302 Q&D Ordinance read with Sections 452, 354, 34 P.P.C., stating therein that on the night of occurrence at about 01.15 a.m. he was sleeping in his house, when woke-up on hearing the firing shots and he also heard hue and cries towards the house of his brother in law, thus entered into his house and saw that Abdul Jabbar was lying in a pool of blood. On query, from the wife of deceased namely Bibi Saeed and daughter Bibi Rabia his daughter disclosed that on hearing footfall on the roof and courtyard, they came out to courtyard, where they found Abdul Hafeez son of Shafee Muhammad, Sarfraz Ahmed son of Shafee Muhammad being armed standing there, while the appellant Shafee Muhammad along with two armed persons was found present at the roof of the house. In the meantime, Abdul Hafeez beat and locked them in kitchen, hence she shouted towards her father Abdul Jabbar not to come out from the room as some armed persons are standing there, but her father came out from the house and all the accused made firing upon his father with Kalashnikov and pistol and committed his murder and escaped from the place of occurrence.

3. In pursuance of the above FIR, investigation was entrusted to PW-10 Muhammad Umer, SI/IO, who during investigation visited the site and prepared site sketch; sent the dead body to hospital; carried out proceeding under Section 174, Cr.P.C. and prepared inquest report of deceased; recorded the statements of witnesses under Section 161, Cr.P.C.; took into possession the empties of pistol and Kalashnikov from the place of occurrence; took into possession the blood stained Chaddar of deceased; obtained MLC of deceased; arrested the appellant; recorded his disclosure memo and on pointation recovered the crime weapon i.e. T.T. pistol; sent the empties along with recovered weapon to FSL for analysis; also recorded the confessional statement of the appellant under Section 164, Cr.P.C.; on completion of investigation submitted the challan in the trial Court.

4. The learned trial Court after non-executing of NBWs and initiating proceedings under Sections 87 and 88 Cr.P.C., has declared absconder to the accused Abdul Karim, Muhammad Yaqoob, Muhammad Ramzan, Bashir Ahmed, Abdul Qayyum, Abdul Hafeez and Sarfraz Ahmed.

5. At the trial, the prosecution produced ten (10) witnesses, whereafter; the appellant was examined under section 342, Cr.P.C. The appellant has also recorded his statement on oath under Section 340(2), Cr.P.C. and produced DW-1 Saifullah in his defence. On concluding the trial and after hearing arguments, the trial Court awarded conviction to the appellant as mentioned in para-1 above. The appellant has preferred the instant criminal appeal, whereas the trial Court has forwarded Murder Reference for confirmation or otherwise of the death sentence awarded to the appellant.

6. Learned counsel for the appellant contended that the prosecution has failed to substantiate the charge against the appellant beyond any shadow of doubt; that the statements of interested and related witnesses are lacking independent corroboration; that the ocular account of testimony is in conflict with medical evidence; that the extra-judicial confession whilst recorded in police custody is not admissible under Articles 38 and 39 of Qanun-e-Shahadat Order, 1984; that the confessional statement of the appellant is the result of coercion, pressure and torture, thus no implicit reliance could be placed upon the same; that the statements of the prosecution witnesses are not consistent and same are suffering from material contradictions, dishonest improvements and infirmities rendering their testimony doubtful, but the benefit of doubts have not been extended in favour of the appellant; that the defence plea so taken and established by the appellant was discarded from consideration.

7. Learned Additional Prosecutor General while supporting the impugned judgment contended that the prosecution through consistent and confidence inspiring evidence has proved the charge against the appellant beyond the shadow of reasonable doubt; that the FIR has been lodged promptly, wherein the appellant along with co-accused persons were nominated, besides during investigation the appellant has confessed his guilt by recording his extra-judicial confession followed by the recovery of crime weapon as well as the confessional statement under Section 164, Cr.P.C.; that the defence has failed to point out any contradiction, infirmity or dishonest improvement in the prosecution evidence; that there are no mitigating circumstances to award lesser punishment to the appellant and that after proper appraisal of the evidence available on record the trial Court has rightly awarded penalty of death to the appellant through the impugned judgment, which otherwise is not open for interference by this Court.

8. Heard the learned counsel and perused the available record. Perusal of record reveals

that the unnatural death of deceased Abdul Jabbar is not disputed. Even the defence has admitted the unnatural death of deceased and also the appellant in his oath statement admitted the unnatural death of deceased and his taking participation in the funeral ceremonies, however, he pleaded his false implication. Soon after the occurrence, the deceased was shifted to Hospital, where PW-8 Dr. Abdullah Jan, Medical Officer DHQ Kalat after examining the deceased has confirmed the receipt of bullet injuries by the deceased on his chin and on right thigh. PW-8 has opined the cause of death of deceased as damage to brain (vital center) and opined that the injuries were caused by fire arm. PW-8 issued MLC Ex.P/8-A. which confirms the unnatural death of deceased. The prosecution case is also supported by the blood stained Chaddar of deceased and the FSL report in affirmative.

9. Adverting to ocular testimony produced by the prosecution. The prosecution in order to substantiate the charge, has produced the evidence of ten witnesses. The complainant of the case Muhammad Siddique appeared as PW-1. This witness has mostly reiterated the contents of his fard-e-bayan Ex.P/1-A. According to this witness on the night of occurrence at about 1.15 a.m. when he was sleeping in his house, woke up on hearing firing shots and on coming out side of his room, heard hue and cries towards the house of his brother-in-law, hence he rushed there and found the dead body of deceased Abdul Jabbar lying in the pool of blood. According to this witness on query from the wife of deceased namely Bibi Saeed and daughter Bibi Rabia, his daughter disclosed that on hearing footfall on the roof and courtyard, they came out from rooms and in the courtyard they found Abdul Hafeez son of Shafee Muhammad and Sarfraz Ahmed son of Shafee Muhammad being armed standing there, while the appellant Shafee Muhammad along with two armed persons were found present in roof of the house. In the meantime, Abdul Hafeez beat and locked them in the kitchen, hence she shouted towards her father Abdul Jabbar not to come out from the room as some armed persons are standing there, but her father came out from the house and all the accused made firing upon him with Kalashnikov and pistol and committed his murder and thereafter decamped from the place of occurrence. This witness has correctly narrated the story as contained in the FIR and nowhere he derailed from his previous deposition. PW-2 is the recovery witness of two empties of pistol, two empties of Kalashnikov took into possession from inside of the house and 30-empties collected from outside of the house of deceased. He is also witness of blood stained Chaddar handed over to the I.O.

10. The most important and star witnesses of the prosecution case are PW-3 Bibi Rabia, who is the daughter of deceased and PW-4 Bibi Saeeda, who is the widow of deceased. The statements of both the witnesses are similar with each other. Both the witnesses in their statements stated that on hearing footfall on the roof and courtyard, they woke-up and came out from the rooms and in the courtyard found present in armed condition to the absconding accused Abdul Hafeez and Sarfaraz, while the appellant along with other unknown accused was present on the roof of the house. The accused Abdul Hafeez started beating them and locked them in the kitchen, hence PW-3 shouted upon her father not to come out as some accused persons are present there in arm condition, but her father came out from the Veranda and all the accused being armed with Kalashnikov and pistol made firing upon her father, due to which he fell down and subsequently succumbed to the injuries. Both the PWs have correctly identified the appellant in the trial Court and further stated that they can also identify the remaining accused persons, if brought before. Both the witnesses have correctly stated the date, time, the place of occurrence and the manner in which the occurrence had taken place. Both the witnesses are dwellers of the said house, thus their presence in the house cannot be doubted rather their presence at the relevant time was natural.

11. Another important witness of the prosecution is PW-6 Abdul Latif, who is the neighbour of deceased Abdul Jabbar. According to this witness on the night of occurrence he along with Hamid Raza was present in his guest room and were watching T.V. when heard firing shots towards the house of Abdul Jabbar, thus they rushed towards the house of Abdul Jabbar and found the accused Shafee Muhammad, Abdul Hafeez, Sarfraz and others while making firing and running towards garden side, then he and Hamid Raza entered in the house of Abdul Jabbar and found the dead body of deceased in the pool of blood. PW-6 also identified the appellant in the trial Court.

12. We at our utmost care, caution and by applying judicious minds analyzed the statements of both the eye-witnesses i.e. PW-3 and PW4 as well as the statement of PW-6 being circumstantial witness and found the same reliable, trust worthy and credible. The mistaken identity of the appellant cannot be doubted as prior to the incident, the appellant remained the Buzgar of deceased's family, thus having acquaintance with the appellant, both the eye-witnesses have correctly identified the appellant in the trial Court. Besides, both the PWs will never raise their fingers on innocent person leaving the actual and real culprits, who had committed the brutal murder of their blood relation. The defence has cross-examined the witnesses at sufficient length, but has failed to give any slightest dent or damage to their testimony rather from the cross-examination the commission of crime by the appellant has been confirmed. Although, the learned counsel for the appellant attempted to discredit the case of prosecution on the basis of some minor discrepancies in the evidence of prosecution witnesses, but in our opinion, those are not substantive enough to justify or create reasonable doubt in the case of prosecution about the involvement and guilt of the appellant.

13. The case of prosecution has further been strengthened from the disclosure memo of the appellant recorded by the Investigating Officer in presence of PW-7 Imam Din, who produced the same as Ex.P/7-A, perusal of which reflects that the appellant has confessed his guilt by disclosing the names of absconding accused persons namely Muhammad Ramzan Baghbani, Muhammad Yaqoob, Abdul Karim and Bashir Ahmed, who persuaded him for committing the murder of deceased. Besides, the appellant has also shown his willingness to the I.O. (PW-10) to get recovered the crime weapon i.e. T.T. pistol and accordingly the recovery of T.T. pistol was effected on the pointation of the appellant. Since, the extra-judicial confession of the appellant Ex.P/7-A has been followed by the recovery of crime weapon as Ex.P/10-E and the discovery of new facts as well as revealing the names of absconding accused persons. thus such disclosure is admissible under Article 40 of the Qanun-e-Shahadat Order, 1984 and the objection of the learned counsel for the defence with regard to its admissibility being recorded in police custody is without any substance, thus such objection is hereby spurned. In the case titled Muhammad Amjad v. The State PLD 2003 SC 704, the Hon'ble Supreme Court held as under:--

"Further it is noted that as per Article 40, corresponding to Section 27 of the Evidence Act, when any fact is revealed in consequence of information received from any accused in custody of a police officer, such information whether it amounts to a confession or not as it relates distinctly to the fact thereby discovered, may be proved. The information supplied by the appellant under Article 40 *ibid* relating to incriminating articles is admissible.

14. The case of prosecution has further been strengthened by the confessional statement of the appellant under Section 164 Cr.P.C. recorded by PW-9 Abdul Hafeez Judicial Magistrate. The perusal of confessional statement of appellant Ex.P/9-B reveals that prior to

recording the statement, the learned Judicial Magistrate had fulfilled all the legal requirements by introducing him before the appellant and also brought into his knowledge the consequences of such confessional statement will be used against him as evidence, but despite such facts the appellant was ready to get recorded his confessional statement and the learned Judicial Magistrate got appended the thumb impressions of the appellant on the said statement. The contents of such confession have corroborated the statements of star eye-witness of the case appeared as PW-3 and PW-4 and it appears that the confessional statement of the appellant and the statements of eye-witnesses are fully corroborating each other on all material counts. The perusal of confessional statement of the appellant confirms that the same was recorded without any coercion, pressure, torture or blackmailing rather the appellant realized his shamefaced act and due to embarrassment, he immediately agreed to record his confessional statement. Thus, there is absolutely no reason available for us to disagree or disbelieve such confessional statement, which on the face of it appears to be recorded in accordance with law, without any fear or torture. The Hon'ble Apex Court in the case of Hashim Qasim v. The State 2017 SCMR 986, has held that "For accepting a confession, two essential requirements must be fulfilled: first, that the confession was made voluntarily and was based on true account of facts leading to the crime and, second, the same was proved at the trial." Admittedly, the said two essential requirements have been fulfilled in the case in hand as through the evidence it has not only been established that the same is voluntarily, but also it was proved at the trial.

15. Adverting to the defence plea of the appellant, suffice to observe here that the appellant has recorded his statement on oath as well as produced a witness in his defence, whereby he has taken the plea of alibi that on the night of occurrence was present in his house at Kapoto, which is at the distance of 25/30 KMs from the place of occurrence and on getting information in the morning he reached to the house of the deceased Abdul Jabbar being his Buzgar and inquired from the womenfolk about the incident, whereafter he has taken participation in funeral ceremonies. According to this witness amount was collected for hiring tracker dogs and he has also given share in it.

16. We have taken into consideration the defence plea of alibi taken by the appellant into juxtaposition with the prosecution evidence and have come to the conclusion that the plea of alibi is not worth credence for variety of reasons. Firstly, the FIR was lodged promptly even on the night of occurrence, wherein the appellant along with his sons was nominated in the FIR, thus no question for his arrival at the house of deceased on the following day or taking participation in funeral ceremonies does arises at all. Furthermore, the father of the PW-3 and the husband of PW-4 was murdered in their presence, thus it does not appeal to the logic that both the witnesses have falsely implicated the appellant in the crime letting the actual culprits. Thus, the appellant has failed to establish the plea of alibi taken by him in his defence.

17. The reappraisal of entire prosecution evidence establishes the fact that the prosecution has succeeded in proving the charge against the appellant through direct, circumstantial and medical evidence. No major contradiction or dishonest improvement has been pointed out by the learned defence counsel in the statements of prosecution witnesses. The recovery of empties of Kalashnikov and T.T. pistol from the place of occurrence coupled with the volunteer recording of extra-judicial confession and the confessional statement of the appellant followed by the recovery of crime weapon on the pointation of the appellant have further strengthened the case of prosecution. Throughout the proceedings the appellant has not taken any specific plea with regard to his false implication nor he has brought any ill-will

or ulterior motives for his false implication by the witnesses and specially against the PW-3 and PW-4, who being natural witnesses directly witnessed the crime. The learned trial Court has discussed and dilated upon each and every aspect of the case and rightly convicted the appellant.

18. So far as the quantum of sentence i.e. Capital punishment of death is concerned, we do not find in agreement ourselves with regard to the same. Suffice to observe here that eight accused persons including the appellant have been booked in the crime and except the appellant, all the accused persons are absconding, hence their pleas are yet to be brought on record. Besides, according to the prosecution case the appellant, along with his two sons and two other absconding accused persons being armed with Kalashnikov and T.T. pistol made indiscriminate firing upon the deceased, but the fact remains that the deceased had only received two bullet injuries and it is not certain that whose bullet hit to the deceased, thus under these circumstances awarding of capital punishment to the appellant is un-warranted.

19. For the reasons discussed hereinabove, while upholding the conviction of convict-appellant Shafee Muhammad son of Ali Sher, his sentence of death is converted into R.I. for life. The amount of compensation and the remaining sentences as ordered by trial Court are maintained with benefit of section 382-B, Cr.P.C.

With the above reduction of sentence, Criminal Appeal No.112 of 2015 is dismissed and Murder Reference No.6 of 2015 is answered in negative.

HBT/59/Bal

Sentence reduced.