

2012 P Cr. L J 1207

[Balochistan]

Before Muhammad Hashim Khan Kakar and Ghulam Mustafa Mengal, JJ

DAD MUHAMMAD and another---Appellants

Versus

THE STATE and another---Respondents

Criminal Appeal No.375 of 2009 and Murder Reference No.25 of 2009, decided on 25th April, 2012.

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

----S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Sentence, reduction in---Trial Court after going through the evidence had come to the conclusion that the prosecution had proved its case against accused by producing circumstantial evidence; particularly the ocular account, furnished by prosecution witness, who had last seen the deceased in the company of accused---Accused had failed to furnish sufficient explanation qua his innocence---Said independent witness had no grudge or malice to falsely involve accused in the commission of the offence, particularly when accused was the real father of deceased---Said witness was subjected to lengthy cross-examination, but defence had failed to shake his veracity---Defence counsel was not in a position to defend the case of accused qua the recovery of dead body on his pointation from the abandoned well---Discrepancies, pointed out by Defence counsel in the statement of prosecution witnesses, were extremely insignificant, which pertained to extraneous detail of the case having no worth---Prosecution had proved its case beyond any shadow of doubt---Trial Court awarded death sentence to accused under S.302(b), P.P.C.---Said

provisions of law had provided two kinds of punishments i.e. punishment with death as Qisas and punishment with death or imprisonment for life as tazir---Question of sentence demanded the utmost care on the part of the court dealing with the life and the liberties of people; and that accused were also entitled to extenuating benefit of doubt on the question of sentence---Some mitigating circumstances available on the file of the case, escaped notice of the Trial Court while determining the quantum of sentence---According to the prosecution's own showing, the occurrence had taken place because of the deceased as she caused annoyance and humiliation to accused and his family; it was not only the accused, but absconding accused and three other unknown accused persons who were also involved in the case---Accused was 73 years old; and prosecution had failed to establish as to who had strangulated the deceased---Taking both such factors as extenuating circumstances, death penalty was not warranted under the law---Death sentence of accused was commuted to that of imprisonment for life, with the benefit of S.382-B, Cr.P.C.

Israr Ali v. The State 2007 SMR 525 rel.

(b) Criminal trial---

---Circumstantial evidence---Punishment could also be awarded on the basis of circumstantial evidence, if it would connect the accused with the offence, without reasonable doubt.

Jaffar v. State 1998 SCMR 2669 rel.

Kamran Murtaza and Rizwan Ejaz for Appellants.

Pervaiz Akhtar, D.P.-G. for the State.

Date of hearing: 17th April, 2012.

JUDGMENT

MUHAMMAD HASHIM KHAN KAKAR, J---The Additional Sessions Judge, Kalat vide judgment dated 13th November, 2009 convicted appellant Dad Muhammad son of Turk Ali under section 302(b) of the P.P.C. and sentenced him to death. The appellant challenged his conviction and sentence by way of filing Criminal Appeal No.375 of 2009, whereas the Additional Sessions Judge has sent Murder Reference No.25 of 2009 for confirmation of the sentence of death or otherwise. Since common question of law and facts is involved, therefore, both the matters are being disposed of by means of this common judgment.

2. Complainant Manzoor Ahmed Mengal, IP/SHO (P.W.1), in his report (Exh.P/1-A) alleged that on 16th July, 2009, one Din Muhammad came to police station and submitted an application, wherein he alleged that he received information telephonically that about 5/6 days prior, his brother Dad Muhammad contracted marriage of his daughter, namely, Mst. Ayesha Bibi with one Muhammad Ismail and, thereafter, the son of Dad Muhammad, namely, Taj Muhammad committed murder of his sister Mst. Ayesha Bibi for some unknown reason and buried her dead body at some unknown place. On receiving the said information, the complainant carried out proceedings as required under section 157(2) of the Cr.P.C. and on the basis of suspicion, brought accused Dad Muhammad to police station, who during course of interrogation disclosed that he, along with his son-in-law, namely, Muhammad Ismail son of Shadad, had taken Mst. Ayesha Bibi to the area of Gaidy Shekhri, where between the night of 15th and 16th July, 2009, they, along with three unknown persons, who were brought by his son-in-law, committed murder of deceased Mst. Ayesha by means of strangulation by declaring her siyahkar, buried her dead body and, thereafter, exhumed the same and threw it in a well and he can point out the said well, whereas the three unknown persons can be identified by his son-in-law Muhammad Ismail. Consequently, a case vide Crime No. 34 of 2009, under section 302 read with sections 201 and 34 of the P.P.C. was registered at Saddar Police Station, Kalat.

3. After registration of F.I.R. Exh.P/1-A, the investigation of the case was carried out by P.W.8 Sanaullah, SI, who, along with SHO, DSP and other police officials, took accused Dad Muhammad to Shekhri area, where the accused pointed out the grave of his daughter Mst. Ayesha Bibi, where they buried her dead body and, thereafter, exhumed the dead body and threw it in a well. The accused also pointed out the said well, at which the Investigating Officer prepared site sketch of grave and well as Exh.P/8-A. He took out the dead body of the deceased from the well and prepared inquest report Exh.P/8-B of the deceased, got examined the dead body through a lady doctor on the spot and, thereafter, released it to the heirs. He recorded the statements of P.Ws., obtained medical certificate of the deceased and after completion of necessary investigation, placed the papers before IP/SHO Manzoor Ahmed, who prepared incomplete challan Exh.P/8-C and supplementary challan Exh.P/8-D and the appellant was sent up to face the trial.

4. On the stated allegations, a formal charge was framed and read to the appellant, to which he did not plead guilty and claimed trial. The prosecution, in order to prove its case, produced five witnesses. P.W.1 Manzoor Ahmed, IP/SHO, is complainant of the case, who placed on record his F.I.R. Exh.P1-A. P.W.2 Ghulam Ali is witness to the alleged exhumation of the dead body of the deceased from a well, its examination by a lady doctor and recovery memo of dead body as Exh.P/2-A. P.W.3 Din Muhammad is the witness, who informed the complainant regarding commission of the offence by the hands of the appellant and his son-in-law Muhammad Ismail. He placed on record his written application as Exh.P/3-A. P.W.4 is Pir Muhammad, in whose presence, the deceased, allegedly, told the appellant about her illicit relations with her cousin Abdul Manan prior to her marriage. P.W.5 Naqeebullah, SI, is witness to the disclosure memo (Exh.P/5-A) of the appellant, memo of pointation of the grave and well (Exh.P/5-B) and site inspection memo (Exh.P/5-C). P.W.6 Dr. Sadia Sarwar, Lady Medical Officer, District Headquarters, Civil Hospital, Kalat, examined the dead body of the deceased and issued death certificate (Exh.P/6-A). P.W.7 is Muhammad Hashim, who, allegedly, gave lift to accused persons and the deceased in his Pickup to Morgand area and P.W.8 Sanauallah, SI, is the Investigating Officer of the case. Then the prosecution closed its side.

5. In his examination under section 342 of the Cr.P.C., the appellant denied and controverted each and every allegation of facts levelled against him by the prosecution and professed his innocence. He recorded his statement on oath under section 340(2) of the Cr.P.C, and produced D.W.1. Noor Bakht and D.W.2 Khair Muhammad in his defence.

6. At the conclusion of trial, the trial Court found the prosecution's case against the appellant to have been proved beyond reasonable doubt, thus, he was convicted and sentenced, as detailed above.

7. Messrs Kamran Murtaza and Rizwan Ejaz, learned counsel for the appellant, in support of the appeal, contended that the prosecution had failed to prove its case against the appellant beyond reasonable doubt and, thus, this appeal warrants acceptance with a resultant acquittal of the appellant.

8. Mr. Pervaiz Akhtar, Deputy Prosecutor-General, on the other hand, maintained that the prosecution has brought sufficient evidence on record to connect the appellant with the commission of crime and, as such, the impugned judgment, relating to the appellant, is unexceptional and warrants no interference.

9. Learned counsel for the appellant feeling themselves not in a position to meet the arguments addressed on behalf of the State, stated that they do not press the criminal appeal and, in peculiar circumstances of the case, the appellant would be satisfied, if some lenient view is taken and the sentence is reduced from death penalty to that of fourteen (14) years' R.I. in view of section 306(b) of the P.P.C.

10. We have considered the contentions put forth by learned counsel for the parties in the light of available record and relevant provisions of law with their valuable assistance. It is an admitted fact that the Court below after proper appreciation of evidence had come to the conclusion that the prosecution had proved its case against the appellant by producing circumstantial evidence, particularly the ocular account, furnished by P.W.7 Muhammad Hashim, who had lastly seen the deceased in the company of the convict/appellant.

11. The appellant had failed to furnish sufficient explanation qua his innocence that the victim disassociated from him in presence of any independent witness. In fact, the appellant had to furnish an explanation with regard to aforesaid circumstance that the victim was not with him, or they were disassociated with each other. P.W.7 Muhammad Hashim is an independent witness, having no grudge or malice on his part to falsely involve the appellant in the commission of the offence, particularly when the appellant is the real father of deceased Mst. Ayesha Bibi. The said witness was subjected to lengthy cross-examination, but defence had failed to shake his veracity. It is a settled principle of law that punishment could also be awarded on the basis of circumstantial evidence, if it connects the accused with the offence without reasonable doubt, as has been held in a case of Jaffar v. the State, 1998 SCMR 2669, the relevant portion thereof is as follows:--

"After careful examination of the record, we are satisfied that overwhelming circumstantial evidence has been brought against the appellant. The contention of the learned counsel for the appellant, that without direct evidence the appellant cannot be sentenced to death, is without force. If the circumstantial evidence connects the accused with the offence without any reasonable doubt, the same can form basis of the capital punishment."

12. Learned trial Court believed the evidence regarding pointing out the place of burial of Mst. Ayesha Bibi by the appellant and his disclosure, in consequence of which the dead body had been recovered from an abandoned well and such aspect of the case has also been supported by the Investigating Officer by deposing that the dead body of Mst. Ayesha had been recovered from a well situated at Shekhri on the pointation of the appellant. According to P.W.5 Naeqebullah, SI, on 25th July, 2009, in his presence, the appellant, during course of interrogation, made disclosure that he had committed the qatl-e-amd of his daughter Mst, Ayesha

Bibi with the help of absconding accused. The witness further stated that the appellant disclosed before him that on next morning of the wedding ceremony, his son-in-law came to him and alleged that the deceased was not virgin. In this regard, inquiry was made from the deceased, who admitted her illicit relationship with her cousin viz. Manan. Thus, on the fateful day, he managed a vehicle with the help of his son-in-law Muhammad Ismail, took the deceased in the area of Shekhri and after strangulation, put her dead body into a grave and, subsequently, the dead body was removed from the grave and was thrown into a well. Later on, in pursuance of the said disclosure, the dead body was got recovered by the appellant from a well situated at Shekhri. At this stage, it would be more beneficial to reproduce herein below the relevant portion of the statement of P.W.5 recorded in Urdu language, which reads as follows:--

13. From perusal of the aforesaid statement, it is quite clear that the witness talked about two disclosures i.e. first was in respect of commission of murder of deceased Mst. Ayesha Bibi and, the second was with regard to concealment of dead body of the deceased in a well, hence we see force in the contention of learned counsel for the appellant that so far as the disclosure made by him with regard to the murder of deceased Mst. Ayesha Bibi is concerned, the same amounts to a confession and, otherwise, was inadmissible in view of the clog contained in Articles 38 and 39 of the Qanun-e-Shahadat Order 1984, as in pursuance thereof, no "fact" was discovered, however, subsequent part of his statement, which relates to the concealment of the dead body, that was admissible, as the dead body was recovered in pursuance thereof. We have minutely gone through the cross-examination of the prosecution witnesses and statement under section 342 of the Cr.P.C. of appellant Dad Muhammad. He completely failed during the course of investigation as well as at the trial to explain qua his innocence. Even at the time of arguments before this Court, his counsel was not in a position to defend the case of appellant qua the recovery of dead body on his pointation from an abandoned well situated at Shekhri, To our

mind, disclosure and pointation of the appellant regarding dead body of the deceased and then its recovery in consequence thereof from an abandoned well is a valuable piece of prosecution evidence, which proves beyond any shadow of doubt that it was the appellant and none else, who killed Mst. Ayesha Bibi with the help of absconding accused and then buried her dead body in a grave and, later on, after disinterment threw it in the well in question.

14. According to learned counsel, appellant being wali of the deceased would be entitled to the benefit of section 308 of the P.P.C., therefore, the conviction and sentence of the appellant under section 302(b) of the P.P.C. was illegal. In the alternative, learned counsel argued that in any case, it was the fault of the deceased, who annoyed and humiliated the appellant and his family, thus, it would not be a case of extreme penalty. The first contention of learned counsel, relating to the application of section 308 of the P.P.C., by virtue of section 306 of the P.P.C., is without any substance. Sections 306(b) and (c), 307 and 308 of the P.P.C. would only attract in the cases of qatl-e-amd, which are liable to qisas under section 302(a) of the P.P.C. and not in the cases, in which the sentence for qatl-e-amd has been awarded as ta'zir under section 302(b) and (c) of the P.P.C. For the purpose of facility, it would be advantageous to reproduce hereinbelow section 306 of the P.P.C.:--

"306. Qatl-e-amd not liable to qisas.---Qatl-e-amd shall not be liable to qisas in the following cases, namely:

(a) when an offender is a minor or insane:

Provided that, where a person liable to qisas associates with himself in the commission of the offence a person not liable to qisas with the intention of saving himself qisas, he shall not be exempted from qisas;

(b) when an offender causes death of his child or grandchild howsoever, and

(c) when any wali of the victim is a direct descendant, howsoever, of the offender."

15. A bare reading of aforesaid provision of law clearly demonstrates that sections 306,

306(b) and (c), 307 and 308 of the P.P.C. would only attract in the cases of qatl-e-amd, which are liable to qisas under section 302(a) of the P.P.C. and not in the cases, in which the sentence for qatl-e-amd has been awarded as ta'zir under section 302(b) and (c) of the P.P.C. Section 306 of the P.P.C. provides that qatl-e-amd shall not be liable to qisas in certain cases mentioned therein and, thus it is clear that in such cases mentioned therein, the punishment of qisas will remain inoperative, but there is no such exception in a case of qatl-e-amd punishable as ta'zir. Under section 307 of the P.P.C., the sentence of qisas for qatl-e-amd cannot be enforced in the cases referred therein and, therefore, the exceptions mentioned in sections 306 and 307 of the P.P.C. are confined only to the cases liable to qisas and not ta'zir. Under section 308 of the P.P.C., it is provided that where an offender guilty of qatl-e-amd is not liable to qisas in terms of section 306 of the P.P.C., the sentence of qisas will not be enforced against him as provided under section 307 of the P.P.C. and he shall be liable to diyat and may also be punished with imprisonment, which may extend to a term of twenty five (25) years as ta'zir. The above provisions of law can be made applicable only, if the essential conditions contained therein are available in a case, which is liable to qisas and not in the cases of qatl-e-amd, punishable as ta'zir. Admittedly, the appellant was tried for the charge of qatl-e-amd under section 302(b) of the P.P.C. and was convicted and sentenced to death as ta'zir, therefore, he would not be entitled to the benefit of section 308 of the P.P.C. and was rightly punished under section 302(b) of the P.P.C. It is not permissible to extend the benefit of the provisions of section 308 of the P.P.C. in the cases of qatl-e-amd, which are punishable under section 302(b) and (c) of the P.P.C. as ta'zir.

16. Learned counsel for the appellant have tried to point out some discrepancies in the statements of prosecution witnesses, particularly regarding the timing of disclosure made by the appellant during police custody, but the same are extremely insignificant. The discrepancies, pointed out by learned counsel, pertain to extraneous details of the case having no worth. In case, all the pieces of evidence i.e. admission of the deceased in front of his father i.e. the appellant in presence of P.W.4 Pir Muhammad regarding commission of sexual intercourse with her by her cousin viz. Manan, last seen evidence, furnished by P.W.7 Muhammad Hashim and the evidence of P.W.5 Naqeebullah, SI as well as P.W.8 Sanaullah, SI (Investigating Officer) regarding the recovery of dead body of deceased Mst. Ayesha from an abandoned well on the pointation of the appellant are kept in juxtaposition, then the prosecution has proved its case beyond any shadow of doubt.

17. The trial Court awarded death sentence to appellant Dad Muhammad on the charge of murder under section 302(b) of the P.P.C. It would be advantageous to reproduce hereinbelow section 302 of the P.P.C. in order to resolve the question regarding quantum of sentence:--

"302. Punishment of qatl-e-amd.---Whoever commits qatl-e-amd shall, subject to the provisions of this Chapter be:

(a) punished with death as qisas;

(b) punished with death or imprisonment for life as ta'zir having regard to the facts and circumstances of the case, if the proof in either of the forms specified in section 304 is not available; or

(c) punished with imprisonment of either description for a term which may extend to twenty-five years, where according to the Injunction of Islam the punishment of qisas is not applicable.

Provided that nothing in this clause shall apply to offence to qatl-e-amd if committed in the name or on the pretext of honour and the same shall fall within the ambit of clause (a) or clause (b), as the case may be."

A minute perusal of above provisions of law clearly demonstrate that section 302(b) of the P.P.C. provides two kinds of punishment i.e. punishment with death qisas and punishment with death or imprisonment for life as ta'zir. In criminal administration of justice, the question of sentence demands the utmost care on the part of the Court, dealing with the life and the liberties of people and that the accused persons are also entitled to extenuating benefit of doubt on the question of sentence. We may observe that while keeping in view the principles enunciated by Hon'ble Shariat Appellate Bench, Supreme Court of Pakistan in a case of *Israr Ali v. the State*, 2007 SCMR 525, the some mitigating circumstances available on the file escaped notice of the trial Court while determining the quantum of sentence. According to the prosecution's own showing, the occurrence had taken place because of the fault of the deceased i.e. she caused annoyance and humiliation to the accused and his family. Furthermore, it was not only the appellant, but absconding accused Muhammad Ismail and three other unknown accused persons have also been involved in the instant case. The appellant is, reportedly, an aged person of 73 years and the prosecution has failed to establish that who has strangled deceased Mst. Ayesha, as such, taking both the factors as extenuating circumstances, death penalty is not warranted under the law.

In view of the peculiar circumstances of the case, we are inclined to commute the death sentence of appellant Dad Muhammad recorded under section 302(b) of the P.P.C. to that of imprisonment for life, with the benefit of section 382-B of the Cr.P.C. With the above modification in the quantum of sentence of imprisonment of the appellant, Criminal Appeal

No.375 of 2009 stands dismissed, whereas Murder Reference No.25 of 2009 is answered in negative.

H.B.T./29/Q

Sentence reduced.