

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

J.Cr.A No. 84-M/2022

Mst. Rainaz v. The State and another

Present: Barrister Asad-ur-Rahman, for the
appellant.

Mr. Razauddin Khan, A.A.G for the
State.

Mr. Badi-uz-Zaman Khan, Advocate for
the complainant.

Date of hearing: 08.03.2023

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. This Jail Criminal Appeal is directed against the judgment of the Additional Sessions Judge/Izafi Zilla Qazi-I, Buner, dated 29.11.2021, whereby he convicted Mst. Rainaz (the appellant-accused) and sentenced her as under:

“Under section 302 (b) PPC, to undergo imprisonment for life for committing qatl-i-amd of Mst. Gul Meena;


Under section 544-A, Cr. P.C., to pay compensation to the tune of Rs. 100,000/- to the legal heirs of the deceased or in default, she was ordered to suffer imprisonment for six months;

Under section 15-A.A., to undergo simple imprisonment for one year with fine of Rs. 5000/-, or in default thereof, she was ordered to suffer one-month S.I.

All the sentences were ordered to be run concurrently. The benefit of section 382-B, Cr. PC., was also extended to the appellant-accused.

2. Facts of the case shortly are that on 26.07.2020, the local police received information that the occurrence of a murder has taken place in village Babakra Ghazi Banda. Pursuant to such information, Sher Aman Khan ASI of Police Station Gul Bandi (PW-6) rushed to the spot. He found the dead

body of a woman by the name Mst. Gul Mena. The complainant/husband of the deceased present there reported that he had gone to the Bazar of Ghazi Banda where he was informed by his mother Mst. Jehanzeba through a cell phone call that his wife has been killed by someone with certain firearm weapon. He came to his home and found his wife dead. He stated that one year ago his wife Mst. Gul Mena had left her house with her free will and contracted Court marriage with him due to which her brother Bakhti Mand was unhappy. He alleged that the aforesaid Bakhti Mand had threatened both of them through cell phone calls for committing their murder. He showed his satisfaction that his wife was killed by her brother Bakhti Mand. Later on, the complainant, his mother and father recorded their statements u/s. 164, Cr. P.C. and charged Mst. Rainaz (the appellant-accused) for committing the murder of Mst. Gul Mena. The appellant is the youngest real sister of the complainant/husband of the deceased.

 3. On 30.07.2020, the appellant-accused was arrested by the local police and on the same day, she was produced before the Judicial Magistrate for recording her confessional statement. After recording her confessional statement, she was charged for the commission of the offence while her mother Mst. Jehan Zeba was charged u/s. 201, PPC, for concealing the real facts. The case against one Bakhti Mand was dropped.

4. After completion of investigation, challan was submitted against the appellant-accused and co-accused before the trial Court. Copies were supplied to them u/s. 265-C, Cr. PC. Charge was framed against them, to which they pleaded not guilty and claimed trial.

5. The prosecution examined as many as thirteen (13) PWs. Statements of the appellant-accused and the other co-accused u/s. 342, Cr. PC, were also recorded, in which they were afforded an opportunity of evidence in defence and/or statements on oath but they did not avail it.

6. After hearing the arguments, the trial Judge vide the impugned judgment dated 29.11.2021, convicted the

appellant-accused as mentioned in para-1 of this judgment while acquitted the co-accused Mst. Jehan Zeba of the charge leveled against her.

7. We have heard arguments of learned counsel for the parties and the learned Additional Advocate General, for the State and perused the record.

8. Admittedly, Amir Khan, husband of the deceased Mst. Gul Mena/brother of the appellant-accused Mst. Rainaz, charged Bakhti Mand, brother of the deceased for the commission of the offence on 26.07.2020. The reason he showed was that he and the deceased had contracted Court marriage at which her brother Bakhti Mand and other family members were unhappy and had threatened her of committing her murder. It was on 29.07.2020, the third day of the occurrence that the aforesaid complainant Amir Khan suddenly changed his version by recording his supplementary statement u/s. 164, Cr. P.C., in which he charged the appellant-accused, his younger real sister. He deposed in his statement that during the investigation, the appellant-accused told to the police that she was the culprit. He added in his statement that it was for this reason that he became satisfied and was sure that the appellant-accused had committed the murder of his wife and that Bakhti Mand was innocent. He further explained that relation between his wife and his sister remained strained and that both would usually quarrel with each other. The complainant never appeared before the Court at the trial. Challan was received in the trial Court on 10.12.2020. Charge was framed against the appellant-accused on 05.01.2021. The case was fixed for evidence of the prosecution for 18.01.2021. Amir Aslam appeared at the trial on 16.10.2021 but was not examined due to illness of counsel for complainant. On 23.10.2021, the next date of hearing, Mst. Bakht Sherina, mother of the deceased, was examined and Amir Aslam was abandoned on that date in the light of the statement of Mst. Bakht Sherina (PW-12). Except the police officials, the prosecution examined Mst. Bakht Sherina, mother of the deceased (PW-12) in support of her case. However, it is worth mentioning that the prosecution examined two other oral witnesses, namely, Abdullah (PW-9) and




Kashmalay (PW-10), who furnished evidence of the fact that they are the neighbours of the accused Bakhti Mand. PW-10 stated that he was present with him on the eventful day as he was busy in construction of a wall in his house. Mst. Bakht Sherina charged the appellant-accused for the commission of the offence. She referred to her statement u/s. 164, Cr. P.C. recorded during the investigation, in which she charged her for the murder of her daughter because the appellant-accused and her mother were not happy with the marriage between the deceased and Amir Khan and that both were usually quarrelling with the deceased. While under cross-examination, she admitted having never visited the house of her daughter. She further admitted that she has never met other relatives of Amir Khan, her son-in-law. She added on her own that the appellant-accused and her mother, being unhappy with the marriage of the deceased, used to quarrel with her. She admitted being not the eyewitness of the occurrence. In such circumstances, the only evidence on which the prosecution relied was the confession the appellant-accused made, before Mr. Salman Ahmad, the Judicial Magistrate on 30.07.2020, the next day of her nomination as accused in the case. We shall, therefore, examine her confessional statement in greater details. Needless to say, a confessional statement is required to be proved that it was voluntarily given and that it was truthful.



9. As stated above, the appellant-accused was arrested on 30.07.2021. She was produced before the Judicial Magistrate the same day with an application that she was willing to record her confessional statement. A close reading of the certificate the Judicial Magistrate appended to the confessional statement would show that she was produced before him at 12:15, p.m. He stated to have explained the questions mentioned in the questionnaire to the appellant-accused, at 12:30, p.m., after 15 minutes. Therefore, she was given 15 minutes more to think over her decision to confess to her guilt. At 12:45, hours, the same questionnaire was again explained to her what the Judicial Magistrate observed to have his satisfaction about her alleged voluntariness. At 12:50, hours, he recorded her statement himself by means of a computer. The certificate further shows that she gave her statement in Pushto, her mother

tongue, which he himself recorded in Urdu by means of a computer and later on read it to her by translating it into Pushto, which she allegedly admitted as correct and then thumb impressed. The certificate also reflects that it took 15 minutes to be completed, at 1:05, p.m. It may be pertinent to reproduce her statement as under:


"بیان کیا کہ میرے بھائی مسمی امیر خان نے پسند کی شادی مسماء گل مینہ دختر امیر اسلم ساکن حصار کے ساتھ کی تھی اور مسماء گل مینہ بحیثیت زوجہ برادر ام ہمارے گھر میں گزشتہ سات ماہ سے آباد تھی۔ وہ زبان کی تیز تھی اور اکثر وہ میرے ساتھ جھگڑہ کیا کرتی تھی۔ اس نے میرے بھائی کو ہمارے گھر کے دیگر خاندان والوں سے الگ رہائش اختیار کرنے پر مجبور کیا تھا اور چند دنوں میں میرا بھائی میری بھابی کو الگ گھر لے جانے اور رہائش اختیار کرنے والے تھے جس پر میں ناخوش تھی اور بروز وقوعہ میرے اور بھابی ام کے مابین جھگڑا ہوئی اسلئے میں تیش میں آکر گھر میں موجود پستول اٹھا کر بھابی ام پر دوفائر کر کے جس پر وہ لگ کر جاں بحق ہو چکی ہے۔ اور بعد ازاں پستول کو مال مویشیوں کے عجل میں چھپایا تھا جو کہ پولیس والوں کو حوالہ کیا میں نے غلطی کی ہے جس پر میں نادم ہوں۔ بس یہی میرا بیان ہے۔"

 10. The questionnaire put before her contained 15 questions in all. She negatively replied to the questions regarding the inducement or threat from the police or any promise that she will be made an accomplice in the case and would be pardoned. She affirmatively answered to the questions that she knew the man before her was a Judicial Magistrate; that she was not compelled for recording her confessional statement; she knew that if she recorded her confession, the same would be used against her and she may be convicted to death or life imprisonment; she would not be handed over back to the police, rather would be sent to the judicial lock up; and, she was recording her statement voluntarily without any compulsion. She replied negatively to the question that she was induced, she wanted to consult her relative or an Advocate, she was subjected to physical or mental torture and that any of her relative threatened her of dire consequences, if she refused to confess her guilt. She was asked as to why she was making such a big decision to confess to her guilt. She gave a short answer, stating that she had committed the offence and she wanted to say the truth. About her custody with the police, she stated that she remained for one day in police custody.

11. To begin with, her card of arrest reflects that she was stated to have been arrested at 09 a.m., on 30.07.2020. Looking at her confessional statement, she remained in police custody for one day. It means that she was arrested on 29.07.2020, the day when she was first nominated in the case. This categorically indicates that she remained in police custody. The Judicial Magistrate did not attend to this aspect of the case, which has its significance for the requirement of voluntariness in confessional statement. This aspect may be seen in juxtaposition to question No. 11 and her reply thereto, put to her in her statement recorded u/s. 342, Cr. P.C. The aforesaid question and its reply read as under:

“Q.No.11: It is in the evidence that investigating officer vide application Ex PW 13/18 produced you accused in the Court of Judicial Magistrate, wherein you have made a volunteer confessional statement which is placed on file in shape of questionnaire Ex PW 13/1, confessional statement Ex PW 13/2, certificate Ex PW 13/3 and Court order Ex PW 13/4, respectively, whereby you have admitted your guilt in the Court. What do you say about it?

Ans. It is incorrect. On the day of arrest just after my arrest, I was produced before an Authority stated by the police to be the DSP Investigation.”



The trial Court also ignored this material aspect of the confessional statement that she resiled from her confession by furnishing the answer that the question was incorrect and then added that she was arrested one day before her confessional statement and was produced before a higher police official who was shown to be a DSP Investigation. We would further observe that though the Judicial Magistrate put the questions to her rather, twice, he appears to have neither read the record nor delved deep into the matter to ascertain whether the statement was in fact true and voluntary.

12. As observed above, the Judicial Magistrate hurriedly obtained the answers to the questions (within 15 minutes) without giving her time to think over her decision at a stretch. In other words, the recording of answers to the questions so quickly left her with no opportunity for thinking, rather, it may be said that she could not get a proper opportunity to understand the questions, to think over each one of them and thereafter to tender her replies. Our concern is that even if the

questions were explained to her, her replies should not have been recorded instantaneously. Being a young and illiterate girl, she could not have been expected to have understood and fully comprehended the questions and the serious implications of her replies, which resulted in her conviction at the conclusion of the trial. In order to ensure the truthfulness of her statement, the Judicial Magistrate did not take an opportunity to himself judiciously understand as to whether: firstly, she was capable of making firing with a pistol. Secondly, where and how did she find the pistol? Thirdly, where, when and from whom she had learnt to fire with a pistol? Fourthly, whether the domestic quarrels between the womenfolk in a house could be comprehended as ineffective because that will provoke a woman of such a tender age to take such a serious decision? Fifthly, her mother was also present in the house at the relevant time. Sixthly, usually the elder one in the house, particularly the mother of the appellant-accused, would quickly and rather commandingly intervene and resolve even a verbal altercation between younger women in the house. These aspects of the case should have been considered by the Judicial Magistrate, while he got involved with the appellant-accused when explaining the questions to her, the background and the reasons in which she was moving forward to record her confessional statement. Then the trial Court was having greater responsibility to have a demonstrable judicial understanding of the above aspects of the case, most particularly, when there is no other independent, impartial and confidence inspiring corroborative evidence in support of the confession.



13. The law of confession is well defined and thoroughly researched in authoritative judicial opinions. In Hashim Qasim and another v. The State (2017 SCMR 986), it was held:

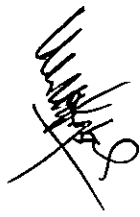
“The confession of appellant, Khayam Khurshid, recorded on 9.3.2007 by the Magistrate, namely, Shah Waliullah (PW-15) is the most suspicious piece of evidence in the whole case, besides having been retracted one. It might be right, as was argued by the learned counsel for the complainant, that retracted confession, if corroborated by independent evidence of reliable nature, can be made basis for conviction on a capital charge but it must be subject to the above cardinal principles.”

In the case titled as Muhammad Ismail and others v. The State (2017 SCMR 898), it was observed:

“The only other piece of evidence remaining in the field was a judicial confession allegedly made by Muhammad Iqrar, Khalid Hussain and Shakir Ali appellants before a Magistrate under Section 164, Cr.P.C. but admittedly the said judicial confession had been retracted by the appellants before the trial Court and in the absence of any independent corroboration such retracted judicial confession could not suffice all by itself for recording or upholding the appellants’ convictions.”

14. Coming to the site plan, the record reflects that it was prepared on 26.07.2020 at the instance of the complainant. On 30.07.2020, point No. 5 was added after nomination and on arrest of the appellant-accused. In this respect, the I.O. in his statement recorded as PW-13 stated that on 30.07.2020, he arrested the appellant-accused Mst. Rainaz and issued her card of arrest. On the same day, she led the police to the place of the occurrence in the presence of a lady constable and pointed out her place of presence at the time of the occurrence. In this respect, he prepared a memo of disclosure (‘pointation’ as it is ordinarily called) and has also made addition of point No. 5 with red ink in the site plan *already prepared*.


15. Two points are worth consideration: firstly, it is not clear at which time exactly the appellant-accused made pointation of the place of the occurrence. According to the card of arrest, she was arrested at 09 a.m. It appears she might have led the IO to the place of the occurrence for the disclosure between 09 a.m. and 12:30 p.m. when at the latter point of time, she was produced before the Judicial Magistrate for recording her confessional statement. Here again, we would refer to the statement of the appellant-accused that she was produced one day after her arrest. Secondly, the disclosure by the appellant-accused could not be considered as discovery for the reason that the site plan was *already prepared* on 26.07.2020 by the I.O. So, he was aware about it. The police investigators have recently started this practice under the garb of discovery within the meaning of Article 40 of the *Qanun-e-Shahadat Order (QSO)*, 1984. This practice is totally wrong and illegal under the QSO. Perhaps, the investigators tend to present it like a confession of the accused which is not allowed under Article 39 QSO. No



doubt the provision of Article 40 provides that so much of such information as is brought to light in consequence of discovery, may be proved. Arguably, the information obtained in such a manner, as is the situation in the case in hand, does not attract the application of Article 40. The reason is that this does not amount to discovery as the IO had already seen the scene of the occurrence and prepared its site plan. Mere taking of the accused to the same place and verifying from her the place of her presence and other details are not sufficient. Legally, such evidence is inadmissible and should, in no case, be allowed to be brought on the record, let alone believing in it. In a recent judgment, the Supreme Court has expressed serious concern about it in a case titled as *Hayatullah vs. the State* (2018 SCMR 2092). The gravity of the concern could be ascertained from the Court's remarks that without attending to this aspect of a case:

"[I]ndicates ignorance of the basic provisions of the law on the part of Prosecutor, defence Counsel and the learned trial Judge. It also indicates the lack of control of the learned presiding officer over the proceedings being conducted by him."

The Hon'ble Court has observed that:

 "After making such disclosure before the police no new fact was discovered because it is already in the knowledge of the police on 11.02.2006 that the deceased had received a bullet injury and from the place of occurrence an empty of 30 bore pistol was also recovered. So, the recovery of pistol after the said disclosure was not a new fact or not a fact which was not in the knowledge of police. [...] disclosure is worthless, irrelevant and inadmissible as the said place was already in the knowledge of the police and a site plan of the same place had already been prepared on 11.02.2006."

Thus, the disclosure is not covered under Articles 39/40 QSO. In such circumstances the recovery of pistol, the empty and the FSL report are of no legal value.

16. As sequel to our above discussion, we have reached to the irresistible conclusion that the prosecution has failed to prove the charge beyond reasonable shadow of doubt against the appellant-accused. Thus, while allowing the instant

appeal, we acquit the appellant-accused Mst. Rainaz from the charge leveled against her by setting aside the impugned judgment dated 29.11.2021 recorded by the Additional Sessions Judge/Izafi Zilla Qazi-I, Buner. She be released forthwith, if not required in any other case.

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

Announced
Dt: 08.03.2023


JUDGE


JUDGE

office w/R
03/05/2023