

80/22

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE MUNIB AKHTAR

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

(AFR) (D J)

JAIL PETITION NO. 403 OF 2018

(On appeal against the judgment dated 24.06.2010
passed by the Lahore High Court, Lahore in
Criminal Appeal No. 280-J/2005 and Murder
Reference No. 423/2005)

Kashif Ali @ Kalu

... Petitioner

VERSUS

The State and another

... Respondents

For the Petitioner: Mr. Dil Muhammad Khan Alizai, ASC
Syed Rifaqat Hussain Shah, AOR

For the State: Mr. Ahmed Raza Gillani, Addl. P.G.

Date of Hearing: 06.06.2022

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Petitioner was tried by the learned Additional Sessions Judge, Gujranwala, pursuant to a case registered vide FIR No. 403 dated 25.06.2004 under Sections 302/34 PPC at Police Station Model Town, Gujranwala, for committing murder of Mst. Sakeena Bibi, mother-in-law of the complainant. The learned Trial Court vide its judgment dated 30.04.2005 convicted the petitioner under Section 302(b) PPC and sentenced him to death. He was also directed to pay compensation amounting to Rs.100,000/- to the legal heirs of the deceased or in default whereof to further undergo SI for six months. He was also convicted under Section 394 PPC and was sentenced to seven years RI and to pay a fine of Rs.5000/- or in default whereof to further undergo six months SI. He was further convicted under Section 449 PPC and was sentenced to five years RI and to pay a fine of Rs.3000/- or in default whereof to further undergo six months SI. All sentences of

imprisonment were ordered to run concurrently. In appeal, the learned High Court while maintaining the conviction of the petitioner under Section 302(b) PPC, altered the sentence of death into imprisonment for life. However, all other sentences including the order for the payment of compensation to the legal heirs of deceased was maintained on the same terms and conditions.

2. The prosecution story as given in the impugned judgment reads as under:-

"In brief, the facts of the prosecution case as narrated in the FIR are that on 24.06.2004 at about 6.30 pm complainant Abdul Waheed (PW-1) received telephonic information that some occurrence had taken place in the house of his mother in law. When he reached at the place of occurrence, he found that his mother in law Mst. Sakina Bibi was lying in serious injured condition, who told him that at 6.30 pm when she was present in the house alone, a boy who told his name Ali called from outside the door and demanded ice. On opening the door, she saw that Ali alongwith one unknown person was present. Ali came inside the house and when she entered in the room, he caught hold her arm and snatched two karras, Jhumkas (ear rings), finger ring, locket and cash from her purse upon which she asked Ali that why he is doing so, he picked up Churri lying near and gave consecutive blows of churri and fled away after bolting the door from outside. On hue and cry of Mst. Sakina Bibi, people of the Mohalla opened the door and in the meanwhile complainant also reached at the spot. Mst. Sakina Bibi (deceased) was brought to the local hospital and after first aid she was referred to Mayo hospital, Lahore."

3. After completion of investigation, report under Section 173 Cr.P.C. was submitted before the Trial Court. In order to prove its case the prosecution produced as many as 11 witnesses. In his statement recorded under Section 342 Cr.P.C, the petitioner pleaded his innocence and refuted all the allegations leveled against him. However, he did not make his statement on oath under Section 340(2) Cr.P.C in disproof of allegations leveled against him. He also did not produce any evidence in his defence.

4. At the very outset, learned counsel for the petitioner argued that there are material contradictions and discrepancies in the prosecution evidence, which have not been taken into consideration by the courts below. Contends that there was an inordinate delay of about 18 hours in

lodging the FIR, which has not been explained. Contends that it was an unseen occurrence and there is no eyewitness of the occurrence. Contends that the statement of the complainant is based upon hearsay and he did not disclose the name of the person who informed him through telephone about the occurrence. Contends that initially, brother of the petitioner namely Ali was nominated as an accused but later on the present petitioner was substituted as an accused, which speaks volume on the conduct of the complainant. Contends that the dying declaration was neither signed by the Investigating Officer nor the Investigating Officer was produced in evidence, therefore, the same cannot be used against the petitioner. Contends that recoveries of *churri* and golden ornaments are also inconsequential, therefore, the petitioner deserves to be acquitted of the charge.

5. On our specific query as to whether he supports the impugned judgment, the learned Law Officer very frankly stated that on the basis of evidence available on the record he does not support the impugned judgment.

6. We have heard learned counsel for the parties at some length and have perused the evidence available on record.

The prosecution case mainly hinges upon (i) dying declaration of Mst. Sakina Bibi, and (ii) recovery of alleged snatched jewellery and *churri* at the instance of the petitioner. It is an admitted position that the complainant is neither an eyewitness nor a resident of the place of occurrence. As per the prosecution story, the complainant on receiving a call that a dacoity has been committed in his mother-in-law's house reached at the place of occurrence. However, he did not disclose the name of the person from whom he had received a call. The FIR was registered with an inordinate delay of about 18 hours for which no plausible explanation has been given. The same makes the whole prosecution story doubtful especially when initially brother of the petitioner namely Ali was nominated in the FIR but subsequently the present petitioner was substituted as an accused. At page 69 of the paper

book, there is available a statement of the complainant which was exhibited in evidence as Ex-PI. In the said statement the complainant stated that the deceased was discharged from hospital on 08.07.2004 and thereafter she was being treated privately in her house and succumbed to the injuries at home but he did not mention the date on which she succumbed to the injuries. The rapat in this regard was registered on 23.07.2004, which shows that the deceased might have died on the said date. The record is also silent as to how and by whom she was being treated privately in her residence. So far as dying declaration of Mst. Sakeena Bibi is concerned, we have noticed that the alleged dying declaration as recorded by the investigating officer is without backing of law established by the superior Courts from time to time and such cannot be given any credence when the time and place where it was recorded are not disclosed which makes it highly improbable to rely upon. The Investigating Officer, who recorded the dying declaration, has also not been produced in court. The record also suggests that after the occurrence, Mst. Sakina Bibi was taken to hospital and police was also present there. The learned High Court has noted that the police had moved an application on 27.06.2004 regarding her condition and to record her statement but despite that it did not record the statement at the first instance i.e. on 24.06.2004 and then on 27.06.2004. The weapon of offence i.e. churri was not sent to the office of Chemical Examiner, therefore, the recovery is inconsequential and the same cannot be used against the petitioner. As far as the alleged recovery of golden ornaments on the pointation of the petitioner is concerned, the same were taken into possession by the police officials namely Muhammad Shafique, LHC (PW-6) and Sultan Ahmed. However, the statement of said Sultan Ahmed could not be recorded as he was given up by the prosecution at the time of trial. Besides, no independent witness of the locality was associated in this process. In these circumstances, it would not be safe to rely upon the recovery of golden ornaments to sustain conviction of the petitioner. These are the dents, which are so grave and sensational that they create a doubt in the authenticity of the prosecution case, which cannot be

ignored. These dents are squarely hampering the very fabric of the prosecution case and ultimately the salient features of the case, therefore, it can safely be concluded that the prosecution has miserably failed to substantiate its case, which is basic requirement to sustain conviction of an accused in case of capital punishment. It is settled law that a single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefits, not as a matter of grace and concession but as a matter of right. The conviction must be based on unimpeachable, trustworthy and reliable evidence. Any doubt arising in prosecution case is to be resolved in favour of the accused.

7. For what has been discussed above, this petition is converted into appeal, allowed and the impugned judgment is set aside. The petitioner is acquitted of the charge. He shall be released from jail forthwith unless detained/required in any other case. The above are the detailed reasons of our short order of even date. —

Islamabad, the

6th of June, 2022

Approved For Reporting

Khurram