IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE DOST MUHAMMAD KHAN
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE FAISAL ARAB

Criminal Appeal No. 430 of 2011
(On appeal from the judgment dated 10.5.2011 passed by the Lahore High Court, Lahore, Multan Bench in Criminal Appeal No.66/08)

Muhammad Ismail **... Petitioner(s)**

VERSUS

The State **... Respondent(s)**

For the petitioner(s): Dr. Farhat Zafar, ASC

For the State: Ch. Zubair Ahmed Farooq, Addl. P.G. Pb.

Date of hearing: 30.1.2017

ORDER

Dost Muhammad Khan, J.— Charged for the murder of his own brother Liaqat, the appellant, Muhammad Ismail, faced trial and at the conclusion of that, the learned Sessions Judge, Rajanpur, vide judgment dated 9.6.2005, upon conviction, sentenced the appellant to death u/s 302(b) PPC and also to pay Rs.50,000/- as compensation, to the legal heirs of the deceased u/s 544-A Crl.P.C.

2. The appellant challenged his conviction and sentence in Crl.A. No.66/08, while the Trial Court sent Murder Reference No.343/05 for confirmation of the sentence. Both were decided vide impugned judgment dated 10.5.2011, hence this appeal from Jail, with the leave of the Court dated 17.11.2011, to see whether there was any mitigating circumstance to consider the reduction of the sentence.

We have heard Dr. Farhat Zafar, learned ASC for the appellant, appointed on State expenses and Ch. Zubair Ahmed Farooq, learned Additional Prosecutor General, Punjab.

3. In brief, the prosecution case against the appellant is that, the complainant **Mst. Bachi Mai,** alongwith her deceased husband Liaqat, was present in their house when, the appellant alongwith acquitted co-accused (son) entered there and inflicted blows with hatchet on the head, beneath the armpit and ear of the deceased. The complainant raised hue and cries, which attracted Samar (PW-7) and Salam (not produced), who witnessed the crime.

Motive for the crime was that, the appellant demanded the hand of the daughter of the deceased, namely, Mst. Ashraf, for his maternal uncle's son, which was refused by the deceased.

4. When the formal charge was framed by the Trial Court, the appellant did not plead guilty to the same and claimed trial. During the trial, besides other PWs, the complainant **Mst. Bachi Mai** (PW-6) and Samar (PW-7) appeared. The crime report was made during the transit to the Police Station by the complainant, a common pattern of the Police, the Court has disapproved; anyhow, we have to see, as to whether the prosecution has been able to bring charge home to the appellant or not, and to what extent?

5. Although **Mst. Bachi Mai** (PW-6) has made some improvements at the trial but otherwise, she has given a straightforward statement, consistent with the facts on record and being the inmate of the same house, her entire testimony cannot be discarded for that reason alone.

6. So far as the testimony of Samar (PW-7) is concerned, we have some reservations about his witnessing the crime because he was attracted to the crime house on the outcry of the complainant. His house is at some distance and being a cultivator by profession, he was supposed to be present in his fields, otherwise too, he has given inconsistent statement. The appellant was living in the adjacent house to that of the deceased, the partition wall was of a little height. He scaled over the wall and in quick succession inflicted blows, which might have consumed hardly 3/4 minutes, at the most and if the two witnesses including Samar (PW-7) had reached there, they would have caught hold of the appellant but they did nothing and only witnessed the crime. The way and manners, this witness has painted the picture of the crime, bespeaks a lot that he was not at all the witness of the crime, however, the testimony given on oath by the complainant, the widow of the deceased, is so firm and reliable that it cannot be doubted in any manner, to the extent of witnessing the crime.

7. Both, the Trial Court and the learned Judges of the High Court, have heavily relied upon the so called confession of the appellant, which is not at all a confession under the law but an admission of guilt. Both the Courts conveniently ignored that the appellant, in the first instance, denied the formal charge and pleaded innocence, therefore, they should have probed into the mind of the appellant, as to what prompted him to make such an admission at a belated stage. We will discuss it in the latter part of the judgment.

8. The most striking feature in the case, is the motive part of the incident and to that extent, we have no hesitation to hold that

except the mere bald statement of the complainant, **Mst. Bachi Mai** (PW-6), no other evidence was furnished by the prosecution to establish the same, in a reasonable manner. In the statement of the appellant, recorded u/s 342 Cr.P.C., in reply to a question with regard to the motive, the appellant stated as follows:-

"(Q-No.3). I do not want to discuss the motive."

9. The reluctance of the appellant to disclose the true motive, indeed, was sufficient whispering into judicial mind, to be alerted. The appellant has shown allegorically his typical rustic character of dignity, not to go for washing a dirty linen in public, at the cost of his own life. The appellant has apparently muffled, what was probably going seriously wrong in the family of the deceased, having a young virgin daughter of vulnerable age and the complainant, his wife too, was of the age of 28. Probably the appellant decided to withhold the true motive for the sake of family honour, a typical characteristic of dignity and virtues, still possessed by the rustic countrymen of our rural society. It was for the judicial mind to have correctly perceived what was not expressly conveyed to it, but much was silently hinted upon. These hints convey a bulk of pains, the appellant had absorbed in the past. When this agony became unbearable to sustain, sufficient to cause extreme annoyance to the appellant where, human blood starts boiling, and the sentiments of anger fly so high, leaving little to re-take its seat. The legitimate inference thus, would be that some detestable affairs in the family of the deceased were prevailing, rendering the appellant unable to bear the stigma/blot on the escutcheon (family honour). The rustic and conservative mind, a

distinct feature of our rural society, is always susceptible to drive away a person to a point, retrieval wherefrom, becomes impossible.

Unfortunately, the learned Judges of the High Court and the Trial Court, both, could not read between the lines, the silent message conveyed to them, was conveniently ignored. In the case of ***Syed Ali Beopari v. Nibaran Mollah and others (PLD 1962 SC 502)*** the learned Courts below were under legal obligation by acting on the third probable theory as has been firmly held in the case of ***Zahid Parvez v. The State*** **(PLD 1991 SC 558)**.

10. The above conceivable inference apart, once the prosecution sets up a particular motive but fails to prove the same, then, ordinarily capital sentence of death is not awarded, which is a consistent view of the Courts since long. Probably, it was in the backdrop of the real motive, not disclosed clearly by the appellant and the prosecution both that, father of the appellant, namely, **Allah Wasaya**, aged 70 years recorded his statement on 26.5.2005, in the Trial Court stating on oath that he had waived off his right of ***Qisas*** and ***Diyat*** both. The Courts below rightly held that this singular statement of the father was not sufficient for acquittal of the appellant but conveniently ignored that the same was certainly having bearings on the quantum of sentence.

11. There is a considerable different between **confession** and **admission**. The former is regulated by Articles 42 and 43 in particular, of **Qanun-e-Shahadat Order, 1984.**

The Trial Court recorded the statement of the appellant on oath u/s 340(2) Cr.P.C. and he re-affirmed his **admission** made in his

statement u/s 342 Cr.P.C. about his guilt, although he never opted for to record such statement. The two learned Courts below also could not perceive the correct legal position that, **confession** of accused as they have held it to be, if is recorded on oath, becomes absolutely inadmissible in evidence and for this reason alone, the same can be discarded.

For recording of confession, whether by a Magistrate or the Trial Court, the procedure laid down under the **High Court Rules and Orders** and the safeguards provided u/s 364 Cr.P.C. have to be essentially followed.

12. True, that u/s 265-E Cr.P.C the Trial Court in a session case, has a discretion to record the plea of the accused and if he pleads guilty to the charge, it may convict him in its discretion. Nevertheless, it is also provided in S.265-F Cr.P.C. that if the Trial Court does not convict him on his plea of guilt, it shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution. This discretion is to be exercised with extra care and caution, and ordinarily on such admission, awarding capital sentence of death shall be avoided and to prove the guilt of an accused, evidence of the complainant or the prosecution has to be recorded, in the interest of safe administration of justice.

The most important factors and required standards of confession may be cited below:-

“It should be ensured,

(i) that the accused is in full senses and understands the consequences of making a confession;

(ii) that, the confession was not a result of any duress, coercion or any promise by the prosecution, to be made an approver;

(iii) that, during transit of the accused by the police from and to the Trial Court from the prison, on each **"Paishi"** *no threat or pressure was applied by the escorting police guard or incharge thereof;*

(iv) what were the actual facts, which induced the accused to confess after facing trial, during which he pleaded innocence all the way;

(v) the court recording the confession has to ensure that the mental capacity of the accused is not diminished due to any illness and if some indication of abnormality is suspected by the Court, it is better to refer the accused to the ***Standing Medical Board*** *to ascertain the true cause thereof;*

(vi) While recording the confession, the same safeguards and precautions be adopted, by directing the Public Prosecutor, the complainant's counsel, the Naib Court and all other officials to leave the Court. If need be, the counsel who represents him, may be given an opportunity to be present inside the Court during the whole process, if the accused person, on asking by the Trial Judge, so demands;

(vii) the handcuffs of the accused be removed and he be provided a chair on the dais. He may be given some time to think over the making of the confession and in that regard particular questions be put to him, as to why he was making the confession when he has already pleaded innocence and claimed trial at the time, the formal charge was framed;

(viii) the Trial Judge shall explain to the accused that, in case of making confession, he has to face a capital sentence in a murder case or any offence punishable with death;

(ix) the entire record of all the questions and answers recorded, be properly maintained and thereafter, a proper ***certificate*** *be appended thereto, showing the satisfaction of the Trial Judge that the accused person was not mentally sick and he was making the confession voluntarily, based on true facts and that, there was no other compelling reason behind that.*

As the above procedure was not adopted, therefore, it was incorrectly construed by the Courts below as **confession** of the accused. Under the law, it may be treated as an **admission** of the appellant, however, on the basis of admission alone, accused person cannot be awarded a capital punishment because **admission**, as has been defined by Article 30 of the **Qanun-e-Shahadat Order, 1984,** is only a relevant fact and not a proof by itself, as has been envisaged in Article 43 of the Order, 1984, where a proved, voluntary and true confession alone is held to be a proof against the maker therefore, both the Courts below have fallen in error by treating this **halfway admission** to be a **confession** of guilt on the part of the appellant.

13. It is a bedrock principle of law that, once a Statute or rule directs that a particular act must be performed and shall be construed in a particular way then, acting contrary to that is impliedly prohibited. That means, doing of something contrary to the requirements of law and rules, is impliedly prohibited. Therefore, it is held that the **admission** of the appellant cannot be a substitute for a true and voluntary **confession**, recorded after adopting a due process of law and it cannot be made the sole basis of conviction on a capital charge.

14. At the same time, we are not supposed to make a departure from the principle of law, consistently laid down that testimony of a **solitary witness**, if rings true, found reliable and is also corroborated by some other evidence as well then, it can be made basis for conviction on capital charge. As has been discussed above that, **Mst. Bachi Mai** (PW-6) was the inmate of the same house, being the widow of the deceased, her presence at the fateful time, cannot be

doubted on any premises whatsoever. Thus, her testimony is sufficient for conviction of the appellant because the same is supported by the recovery of the crime weapons on the spot, stained with the human blood; besides, the medical evidence provides ample support to the same.

15. Judged and considered from all angles, we are of the considered view that on the basis of evidence, recorded at the trial, the appellant was rightly convicted u/s 302(b) PPC however, his capital sentence of death awarded, was not justified in law in view of the peculiar facts and circumstances of the case.

These are the detailed reasons for our short order of even date, which is reproduced as under:-

> *"For the reasons to be recorded later, this appeal is partly allowed. The conviction of the appellant u/s 302 PPC is maintained, however, his death sentence is reduced to life imprisonment with benefit of S.382-B Cr.P.C. along with compensation awarded by the Trial Court and in default thereof he shall further undergo six months S.I."*

Judge

Judge

Judge

Islamabad, the
30th January, 2017
Nisar /-

Approved For Reporting.