

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE ASIF SAEED KHAN KHOSA
MR. JUSTICE DOST MUHAMMAD KHAN
MR. JUSTICE MANZOOR AHMAD MALIK

Criminal Appeals No.115 & 116 of 2013

(On appeal from the judgment dated 30.1.2013
passed by the Peshawar High Court, Abbottabad
Bench, Abbottabad in CrI. Appeals No.99 &
100/09)

Hashim Qasim (in CrI.A.No.115/13)
Khayam Khurshid (in CrI.A.No.116/13)

... Appellant(s)

VERSUS

The State

... Respondent(s)

Criminal Petition No.161 of 2013

(On appeal from the judgment dated
30.1.2013 passed by the Peshawar High
Court, Abbottabad Bench, Abbottabad in
CrI.Rev.No.40/09)

Jehangir Elahi

... Petitioner(s)

VERSUS

Shoaib Ahmed and others

... Respondent(s)

For the appellant(s): Ch. Muhammad Shuaib, ASC
(in Criminal Appeal No. 115/2013)

Malik Abdul Haq, ASC
(in Criminal Appeal No. 116/2013)

Mr. Mushtaq Ali Tahirkheli, ASC
(in Criminal Petition No. 161/2013)

On Court Call /
For Federation:

Syed Nayyab Hussain Gardezi, A.A.G

For the State:

Mian Arshad Jan, Addl. A.G. KPK

Date of hearing:

12.4.2017

JUDGMENT

Dost Muhammad Khan, J.—

Brief Facts:- At a trial, held by learned Additional Sessions Judge-IV, Abbottabad, (i) appellant Hashim Qasim (ii) appellant Khayam Khurshid and (iii) Shoaib Ahmed (non appealing accused) were found guilty and were convicted & sentenced as follows:-

(a) Appellant Hashim Qasim (in Crl.A. 115/13):

- (i) U/s. 302 PPC: Death sentence and also to pay compensation of Rs.1,00,000/- to the legal heirs of the deceased, or in default thereof, to suffer further simple imprisonment for six months.
- (ii) U/s. 377 PPC: Life imprisonment and to pay fine of Rs.20,000/-, or in default of payment thereof, to further undergo S.I. for three months.
- (iii) U/s. 367 PPC: 10 years R.I. and fine of Rs.10,000/- or in default of payment of fine to undergo two months S.I.

(b) Appellant Khayam Khurshid (in Crl.A.116/13)

**(c) Shoaib Ahmed (non-appealing accused)
(Tried under Juvenile Justice System Ordinance):**

- (i) U/s. 302/34 (b) PPC: Life imprisonment and also to pay compensation of Rs.1,00,000/- to the legal heirs of the deceased, or in default of payment thereof, to further undergo S.I. for six months.
- (ii) U/s. 367-A/34 PPC: 10 years R.I. and fine of Rs.10,000/- or in default thereof to further undergo S.I. for two months.
- (iii) U/s. 377 PPC: Life Imprisonment and also to pay fine of Rs.20,000/- or in default of payment of fine, to further undergo S.I. for three months.

Benefit of S.382-B Cr.P.C. was, however, extended to all the accused.

2. Appellant Hashim Qasim, filed Criminal Appeal No.99/09 before the Peshawar High Court, Abbottabad Bench, against his conviction and sentence of death and the above sentences of imprisonment, while the Trial Court sent Murder Reference to the High Court for confirmation of his death sentence. Similarly, Shoaib Ahmed (non-appealing accused) and Khayam Khurshid filed separate Appeal No.100/09, against their conviction and sentences. Both the appeals came up for hearing before the High Court, Bench at Abbottabad and the learned Judges dismissed both the appeals, while in the case of appellant Hashim Qasim, Murder Reference was answered in the affirmative.

3. Against the judgment of the Peshawar High Court, Abbottabad Bench dated 30.1.2013, appellant Hashim Qasim, the condemned prisoner, has filed Crl. Appeal No.115/13, while Criminal Appeal No.116/13 has been filed by Khayam Khurshid (juvenile), with the leave of the Court dated 31.5.2013. Similarly, on Criminal Petition No.161/13, filed by Jehangir Elahi, complainant, seeking enhancement of sentence of life imprisonment, awarded to Shoaib Ahmed (non appealing accused) and appellant Khayam Khurshid, notices were issued to the Attorney General for Pakistan and the Advocate General of KPK because interpretation of the provisions of Juvenile Justice System Ordinance is involved.

Arguments heard, impugned judgment gone through and the evidence on record was perused with due care and caution with the assistance of the learned counsel for the parties.

4. The epitome of the occurrence is that, on 26.02.2007 at 11:30 am, Haider Elahi, a child of 8 years, after seeking permission of his father, the complainant Jehangir, in his house to play outside, went away but when he did not turn up, the complainant got worried and started search for his minor son. In the said course, he contacted each and every relative and friend and also informed the Emergency Response Police on phone No. 15, however, when no clue about the child was found from

anywhere, the complainant (PW-17) lodged a report with Police Station, City Abbottabad on 28.2.2007 at 14:00 hrs., expressing suspicion that probably, the missing child was kidnapped, however, no one was charged in the FIR, nor any suspicion about anyone, much less the appellants was expressed.

5. During the course of investigation, the investigating officer, namely, Sardar Muhammad Haroon, S.I. (PW-18) arrested three suspects on 3.3.2007, however, after interrogation they were released. He stated at the trial that, the said three suspects disclosed during their interrogation that, complainant had beaten appellants Khayam, Hashim Qasim and one Zubair, due to plucking of fruits from his domestic orchard thus, he went in search of them but they were found missing from their homes. He arrested accused Shoaib while playing cricket in "*Thanda Maira*" on 5.3.2007 however, before that on 1.3.2007, he was informed by the Emergency Rescue Police-15 that a dead body of a child had been discovered inside the overhead water tank of government Primary School, "*Thanda Maira*", thus he reached the site and secured the dead body of the child through Memo (Ex.PW-4/1); prepared its inquest report and injury sheet and dispatched the same to the mortuary of Ayub Medical Complex. He also found two packets of "*Coco Supari*" in the water tank, which too were secured through Memo (Ex.PW-4/3). He prepared the sketch of the crime spot (Ex.PB); collected water from the water tank in four small bottles and sent to the Medical Officer, recovery memo to that effect was prepared as Ex.PW-4/2; and also added penal sections 302/377/201/34 PPC in the FIR, already registered vide Crime No.119/2007.

He further deposed that the complainant party availed services of the private Sniffer Dog Center at Sargodha; sniffer dogs were brought to the spot and one of the dogs, after sniffing the crime spot, went to the house of one Khurshid and sat on a "*cot*", while the rest of the dogs did not enter in the house. The son of Khurshid, namely, Khayam Khurshid, appellant, was thus arrested

and also Shoaib (non-appealing accused). The custody of all the three accused, was obtained from the "*Ilaqa Magistrate*" and on the expiry of the police custody, they were produced before the Magistrate where, Khayam appellant made a confession (Ex.PW-15/2). He also recorded the statement of one Adeel u/s 161 Cr.P.C. on 4.3.2007 and his statement was also got recorded through Magistrate on 5.3.2007 u/s 164 Cr.P.C., who has furnished evidence of the deceased, last seen with Shoaib and two unknown accused. The autopsy report and reports of the Chemical Examiner were also placed on record.

6. According to the evidence, the dead body of the deceased was found by a student of the school, who in turn informed the "*Chowkidar*" who then informed a teacher and the teacher rang 15 Police, who informed the above Investigating Officer. At the belated stage, after the arrest of the accused, motive was set up by the complainant against the appellants and accused Shoaib Ahmed.

7. At the trial, the prosecution has relied, mainly on the following pieces of evidence:

- "(i) Retracted confession of accused, Khayam Khurshid (juvenile);*
- (ii) The last seen evidence, given by Adeel (PW-8);*
- (iii) Motive for crime;*
- (iv) The medical evidence, furnished by Dr. Syed Farooq Shah (PW-13) and;*
- (v) The pointing of place of crime by the accused where, the deceased was subjected to unnatural intercourse and then strangled to death."*

Analysis/discussion:

8. Keeping in view the above, the case of the prosecution appears to have been based entirely on circumstantial evidence. Placing reliance on circumstantial evidence, in cases involving capital punishment, the superior Courts since long have laid down

stringent principles for accepting the same. It has been the consistent view that such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. Any missing link in the chain would destroy the whole and would render the same unreliable for recording a conviction on a capital charge. Reference is made to the cases of **Muhammad Aslam v. The State** (PLD 1992 SC 254) and **Ch. Barkat Ali v. Major Karam Elahi Zia** (1992 SCMR 1047).

9. In cases of circumstantial evidence, there are chances of procuring and fabricating evidence, therefore, Courts are required to take extra care and caution to narrowly examine such evidence with pure judicial approach to satisfy itself, about its intrinsic worth and reliability, also ensuring that no dishonesty was committed during the course of collecting such evidence by the Investigators. If there are apparent indications of designs on part of the investigating agency in the preparation of a case resting on circumstantial evidence, the court must be on its guard against the trap of being deliberately misled into a false inference. If the court fails to observe such care and caution and hastily relies on such evidence, there would be a failure of justice. Reference may be made to the case of **Fazal Elahi v. Crown** (PLD 1953 FC 214) and of **Lejzor v. The Queen** (PLD 1952 PC 109), it was held therein with considerable emphasis that circumstantial evidence may sometimes appears to be conclusive but it must always be narrowly examined, if only because this count of evidence may be fabricated in order to cast suspicion on another, therefore, it is all the more necessary before drawing inference, if the accused's guilt from circumstantial evidence to be sure and that there are no other co-existing circumstances, which weaken or destroy the inference then, in that case alone it may be relied upon otherwise, not at all.

10. Keeping in view the broader principles, so laid down, we have now to deal with the evidence of the prosecution, adduced

at the trial and the manner, it was collected by the investigating agency.

11. 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.

12. It is trite law that for accepting a confession, two essential requirements must be fulfilled i.e. that the confession was made voluntarily, it was based on true account of facts, leading to the crime and the same was proved at the trial. The superior courts have also given strict guidelines for the Magistrate, recording confession, to be followed without any exception which need not be repeated herein, because long line of authorities on this point is already in the field.

13. In the instant case, we are confronted with confession consisting of almost six full scape sentences. The accused, Khayam Khurshid was treated as Juvenile by the prosecution itself being of the age of sixteen years or less at the relevant time; he remained in the custody of the police for many days, however, the recording Magistrate did not provide him sufficient time for reflection to recompose. Being a Juvenile (minor), it was appropriate and desirable that he should have been provided counseling / consultation facility of natural guardian or any close blood relative of mature age, having no clash of interest with him in the case in hand but no such care and caution was observed by the Magistrate.

We have found that the name of Shoaib accused was added subsequently and we have satisfied ourselves in this regard by consulting the original record. This glaring manipulation has

knocked at the bottom of the confession, and same is denuded of its legal worth.

14. The confession is contradicted by established facts on record and instead of providing any corroboration, the same is clashing with the rest of evidence. In this regard the pointation memo (Ex-PW/5) is at page-39 of the paper book would show that the said accused pointed out the house of the complainant where he had entered the courtyard and took away the deceased, Haider Ali, deceitfully on the pretext to play cricket outside and providing him plums. The deceased accordingly accompanied him there and then. To the contrary, the complainant stated that on the fateful day at 11:30 am his deceased son got his permission to go outside for playing. There is no mention of the presence of the said accused nor the deceased had disclosed to the father that with whom he was going to play outside. In the very beginning of the confession, the accused had stated that a conspiracy was hatched by all of them to kill the deceased to take revenge from his father, however, after such a disclosure, the prosecution did not add the penal provision of section 120-B PPC which was squarely attracted, the result would be that the prosecution itself was not relying on that portion of the confession because date and place, where such conspiracy was hatched, is still a mystery. The next point equally important is that, during the earlier beating, given to him by the father of the deceased, his hand was fractured but the Investigating Officer did not take a single step to get it confirmed from the concerned Doctor, also obtaining the opinion of the

Radiologist taking X-Ray of his fractured hand. The confession is conspicuously silent about the meeting of Adeel (PW-8), who exchanged welcome words with co-accused Shoaib when the deceased was in their company. Keeping in view the above conflict with the other pieces of evidence, brought on record, the retracted confession of the accused has lost its evidentiary value and legal efficacy thus, it would be absolutely unsafe to rely on it and that too for recording punishment on a capital charge.

Another important aspect, which escaped the notice of the two courts below, is that, the Magistrate in his certificate has mentioned that the accused gave statement in "*Hindko* Dialect" which the Magistrate translated into Urdu. The Magistrate has nowhere stated in the certificate or at the trial that he was fully acquainted with or could understand "*Hindko* language" and that the confession was translated word by word from '*Hindko to Urdu*'.

15. The appellant Khayam Khurshid was arrested, probably when 'sniffer dog' entered into his father house twice and sat on a "Cot". No provision of **Qanun-e-Shahdat Order, 1984** endorse with approval this process and procedure, nor such evidence has been made expressly or impliedly admissible, the begging question thus, would be that how one dog, out of many entered the house while remaining stood outside, could be made the basis of forming an opinion about the involvement of Khayam accused in the case. What was the level of training imparted to the dogs, no pointation memo was prepared by the investigating officer about the said proceedings are such aspects, looking askance but

the prosecution has no satisfactory answer to give. The dogs were arranged privately by one Major Jehangir through phone call made to the Commander of the Dog Centre, Sargodha, showing himself to be the father of the deceased, as is evident from the statement of Azhar Mehmood (PW-16) who brought the dogs to the spot and conducted the whole exercise. He confessed that he was illiterate person and the report placed on record was prepared by the Commander Dog Centre and was sent to the police.

16. So far as, the last seen evidence is concerned, the same is cryptic, infirm in nature and substance, which deserves outright rejection. It was by sheer chance that Adeel (PW-8) came across Shoaib accused in the midway when, he was accompanied by two unknown persons and the deceased Haider Elahi. No identification parade was arranged to get identify the said two unknown persons through the PW. The said PW is absolutely a chance witness, he also stayed tight lips even when he came to know about the missing of the child, how he was discovered by the police and when he met the police, is a question mark. The recording of his statement u/s 164 Cr.P.C. on 5.3.2007 is a testimony to the fact that probably he was a paid and procured witness and because the complainant and the investigator, both were apprehensive that he might not resile, thus, his statement on oath was recorded. What was the distance of the place where this PW met with Shoaib accused from the house of the complainant and the place of crime, is also an unexplained circumstance, more

so, when the actual time of death of the deceased is still not known. Thus, this evidence is of no help to the prosecution.

17. The motive was set up after the arrest of the accused, is another question enough to disturb judicial mind. If the motive was really in existence then, in the FIR or at least at a subsequent stage before the discovery of the dead body and arrest of the accused, the complainant (PW-17) might have disclosed it, being very important factor because on that basis, the investigator would have taken step to interrogate all the three accused before their actual arrest particularly when the complainant being a practicing lawyer was supposed to know its importance. To the contrary, the IO, Sardar Muhammad Haroon, SI (PW-18), has squarely stated in unequivocal words that during the course of investigation on 3.3.2007 he had arrested (i) Khurram (ii) Faisal and (iii) Yasir, being suspects in the crime, however, after thorough interrogation they were released. He further added that those suspects disclosed the motive with accusing finger towards the present three accused because they were given thrashing/beatings by the father of the deceased due to plucking of fruits from his domestic orchard thus, the motive was revealed for the first time by the persons who themselves were suspects in the crime and then it was put into the mouth of the complainant. Thus, the motive belatedly set up, is nothing but a cosmetic baseline, which appears to be self manufactured with the connivance of the police. The defence has consistently taken the plea that the deceased was son of a lawyer, all the Bar Associations of the area thus, put a weight behind him

and even the accused could not arrange a counsel for their defence. In any case, the motive remained unestablished.

18. The next is the medical evidence, not only relied upon by the prosecution but readily accepted and acted upon by the learned Courts below. True, that the deceased child was done to death by strangulating him after he was subjected to sodomy, however, to establish the individual participation of each one of the accused, in the crime, it was all the more necessary that samples of semen of the accused should have been sent to chemical examiner with swabs for cross matching. Only one swab in the parcel was found to be stained with the human semen, while the rest were not so. No sample of semen was obtained from the three accused for cross-matching. On this point, the case law has settled the standard of proof, however, quick reference may be made to the cases of **Mst. Ehsan Begum v. The State** (PLD 1983 FSC 204), **Ghulam Abbas v. SHO Polcie Station City Chiniot Jhang** (1996 P Cr. LJ 1661) and **Waqar-ul-Islam v. State** (PLJ 1998 FSC 13). The medical evidence is only confirmatory or of supporting nature and is never held to be corroboratory evidence, to identify the culprit(s).

19. The next question is the pointing out of the crime place by the accused. It was impossible for them to have had access to the school, which was surrounded by boundary walls, having a gate, and was under the watch and guard of "chowkidar" and was closed during the days of occurrence due to winter vacations. If the accused could have an access to it then, it was

open to general public as well. The crime spot was already in the knowledge of the police and when in consequence of the alleged disclosure, no fresh discovery was made from the crime spot then, this piece of evidence is of no legal worth to be relied upon.

20. Even a single doubt, if found reasonable, would entitle the accused person to acquittal and not a combination of several doubts is bedrock principle of justice. Reference may be made to the case of **Riaz Masih @ Mithoo v. The State** (NLR 1995 Crl. 694).

Conclusion/decision:

21. Judged from all angles and considered from all aspects after fair reappraisal of evidence, we are of the firm and considered view that the prosecution has miserably failed to establish its case against the accused. **Accordingly, both the appeals of both the appellants namely, Hashim Qasim and Khayam Khurshid, are allowed** and they are acquitted of all the charges leveled against them.

22. So far as the case of non-appealing accused, Shoaib Ahmed is concerned, as we have already mentioned that notice for enhancement of sentence was given to him in Crl.P. 161/13, and when his case too is not distinguishable on any factual and legal premises from the appellants, therefore, he is also entitled to and deserves the same treatment. Reference may be made to the cases of **Haji Syed Rafi Ahmed v. Additional Sessions Judge, Rawalpindi and others** (PLD 1992 SC 251) and **Muhabbat Ali**

v. The State (1985 SCMR 662). Accordingly, he (Shoaib Ahmed) too is extended the benefit of doubt and is acquitted of all the charges leveled against him. All the accused, including Shoaib Ahmed (non appealing accused) be set free forthwith, if not required in any other case.

23. In view of the above, Criminal Petition No.161/13 has become infructuous and because the same was not supported by the Advocate General, who has also filed concise statement and the learned Additional Attorney General on behalf of the Attorney General for Pakistan, which is accordingly dismissed.

Judge

Judge

Judge

Islamabad, the
12th April, 2017
Nisar/*

Approved For Reporting.