SHARIAT APPELLATE BENCH OF HIGH COURT OF AZAD JAMMU AND KASHMIR

Crim. Appeal No.47/2017;
Date of Inst. 01.11.2017;
Date of hearing. 20.09.2022.
Date of decision. 29.09.2022.

Mst. Hakim Jan widow of Ali Dad Khan caste Khakha R/o Rajputhi Tehsil and District Muzaffarabad.

...Appellant

VERSUS

1. Syed Waqar Gillani alias Ibrar Shah S/o Syed Iftikhar Gillani caste Gillani R/o Peelobaghla presently Central Jail Muzaffarabad Rara.
2. Raja Ashiq Hussain S/o Raja Mohammad Kabir Khan caste Khakha r/o Rajputhi presently in Central Jail Muzaffarabad Rara.

.....Accused/respondents

Crim. Appeal No.52/2017;
Date of inst.05.06.2017;

1. Waqar Hussain Gillani s/o Syed Iftikhar Hussain Gillani R/o Peelo Baghla.
2. Raja Ashiq Hussain S/o Raja Kabir Khan R/o Rajputhi present in judicial lockup Muzaffarabad.

.....Appellants

VERSUS

1. The State through Advocate General Azad Government of the State of Jammu and Kashmir Muzaffarabad.
2. Mst. Hakim Jan widow of Ali Dad Khan Caste Khakha R/o Rajputhi.

.....Respondent

MURDER APPEALS

Before:— Justice Sadaqat Hussain Raja, C.J.
Justice Chaudhary Khalid Rasheed, J.

***PRESENT*:**
Raja Ibrar Hussain, Advocate, for Hakim Jan/complainant.
Raja Zaigham Iftikhar, Advocate, for convict appellants.
Pirzada Muhammad Sajjad, AAG, for State.

***JUDGMENT*:**

(Chaudhary Khalid Rasheed, J.), The captioned appeals have been filed against the judgment dated 10.04.2013 passed by the learned Additional District Court of Criminal Jurisdiction, Muzaffarabad, whereby, accused Waqar Hussain Gillani and Raja Ashiq Hussain have been convicted 10 years rigorous imprisonment under Section 302(C)/ 34 APC with further sentenced to one year rigorous imprisonment and Rs. 3000/- fine under Section 458 APC and 3 years rigorous imprisonment and Rs.5000/- fine under Section 20 EHA to both of them.

Facts giving rise to the instant appeals are, Mst. Hakim Jan filed an application Ex.PA at Police Station Danna on 06.10.2011 stating therein that on 05.10.2011 at about 09:00 pm she and her husband Ali Dad went to sleep. At about 10:30 pm she heard a voice of his husband who was saying that someone has tied him with the cot. The complainant asked him to switch on the light, he replied that someone has taken away the torch and mobile from the table.

When the complainant tried to get up she also found tied. In the meantime some unknown person started strangulation and gave fist blow on her head and put a pistol at her temple meanwhile she felt that somebody fled away from the bed of her husband followed by the person who pointed pistol at her temple, when the complainant succeeded to reach her husband she found that massive blood was oozing from his ribs. She took him out of the room and gave some water. On her hue and cry, Mst. Shakoor Jan reached with an emergency light thus found that someone has stabbed her husband through knife/dagger blow at his ribs.

On this report FIR No. 49/2011 was registered at Police Station Danna in offences under Sections 302/34 APC on 06.10.2011. Police during investigation apprehended convict-appellants and found them involved, whereupon, they were sent to face the trial by forwarding report under Section 173 Cr.P.C in offences under Sections 302/34, 458, 337(A)(F)(i) PC, 20 EHA and 13/20/65 Arms Acts on 18.02.2012. In the statement recorded under Section 265-D Cr.PC. on 05.03.2012, both the accused persons claimed innocence upon which the prosecution was directed to produce evidence. Upon completion of prosecution evidence the statements of the accused persons were recorded under Section 342 Cr.P.C on 07.02.2013, they refuted prosecution

evidence and opted not to give or produce evidence in defence. The learned trial Court after hearing the arguments pro and contra vide its impugned judgment dated 10.04.2013 convicted the accused/ appellants in the manner supra mentioned, hence, the captioned appeals.

The learned counsel for the convict-appellants filed written arguments, wherein it is submitted that accused persons were not nominated in F.I.R. but have been involved during investigation by the investigating agency with mala-fide intention. The learned Advocate further argued that there is no eye witness of the occurrence and entire prosecution case rotated around circumstantial evidence which is not confidence inspiring rather full of major contradictions which not only created serious doubts and dints in the prosecution story but also blatantly falsify and negated the occurrence as it was alleged. The learned counsel claimed that recoveries of the weapon of offence and alleged stolen articles have not proved as recovery witnesses miserably failed to support the prosecution version. The learned Advocate also held that neither any reliable or independent witness has been associated to prove the guilt of accused nor any connected chain of evidence is visible which was sine qua non in a case of circumstantial evidence. The learned Advocate also vehemently contended that statements

of the witnesses recorded under section 164 Cr.P.C. are also not reliable as the procedure provided by law has also not been adopted, hence are not tangible and credible. It was also stated that in case of circumstantial evidence, prosecution has to prove its case through enormously persuasive evidence and if a single link of chain is missing the conviction could not be sustained while in the instant case, prosecution story is a bunch of uncertainties hence, accused persons are entitled to get the benefit of doubt not as grace but right, whereas, the Court below anomalously passed the conviction order on the basis of unstable and shaky evidence. The learned Advocate placed reliance on 2015 P.Cr.L.J 735, 1153, 1163, 1269, 1279.

The learned Advocate appeared on behalf of the complainant submitted that prosecution has proved its case by producing cogent, convincing, tangible and confidence inspiring evidence therefore, accused persons were liable to be convicted major punishment under section 302-APC. He further solicited that the weapon of offence and stolen articles were recovered on the pointation of accused persons, therefore, the case of the prosecution is amply proved through concrete circumstantial evidence. It was further contended that motive illuminated by the prosecution of robbing money is also proved and even its absence is no ground for acquittal or for lesser punishment and becomes

immaterial if the case of the prosecution is otherwise proved through reliable evidence.

We have heard the learned counsel for the parties and gone through the record of the case with utmost care and caution.

The case in hand is a case of circumstantial evidence. No doubt, as per the contents of FIR Mst. Hakim Jan, complainant was present there when the deceased was given dagger blow but due to darkness she could not witness the occurrence and culprits, hence, she cannot be considered as an eye witness of the occurrence in any stretch of imagination. For conviction in the case of circumstantial evidence all the facts established should be consistent with the hypothesis of the guilt of accused and if any ring of the chain of evidence is found missing it can spoil the whole prosecution version because for the purpose of conviction all the links of circumstances must lead to the guilt of the accused. It is a well settled precept of law that circumstantial evidence should be so interconnected that its one end touches the dead body and other to the neck of the accused by excluding all hypothesis of his innocence. Now to consider whether the prosecution has proved its case beyond shadow of reasonable doubt or not, we have to discuss the prosecution case in detail. The prosecution case is consist of

medical evidence, recoveries and statements of prosecution witnesses in the shape of extra judicial confessions.

Firstly, we would like to discuss the medical evidence, as per medical report the cause of death is intra peritoneal hemorrhage due to rupture of spleen. Under law the medical evidence is used to corroborate the ocular evidence with respect to set of injuries, time of occurrence, gap between the occurrence and death of deceased and weapon used for the offence etc. and medical evidence ipso facto does not prove the guilt of an accused who has committed the offence but can corroborate or bond the other relevant evidence.

The second evidence relied upon by the trial Court for conviction are recoveries at the instance of accused. As per Ex.PJ, the weapon of offence i.e. knife, stolen mobile and torch were recovered on the bearing of convict appellants on 14.01.2012 in presence of Raja Shanzaib Khan and Raja Sarfraz Khan. Shanzaib got recorded his statement on 04.09.2012 and deposed that they reached on the place of recovery at about 01:30am whereas, the other recovery witness Mohammad Sarfraz, whose statement was recorded on the same day i.e. 04.09.2012 deposed that they reached at the place of recovery at about 2/2:30 pm. PW Shanzaib further stated that Police remained at the place of recovery

for 10/15 minutes, however, PW Mohammad Sarfraz deposed that police took one and half hour to complete the recovery process. As per statements of the recovery witnesses the recovered weapon of offence i.e. knife was not blood stained thus, this fact creates a serious doubt because as per prosecution case the said knife was used in murder but not found as blood stained. As discussed above there are contradictions regarding the time of recovery in the statements of recovery witnesses hence, such statement cannot be believed particularly in the case of circumstantial evidence when other circumstances also negate the prosecution version. It is also astonishing that recovery witnesses were informed a day before the recovery that on the next day Police will come at the place of recovery, while as per Ex.PJ recovery memo, the accused on the day of recovery i.e. 14.01.2012 disclosed that they have hidden the weapon of offence and stolen articles at the place of recovery, hence, the recovery of weapon of offence and stolen article are doubtful and such type of shaky evidence cannot be relied upon for a sustainable conviction. Moreover, a perusal of remand form available at page 46 of the trial Court reveals that accused were arrested on 14.01.2012 and recovery of weapon of offence and stolen articles were done on the same day but how prior to their arrest the police informed the

recovery witnesses that on the day of arrest of the accused the recoveries shall be made on their instance. Furthermore, as per version of the police submitted in the remand form on 15.01.2012 that some recoveries are yet to be effected further makes the whole recoveries doubtful. A perusal of remand form available at page 45 of the file of trial Court further depicts that police requested for further remand on 21.01.2012 on the ground that other co-accused persons are yet to be traced and blood stained clothes of the accused are also to be recovered. When the accused had confessed their guilt and recoveries had been affected then the question of tracing co-accused makes the whole prosecution story doubtful. In such state of affairs the recoveries Exh.PJ appear to be bogus and are not reliable.

So far the statements of Khaksar Khan and Mst. Nazia Bibi wife of Syed Waqar Gillani under section 164 Cr.PC. are concerned, Mst. Nazia Bibi has resiled and deviated from the said statement, hence, not reliable. In a case where extrajudicial confession allegedly has been made before a person who is neither an influential person nor has good, friendly or cordial relations with the accused so that the accused can trust him or seek his help, such confession is full of suspicion and cannot be believed. Reliance can be placed on 2009 SCR 252. Mst. Nazia in her court statement claimed

that on the night of occurrence her husband was at home and did not go anywhere whole night, whereupon she was declared hostile and counsel for the prosecution failed to shake her evidence. With regard to the statement Exh.PL, she deposed that she put her thumb impression at her home on a blank paper on the direction of police. As far the statement of Khaksar Khan is concerned, if it is presumed to be correct even then it does not appear that the wrong doing confessed before him by the accused was to kill the deceased, thus, such statement of Khaksar Khan does not link the accused persons with the commission of murder of deceased. His statement further portrays that he was in possession of a Photostat copy of his statement recorded under section 164 Cr.PC. and his court statement is just a repetition of the said statement, thus, such a statement cannot be considered for conviction. Moreover, while recording statements, requirement of section 364 Cr.PC. have also not been fulfilled and mandatory requirements have been violated because before recording such statements necessary questions have not been put to them, thus, on this ground too, these statements are not reliable.

It is also pertinent to note here that at page 18 of the impugned judgment, the Court below while discussing the statement of Raja Ansar Sajjad Khan, Sub Inspector observed

that on 28.01.2012 both the convict-appellants recorded their confessional statements under section 164 Cr.PC. however we have failed to find any such statement on the record.

It is also not out of context to mention here that as per the prosecution version the convict appellants were intended to commit robbery and during robbery they murdered the deceased, but the same stance is not proved because after corded the deceased and his wife/complainant with ropes they can easily took away the valuable items from their house but they rob or stole nothing and only useless mobile and a torch were allegedly taken, hence, the occurrence cannot be declared as robbery because robbery as defined under law is a use of force or show of force during theft. The other aspect of murder in the instant case when considered on the touchstone of given circumstances, is also not proved because as per prosecution own version there was no vendetta between the parties. In dispensation of criminal Justice, the bedrock and elementary principle is that no one should be convicted for a crime unless his guilt has been proved beyond shadow of reasonable doubt through tangible, reliable and legally admissible evidence. Dubious and shaky kind of evidence could not be treated as substantive evidence and to convict an accused, there should be a confirmed and authentic evidence which appeals logics

and solid reasons. It is also a trite law that for acquittal of an accused there need not to be several doubts in the prosecution story rather a single doubt which goes to the roots of the matter can be validly considered for acquittal of the accused not as a matter of grace and concession but as a matter of right. Reliance can be placed on 2022 SCMR 1567. It is also a celebrated precept of criminal Justice, based on Islamic legal concept, that acquittal of hundred culprits could not redress conviction of even one innocent person.

The appeal filed on behalf of the complainant, in the light of above discussion has no merits and even otherwise is not maintainable because an enhancement of sentence can only be awarded while exercising the revisional powers under Section 439 Cr.P.C because under section 423 Cr.PC. the enhancement of sentence in appeal is specifically debarred, hence, on this score too, the appeal filed by complainant is liable to be dismissed.

The upshot and crux of the above discussion is, the prosecution has miserably failed to prove its case beyond shadow of reasonable doubt, thus, the conviction recorded by the trial Court is not sustainable, hence, by accepting appeal filed by convicts-appellants, the convicts-appellants are hereby acquitted of all the charges by extending them a benefit of doubt. Resultantly, the counter appeal is dismissed.

The confiscated material shall be disposed of in accordance with law.

Muzaffarabad; -Sd- -Sd-
29.09.2 022. **CHIEF JUSTICE** **JUSTICE**

Approved for reporting.

-Sd-
JUSTICE