ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Revision Application No.75 of 2020
Criminal Appeal No.197 of 2020
Criminal Acquittal Appeal No.257 of 2020

ORDER WITH SIGNATURE OF JUDGE

20.04.2022

Mr. Habib Ahmed, Advocate for the Appellant in Crl. Appeal No.197/2020 & Crl. Acq. Appeal No.257/2020
Mr. Muhammad Jamil, Advocate for the Applicant in Crl. Rev. Application No.75/2020 & for the Appellant in Crl. Acq. Appeal No.257/2020 & for complainant in Crl. Appeal No.197/2020
Mr. Muhammad Iqbal Awan, Addl. Prosecutor General

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O R D E R

Mohammad Karim Khan Agha, J. Appellant Sajjad Khan and co-accused Mst. Shahnaz Bibi were tried in Model Criminal Trial Court/1st Additional District & Sessions Judge, Malir, Karachi in Sessions Case No.1859/2019 in FIR No.332/2019 at PS Sukhan under Sections 365/302/201/202/34 PPC. Vide impugned judgment dated 03.02.2020, accused Mst. Shahnaz Bibi was acquitted of the charge. On the other hand, appellant Sajjad Khan was convicted under Section 302(b) PPC and sentenced him to life imprisonment and to pay fine of Rs.1 million and in case of default of such payment, he shall further undergo simple imprisonment of 06 months.

2. The brief facts of the case are that Ali Sher left his home on 06.09.2019 and did not return. The complainant alongwith other relatives made search but they could not find him and thereby intimated to the police station. A dead body was found which was recognized as deceased Ali Sher and as such FIR was lodged as Sher Ali had been murdered. After investigation, police reached the conclusion that appellant Sajjad Khan and his co-accused Mst. Shahnaz Bibi had murdered Ali Sher.

3. After usual investigation the matter was challaned and the appellant and his co-accused were sent up to face trial. They pleaded not guilty and claimed false implication.

4. In order to prove its case, the prosecution examined 11 PWs and exhibited various documents and other items. The statement of accused persons was recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them; however, they did not given evidence on oath nor produced any DWs in their defence. After hearing the parties and appreciating the evidence on record, the learned trial court convicted the appellant Sajjad Khan and sentenced him as mentioned earlier, whereas, co-accused Mst. Shahnaz Bibi was acquitted of the charge.

5. As noted earlier in the impugned judgment that appellant Sajjad Khan was sentenced to life imprisonment, as such, complainant moved a Criminal Revision Application bearing No.75 of 2020 for enhancement of sentence of the appellant Sajjad Khan.

6. We have heard the learned counsel for the parties in respect of the said Criminal Revision Application. The impugned judgment has given reasons why the death penalty was not imposed on the appellant Sajjad Khan mainly on the ground that prosecution has failed to prove the motive for the murder. The superior courts have generally accepted when a motive is not asserted and not proven this can justify a reduction in the sentence from death penalty to life imprisonment. In addition, there was no direct evidence against the appellant Sajjad Khan in the impugned judgment and this was yet another mitigating factor in reducing the sentence from death penalty to life imprisonment.

7. We have found no legal infirmity in the impugned judgment in terms of awarding sentence of life imprisonment as opposed to the death penalty, as such, this Criminal Revision Application in respect of Appellant Sajjad Khan is dismissed.

8. With regard to appeal against acquittal in respect of co-accused Mst. Shahnaz Bibi, learned counsel for the appellant submits that there is sufficient evidence on record to connect her to the commission of the crime, in particular, he has referred to the evidence of PW-10 Mukaram Kalim, who was a journalist in this case, the co-accused confession before the police and certain averments in her 342 Cr.P.C statement. He has also relied on the cases of 2005 PCRLJ 1074 and 2017 PCRLJ 757. It is noted

that no counsel has appeared for Respondent Mst. Shahnaz Bibi; however service had been held good on her already by this court.

9. We have gone through the impugned judgment which has given its reasons as to why the co-accused was acquitted. These reasons are found at Paragraphs 12 to 16 of the impugned judgment which are reproduced below for ease of reference:

> *"12. It is admitted fact on record that accused Shahnaz is not named in FIR and she was arrested on the suspicion of complainant after 04 days of the FIR. It is also admitted fact that prosecution had not alleged any active role in the actual murder of deceased except hatching of plan with accused Sajjad Khan. Now if we analyze the prosecution evidence, prosecution has based its case on the basis of;*
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> *i. Motive;*
> *ii. Extra judicial confession;*
> *iii. Recovery of rings of deceased; and*
> *iv. CDR Record*
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> *13. Prosecution has alleged that accused Shahnaz had committed murder of Ali Sher with the help of Sajjad Khan since she was having illicit relation with him and deceased used to maltreat her. For proving such point prosecution produced complainant but he failed to prove that there was any hostility between deceased and accused Shahnaz on account of illicit relations of accused Shahnaz with accused Sajjad Khan. During cross examination, complainant admitted that although he had visiting terms in the house of deceased, but deceased never disclosed him that he had doubts on his wife. Although during cross complainant admitted that he had never seen accused Shahnaz with accused Sajjad, but he further clarified that on one occasion when deceased was angry and he maltreated the accused Shahnaz but he did not disclose him anything. Thus it is crystal clear that complainant had no information about relation between accused Shahnaz and Sajjad. Moreover it was claimed by the prosecution that Nani (maternal grandmother of deceased) caught accused Shahnaz while talking on telephone and she did disclose this facts to deceased, but neither such Nani was produced nor prosecution was successful in proving the fact of both accused talking with each other. I.O had produced CDR record of both accused and deceased but it is fact that such record is of no help since it had not been proved by the prosecution that such Cell numbers are actually in use of the persons alleged by the I.O and moreover the CDR report does not bear any signature or stamp of the cellular company and it is also fact that no official of the cellular company is even examined to prove genuineness of such CDR as required in the case of* ***Kaleemullah V. The State*** *(2018 YLR 2363) [Federal Shariat Court]. Furthermore, I.O had himself admitted that in the record produced by him there is not a single entry which could show that either accused Sajjad had called*

Shahnaz or Shahnaz had called Sajjad. No person has been examined in court which could prove that accused persons were in contact with each other or there was any relation between them. Thus on the basis of above discussion I am of the view that prosecution has failed to prove motive of murder in this case.

14. *It was argued by the learned counsel for complainant that both accused had admitted their guilt during interrogation as well as interview before TV anchor Mukaram Kaleem. It is admitted fact tht confession of any accused before police is inadmissible under article 38 and likewise any statement of accused in police custody is inadmissible under article 39 of the Qanun-e-shahadat unless some new facts are discovered in consequence of such disclosure (Article 40) of Qanun-e-Shahadat. Prosecution has claimed that accused Shahnaz had disclosed in her interrogation that she had relationship with accused but it had already been discussed in above paragraph that prosecution had failed to prove the same. Apart from that, prosecution has alleged that accused had led to recovery of three rings of the deceased along with one Sim Card, mobile jacket and mobile phone, but I am of the view that such recovery is doubtful in the circumstances. First of all, it was deposd by all witnesses that on 18.09.2019 at 1630 hours accused Shahnaz led police to her house from where she got recovered the above mentioned articles, however if we closely analyze the evidence it appears that same is not the case. It was deposed by complainant that on such date he was in the house of deceased when door was knocked and he found I.O along with lady police official and accused Shahnaz over there and on the directions of Shahnaz he brought one box of silver sheet which was around 03 feet to the I.O and then I.O opened the same and found rings, cell phone and mobile jacket. He categorically made it clear that accused Shahnaz did not enter inside the house except one Jameel who was relative. Same version was deposed by the I.O the complainant Ajab Khan opened the door and he was asked by accused Shahnaz to bring rings and other articles from the box, but he contradicted the recovery mashir/complainant by deposing that complainant only brought rings in plastic shopper without any box. He further clarified that he had not seen the box from where Ajab Khan had brought the articles. Apart from this there were other contradictions such as, as per complainant one seal was affixed on the parcel whereas I.O claims three and the fact that I.O claimed that at the time of writing memo lady was on the backside of mobile along with lady ASI, but complainant deposed that accused Shahnaz was also standing along with lady police official. As per I.O he prepared memo on the bonnet but complainant deposed that he prepared it in standing position. Furthermore, no private witness was associated from the Mohalla being independent witness which further cast doubts as to recovery. It was really surprising that accused Shahnaz was not brought inside her own house and such recovery are only handed over to the I.O by the complainant from box which by no stretch of imagination can be termed to have been recovered on pointation of accused Shahnaz. Even otherwise if we ignore this fact, there is no evidence that the rings allegedly recovered from the house of accused were of the deceased and even if we admit it, there is no evidence that he was wearing such rings at the time of his death or when he lastly left his home, so that presumption can be drawn against accused*

Shahnaz that wearing apparels of deceased had come in her possession which link her with this murder. The accused Shahnaz had given explanation of such rings at her own during her statement under section 342 Cr.P.C. wherein she stated in Anwer to Question No.08 that deceased only used to wear two rings and once they became tight to the deceased he himself removed and kept them in the fridge. Thus the recovery is not only doubtful but same does not come within the definition of Article 40 of Qanun-e-Shahadat Ord.

15). Apart from that, prosecution has claimed that one mobile was also recovered from the accused Shahnaz but I.O had admitted that he had not sent such mobile for forensic lab and no data is extracted. Further he had also admitted in cross that he does not have any SMS or voice record to show that accused Shahnaz had instigated or conspired murder with accused Sajjad Khan. Thus on the basis of above discussion it can be said that no discovery is made on the confession or statement of the accused which could bring her confession before police under article 40 of Qanun-e-Shahadat and resultantly same is inadmissible in view of ***Rahat Ali Versus The State*** *(2010 SCMR 584).*

16). Lastly, prosecution had claimed that accused had confessed her guilt during her interview before P.W Mukaram Kaleem. It is fact that at the time of such interview accused Shahnaz was in police custody and such fact is admitted by P.W Mukaram Kaleem and he further clarified that at the time of such interview, police officials were present and in connection to this I.O admitted in his cross that he was also present in the same room when accused Shahnaz was being interviewed. Now if we analyze such statement, it is fact that such statement is hit by Article 39 of QSA which states that any statement of accused while he/she is in police custody is inadmissible and again it would be relied only if it comes within article 40 of Qanun-e-Shahadat and we had already discussed that no discovery had been made by the prosecution on the basis on such alleged confession, therefore such piece of evidence would also be termed as inadmissible as per Qanun-e-Shahadat. At this stage it is also important that prosecution has also produced footage of such program but defence had challenged authenticity of same on the ground that same is edited program and thus it had lost its sanctity. Interestingly, P.W Mukaram Kaleem also admitted in his cross that the program which was on aired was edited whereas real footage recorded by him was more than 33/34 minutes. Prosecution has not examined the person who had edited the program which also put doubt in the said piece of evidence. No application is moved by the I.O for recording confession of the accused before learned Magistrate which further cast doubt as to charge against accused Shahnaz. Prosecution had completely failed to show any relation of accused Shahnaz and Sajjad Khan and subsequently any conspiracy between accused Shahnaz and Sajjad as to murder of Ali Sher. Thus I answer Point No.3 as ***"Doubtful"****, while point No.2 shall be answered after discussing evidence of accused Sajjad Khan."*

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10. It is well-settled law that appeal against acquittal has much different parameters as compared to appeal against conviction. In appeal against acquittal, the accused acquires double presumption of innocence and the impugned judgment can only be set aside in respect of Respondent/accused if the impugned judgment amounts to clear misreading and non-reading of the evidence, is arbitrary, whimsical and that no court could have reached such a decision and an appeal against acquittal even fails if this court could have come to a different opinion to that of the learned trial Court.

11. Keeping in view the reasoning as reproduced above, we found that learned counsel for the appellant has not been able to point out any infirmity which would justify this appeal against acquittal being admitted to regular hearing keeping in view the narrow legal parameters governing an appeal against acquittal, as such, the appeal against acquittal is dismissed in limine.

12. The office shall put up the Criminal Appeal No.197 of 2020 for regular hearing before a Single Bench of this Court as per roster on 17.05.2022 with due notice to all concerned.

Office to place copy of this order in all connected matters.

Kamran-