Hg of Case

1. For Orders on M.A 1530/2021 (4/
2. For Orders on M.A 437/2021 (4/
3. For hearing of Main Case

16-4-2021.

M/s. Sabir Ali Shaikh, advocate for the appellant.

M/s. Ali Anwar Kandhro, Addl. PG.

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Arguments heard. Reserved for judgment.

Judge

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Jail Appeal No.S-110 of 2019

Appellant : Ali Akbar son of Noukhaf Choliyani, through Mr. Sabir Ali Sheikh, Advocate.

Respondent : The State, through Mr. Ali Anwar Kandhro, Additional Prosecutor General.

Date of hearing : 16.04.2021.
Date of Judgment : 30..04.2021.

JUDGMENT.

Omar Sial, J.: Ali Akbar Choliyani on 31-10-2019 was convicted for having committed an offence under section 302(b) P.P.C. and sentenced to a life in prison as well as pay a fine of Rs.100,000/- and if he failed to pay the fine he would have to spend another year in prison. This judgment of the learned 1st Additional Sessions Judge, Kandhkot has been challenged by Choliyani through this appeal.

2. A background to the case against Ali Akbar is that a police party of the A-Section Police Station in Kandhkot was on normal patrol duty on 27-7-2019 when its head A.S.I. Sain Bux Bahalkani received information that Ali Akbar is in the process of murdering Noorzadi, his sister, on the ground that she has illicit relationships with another Choliyani man called Ali Beg. The police party reached the place pinpointed by the informer and saw Ali Akbar wearing blood-stained clothes hurriedly leaving his house. Although, the police party tried to apprehend him, Ali Akbar managed to run away. The police party went inside the house and saw that the house was empty but that an injured Noorzadi with blood flowing from her head lying on the floor unconscious. Noorzadi was

taken to a hospital where she succumbed to her injury. While Noorzadi was at the hospital, a man by the name of Allah Rakhio appeared at the hospital and disclosed that he was the brother of the deceased Noorzadi. F.I.R. No.136 of 2019 (**F.I.R. 136**) was registered against Ali Akbar, however not on the complaint of Allah Rakhio, but on the complaint of A.S.I. Bahalkani. The body of Noorzadi was handed over to her brother Allah Rakhio. 3 days later i.e. on 30-7-2019, Ali Akbar was arrested while he was standing near the Kandhkot bypass. The same day Ali Akbar not only confessed to his crime, but also led the police party back to his house where he produced a wooden head of a *charpoy* which he had used to strike and kill Noorzadi.

3. The record further reflects that Noorzadi's brother Allah Rakhio also wanted to register an F.I.R. for the murder of Noorzadi but having been declined to do so by the police, he approached the learned Justice of Peace and subsequently managed to register F.I.R. No.145 of 2019 (**F.I.R. 145**) for the murder of his sister. In that F.I.R., Allah Rakhio narrated that on 27-7-2019 he was at home with his family members when Ali Akbar suddenly came to the house and hit Noorzadi with a wooden head of a charpoy. On the commotion raised by the family members of Noorzadi, Ali Akbar ran away and soon thereafter A.S.I. Sain Bux Bahalkani arrived. What happened in essence was that the principles laid down by the Honorable Supreme Court in the *Sughran Bibi* case were not complied with at all forums and resultantly 2 F.I.Rs were registered against Ali Akbar, albeit with two different versions of how the events unfolded, but for the same offence i.e. Ali Akbar murdering Noorzadi.

4. On 21-10-2019 the learned DDPP for the State moved an application before the learned 1st Additional Sessions Judge, Kandhkot stating that 2 separate trials have been initiated, one on the basis of F.I.R. 136 and the other on the basis of F.I.R. 145 and as such the 2 cases be amalgamated. While not specifically stated in the application of the DDPP, his apprehension nonetheless appeared to be that amalgamation would prevent conflicting judgments in the 2 cases. The learned trial judge the same day i.e. on 21-10-2019 while acknowledging that 2

separate cases were pending for the same murder, declined the request of the DDPP on the ground that there was no provision in law that empowered him to amalgamate the 2 cases. He thus ordered that both cases be tried separately. This order was not challenged by any party and thus 2 separate trials took place for the same incident. The apprehension of the learned DDPP came true and on 31-10-2019 the learned trial court announced its judgments in the 2 trials. Ali Akbar was convicted in the case arising out of F.I.R. 36 but acquitted in the case arising out of F.I.R. 45.

5. Ali Akbar pleaded 'not guilty' to the charge of murder and claimed trial. At trial, the prosecution examined 5 witnesses. Meer Hazar (PW-1) who was the tapedar of the area and who prepared the sketch of the place of incident. A.S.I. Sain Bux Bahalkani (PW-2) was the complainant of the case. P.C. Mohammad Taeeb Gujrani (PW-3) was witness to the various memos prepared by the complainant and the investigating officer. S.I. Akbar Ali Bangwar (PW-4) was the investigating officer of the case. Dr.Sapna Kumari (PW-5) conducted the postmortem on the deceased. In his section 342 Cr.P.C. statement Ali Akbar pleaded innocence and attributed the desire of the police officers to show their efficiency as the reason that he was accused in Noorzadi's murder.

6. Learned counsel for the appellant has very rightly argued that the appellant was tried for the same offence twice and this was a blatant illegality committed by the learned trial court both under the Constitution as well as the Code. He also argued that in accordance with the evidence led at trial even the recovery of the wooden piece of a charpoy (the murder weapon) was extremely doubtful. The learned DPG though supported the impugned judgment, in the face of the factual position of the case, could not advance a convincing argument though he tried his best.

7. I have heard both counsels and with their able assistance perused the record.

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8. It appears that the learned trial judge was not correct to hold separate trials for the same offence and against the same accused, albeit with 2 different complainants giving a different version of how events unfolded. Not only was such a route taken against the principles laid down in the *Sughran Bibi* case but also violated the fundamental right guaranteed to the appellant in Article 13 of the Constitution that no person will be prosecuted for the same offence twice.

9. The evidence against the appellant in the case arising out of F.I.R. 136 was twofold. The police party seeing Ali Akbar leaving the house with blood-stained clothes and later, after his arrest, leading the police to the same house where the injured Noorzadi was found and from there producing a blood-stained murder weapon (the wooden piece of a charpoy).

10. A.S.I. Bahalkani in his testimony at trial recorded that when the police party entered the house where Noorzadi was lying injured on 27-7-2019 they saw a rod of charpoy lying next to her. Witness Mohammad Tayyeb also recorded the same. Witness S.I.P Akbar Ali Bangwar, however, testified that on 30-7-2019 when he arrested Ali Akbar, Ali Akbar led him to the same house from where he produced the wooden piece of charpoy. I do not believe both witnesses in this regard. It seems implausible that Bahalkani would just ignore the murder weapon lying right next to the injured nor was the same found by Banghwar when he inspected the place of incident later that day; specially keeping in mind that the memo of site inspection details that the house consisted of only one room and a covered space. Miraculously the wooden piece then appeared 3 days later from underneath the covered space. The wooden piece was sent to the chemical analyzer who opined that there was human blood on it. Be that as it may, without a blood grouping having been performed it cannot be said with certainty that the blood on the wood was that of Noorzadi. Further, simply that there was blood on the wooden piece would not necessarily mean that it was Ali Akbar who struck Noorzadi. The investigating officer of the case testified that he had collected blood-stained earth from the place of incident in a cigarette box

and then sealed the same, however, the chemical analyzer's report does not indicate that the sample received by it was in a cigarette box. Notwithstanding the foregoing, the accused in his section 342 Cr.P.C. statement was not confronted with the reports of the chemical analyzer nor the murder weapon hence the same, according to well-established principles, cannot be used as evidence for conviction.

11. The recovery of the alleged murder weapon on the lead of the appellant as indeed the blood-stained earth from the alleged place of incident was thus doubtful.

12. It was not claimed by the witnesses that they knew Ali Akbar from before. It therefore remains a mystery as to how the police party so correctly and completely i.e. with his parentage and address, identify the man leaving the premises, who according to their own version, had run away at that time. No identification parade was held to determine that the man caught subsequently was the same person who was allegedly seen leaving the premises.

13. Noorzadi's illicit relationship being the reason for the murder was never established at trial. Though the police seemed sure of the truth of the allegation, Ali Beg Choliyani (the man with whom she was supposed to have an affair) was not interrogated nor was his statement recorded. Absolutely no evidence was recorded in this regard. The investigating officer also did not record the statements of any family member or any person who might have been acquainted with what happened. Allah Rakhio, the brother of the deceased was handed over the body of Noorzadi and her father was also present there but the investigating officer did not deem it appropriate to record their statements or to investigate them.

14. The complainant, witness Mohamamd Tayeb and the investigating officer gave exactly the same testimony as in this case in the trial arising out of F.I.R. 145 but the learned trial judge did not believe them and acquitted the appellant in the case. Upon the same testimony the

appellant was convicted in this case. Considerable doubt is caused in the prosecution case on this ground alone.

15. In view of the above findings, I conclude that the prosecution did not prove its case against the appellant beyond reasonable doubt. Accordingly, the appeal is allowed and the appellant acquitted of the charge. He may be released forthwith if not required in any other custody case.

30/4/21

JUDGE