

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT  
HYDERABAD**

***Criminal Appeal No.D-96 of 2013***

*Confirmation Case No.30 of 2013*

**PRESENT**

*Mr. Justice Naimatullah Phulpoto*

*Justice Mrs. Kausar Sultana Hussain*

*Appellant:* *Syed Muhammad Iqbal Shah,  
through Syed Tarique Ahmed  
Shah, Advocate.*

*Complainant:* *Karim Bux S/o Lakha Dino  
Qambrani, through Mr. Ahmed  
Nawaz Chang, Advocate/Associate  
of Mr. Ghulamullah Chang,  
Advocate.*

*The State:* *Through Mr. Shawak Rathore,  
Deputy Prosecutor General, Sindh.*

*Date of Hearing:* *05.05.2021*

*Date of Judgment:* *20.05.2021*

**JUDGMENT**

**NAIMATULLAH PHULPOTO, J.-** This judgment shall dispose of Criminal Appeal No.D-96 of 2013 (Re: Syed Muhammad Iqbal Shah v. The State) and murder Reference No.30 of 2013 sent by learned trial Court for confirmation or otherwise, of the sentence of death awarded to the appellant as both these matters are arising out of the same judgment dated 30.11.2013 passed by learned Illrd Additional Sessions Judge, Hyderabad, whereby appellant was convicted for murder of deceased boy Nabeel, aged about 09 years, under Section

302(b) PPC and sentenced to death. Appellant was also convicted under Section 377 PPC and sentenced to 10 years R.I. He was also convicted under Section 201 PPC and sentenced to 10 years R.I. Appellant was directed to pay compensation of Rs.100,000/- (Rupees One Lac) in terms of Section 544-A Cr.P.C, to be paid to the legal heirs of deceased Nabeel, in default thereof, appellant was ordered to suffer S.I for further 06 months. All the sentences were ordered to run concurrently. Appellant was extended benefit of Section 382-B Cr.P.C.

2. Brief facts of the prosecution case as disclosed by complainant Karim Bux are that the present incident had occurred on 7<sup>th</sup> August, 2008. The complainant was an employee of Auqaf department. Nabeel, aged about 09 years, was his son and student of Class-II. At about 07:55 a.m. he left home for office but immediately returned back for taking his mobile. After taking the mobile complainant was going to the office and saw that his son Nabeel was going to the school; he gave him Rs.5/- as pocket money. At 01:15 noon, he received a call from his younger brother Muhammad Akbar, who informed him that his son Nabeel has neither attended the school nor came back to the home and asked the complainant to return home soon. Thereafter, complainant came back to the home and met his brother Muhammad Akbar and started search for his son alongwith co-villagers in sugarcane cultivation. There

was no clue of the minor child for the whole night. On the next morning at about 05:30 a.m. complainant again started search for his son. In the meanwhile, the villagers namely Yar Muhammad Khaskheli, Raees Sher Khan Bhurgari, Raees Ghulam Hussain Bhurgari and Ali Bux Turk informed the complainant that dead body of his son was lying near the hedge of the house of Achar Khaskheli. Complainant proceeded to the pointed place and gave such information to the police. Complainant saw the dead body of his son, blood was oozing from his nose and mouth. Police brought the dead body to the hospital. Doctor conducted postmortem examination of the deceased. After burial of the son, the complainant lodged F.I.R on 09.08.2008 against the unknown persons at P.S Husri. PWs Abdul Majeed and Sher Muhammad came to the complainant for condolence for his son and narrated that on 07.08.2008, in the morning, they had seen his son Nabeel alongwith appellant Iqbal Shah going towards sugarcane cultivation, then above named witnesses went to their work. They further disclosed that when they returned back from their work, they came to know about murder of the minor boy. Complainant went to the police station and informed the I.O about name of the culprit and further statement of the complainant was recorded.

3. SIP Moula Bux (PW-12) has stated that he received F.I.R No.101 of 2008 under Sections 302, 377 PPC at P.S Husri for investigation on 09.08.2008. He also received mashirnama of

the place of occurrence, inquest report and clothes of the deceased for further investigation. Investigation Officer proceeded to village Tando Bahawal where he prepared mashirnama in presence of mashirs Mumtaz Ali Chandio and Shoukat Ali Qambrani and prepared such mashirnama. He had also prepared sketch of the place of wardat and recorded further statement of the complainant. Investigation Officer recorded 161 Cr.P.C statements of the prosecution witnesses. On 11.08.2008, Investigation Officer left P.S for investigation and arrested accused Muhammad Iqbal Shah in-front of his house and conducted his personal search. Mashirnama of arrest was prepared in presence of mashirs namely Muhammad Khan Brohi and Muhammad Akbar Qambrani. Investigation Officer referred the appellant/accused to the doctor regarding his potency test. According to I.O, the accused during interrogation admitted that on 07.08.2008, accused Iqbal Shah was present outside of his house where he saw deceased Nabeel, who was going to the school. He took the boy to the sugarcane crop of Raees Allah Rakhio Gopang and committed sodomy with him. The boy started crying, he pressed his neck and caused murder and then came to the home where he changed his clothes and disclosed this fact to his brother Parvez @ Bhooral Shah (now acquitted) whereupon accused Pervez @ Bhooral Shah prevented the appellant, not to disclose this fact to any person and asked him that in night time they would throw the dead body at abandoned Mari near the house of Achar Khaskheli.

Investigation Officer has further stated that appellant had concealed the chappal and books of the boy under the leaves of the tree. Appellant prepared to produce chappal and school books of the deceased. Investigation Officer arranged private vehicle, took the accused, who led the police to the pointed place, and produced chappal and books of the deceased. Investigation Officer got recorded 164 Cr.P.C statements of the PWs Abdul Majeed and Sher Muhammad. Investigation Officer recovered clothes of the deceased, bloodstained earth and swabs and sent the same to the chemical examiner for analysis and report. On the conclusion of investigation, I.O submitted challan against accused Iqbal Shah and Pervez @ Bhooro under Sections 302, 377 PPC.

4. Leaned trial Court framed charge against both accused, who pleaded not guilty and claimed trial.

5. In order to prove it's case, the prosecution examined as many as 13 (thirteen) witnesses during the trial. PW-01 Karim Bux, the complainant at Ex-08, PW-2 Muhammad Akbar at Ex-09, PW-03 Abdul Majeed at Ex-10, PW-04 Sher Muhammad at Ex-11, PW-05 Mumtaz Ali at Ex-12, PW-06 Muhammad Juman at Ex-13, PW-07 Dr. Javed Iqbal at Ex-14, PW-08 Zainul Abadin at Ex-15, PW-09 Ghulam Hussain at Ex-16, PW-10 Shakeel Ahmed at Ex-17, PW-11 Dr. Hotoomal at Ex-18, PW-12 Moula Bux at Ex-19, PW-13 Nasir Nawab at Ex-20, who produced

various documents in their evidence. Thereafter, prosecution side was closed.

6. Appellant was examined under Section 342 Cr.P.C, who opted not to depose on oath as required under Section 340(2) Cr.P.C. nor led the evidence in defence. In an answer to the question that why the PWs have deposed against him, the appellant replied that complainant has lodged false case against him at the instance of Wadero Allah Rakhio Gopang.

7. After conclusion of the trial, learned trial Court convicted and sentenced the appellant to death as mentioned in the preceding paragraph, whereas co-accused Pervez @ Bhooro was acquitted of the charge for want of evidence.

8. Learned Counsel for the appellant, in support of this appeal, contended that PWs Abdul Majeed and Sher Muhammad, who claimed that they had seen the deceased boy in the company of the appellant near sugarcane crop, are not residents of the area where incident took place. It is submitted that both these witnesses were chance witnesses and the reason given by them for their presence at the time when they had seen the deceased in the company of the accused, is neither plausible nor convincing; that as per the complainant the occurrence took place during school hours on 07.08.2008. The police station was at the distance of 7/8 kilometers but the matter was reported to the police on 09.08.2008 with an inordinate and un-explained delay; that there was also delay in

conducting the postmortem examination of the deceased without explanation. It is argued that deceased boy left home for the school but did not reach the school and disappeared on the way and he was in the school uniform but school teacher, who being most important witness of the case, was not examined by the prosecution, therefore, on account of withholding of his evidence an adverse inference may be drawn against the prosecution in view of Article 129(g) of the Qanun-e-Shahadat Order, 1984; that PWs Abdul Majeed and Sher Muhammad, who claimed to have seen the deceased in the company of the appellant, have made dishonest improvements justifying their presence at the spot at the time of occurrence. It is also submitted that the case of the prosecution is of doubtful nature; that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt and that the appellant is entitled for acquittal. Learned Advocate for the appellant lastly submitted that in case the Court is not convinced from his submissions, the sentence of death may be converted into the sentence for imprisonment of life as the prosecution case is based upon the circumstantial evidence. Learned defence Counsel has placed reliance upon the cases of MUHAMMAD ABID v. The STATE and another (PLD 2018 Supreme Court 813), MUHAMMAD IBRAHIM v. AHMED ALI and others (2010 SCMR 637) and MUHAMMAD ASHRAF v. The STATE (2016 SCMR 1617).

9. Mr. Shawak Rathore, learned Deputy Prosecutor General appearing on behalf of the State has argued that deceased Nabeel was lastly seen by PWs Abdul Majeed and Sher Muhammad in the company of the appellant on the day of incident viz. 07.08.2008 at sugarcane crop; that these witnesses were not related to complainant; that during interrogation appellant voluntarily led the Investigation Officer and mashirs and produced school books and chappal of the deceased boy concealed by him under a tree at abandoned place; that the deceased boy was subjected to sodomy; that medical evidence corroborated unnatural act with him; that the report of the chemical examiner showed that swabs were stained with semen. Learned D.P.G further submitted that the prosecution has successfully to prove case against the appellant. It is also submitted that deceased boy did not reach in school on the day of incident, as such non-examination of school teacher would not be fatal to the case of prosecution. So far as the prayer of learned Counsel for the appellant regarding alternate sentence to the imprisonment for life instead of death sentence is concerned, learned D.P.G submitted that the prosecution case is based upon circumstantial evidence, therefore, alternate sentence of imprisonment for life under Section 302(b) PPC shall meet the ends of justice.

10. We have carefully heard learned Counsel for the parties and examined the material available on the record.



11. Complainant Karim Bux (PW-1), the father of the deceased boy has stated before trial Court that on 07.08.2008 his son Nabeel, aged about 09 years; student of Class-II, left for school at 07:55 a.m. and did not return back to home. He was informed on the mobile by his younger brother Akbar regarding missing of his son. He came to home from duty and started search for the whole night but without result. On the next morning, the villagers Yar Muhammad Khaskheli and others informed the complainant that dead body of his son was lying near the house of Achar Khaskheli. Complainant informed the police about this fact and went to the pointed place alongwith villagers and found dead body of his son. Thereafter, the police took the dead body to the hospital for postmortem examination. After postmortem examination, it was handed over to the complainant. After burial of his son, complainant lodged F.I.R on 09.08.2008 against unknown accused. PWs Abdul Majeed and Sher Muhammad came to the complainant for condolence regarding his son and informed him that on 07.08.2008, in the morning they saw his son Nabeel going alongwith appellant Iqbal towards sugarcane cultivation, when they returned back from the work they came to know about the incident. Complainant informed these facts to the Investigation Officer, who recorded his statement.

12. Abdul Majeed (PW-03) has stated that the present incident took place on 07.08.2008. On that day, he came to hire

the labour at Tando Bahawal for plantation of the onions and hired Sher Muhammad, then both were going to the lands through the road, on which school is situated. At about 08:00 or 08:30 when they were on the way, they saw minor Nabeel in school uniform alongwith appellant Iqbal Shah going to the sugarcane crop. Then above named PW and Sher Muhammad went to the lands to work. When they returned back after two days, came to know about the murder of deceased boy. PWs Abdul Majeed and Sher Muhammad narrated the facts to the complainant. Investigation Officer got recorded 164 Cr.P.C statements of PWs Abdul Majeed and Sher Muhammad. Both the witnesses were cross-examined at length by the defence Counsel and they denied the suggestion that they have falsely deposed against the appellant at the instance of the complainant.

13. Mashir Muhammad Akbar (PW-02) has deposed that on 13.08.2008, accused Iqbal Shah led the police in his presence to the sugarcane cultivation of Zamindar Allah Rakhio Gopang and near the water course produced books, slate, copies and chappals of deceased Nabeel. Police prepared such mashirnama, he acted as mashir and co-mashir was Muhammad Khan. He produced such mashirnama as Ex-9/B. He was also cross-examined by the defence Counsel in which he denied the suggestion that he has deposed falsely against the appellant at the instance of Allah Rakhio.

14. The unnatural death of deceased is not disputed in this case, minor boy was subjected to sodomy which fact has been confirmed by Dr. Javed Iqbal (PW-07). He has stated that on 08.08.2008, he received the dead body of the minor boy at 09:30 a.m. and started postmortem examination at 09:45 a.m. and finished at 11:50 a.m. Time between death and injuries was instantly. Duration between death and postmortem was about 3 to 6 hours. It was the dead body of a body of 09 years. The doctor found swelling over occipital region of head. Bruise was seen over parianeal area and faeces seen out from anal sphincter. All the injuries were anti mortem in nature. According to the doctor, tears were seen by him in the position on 12 O'clock and 6 O'clock, which confirmed the act of sodomy committed upon him. Human sperms were detected and chemical report was positive.

15. The recovery of the chappal, school books on which name of deceased was written on the pointation of the accused from the abandoned place under the tree in his exclusive knowledge as per mashirnama at Ex-9/B provide full corroboration to the last seen evidence. The medical evidence also supports the prosecution case. Prosecution has established that the information given by the appellant which led to the recovery of chappal and school bag of the deceased boy, the same were in the exclusive knowledge of the appellant; that piece of evidence is admissible in evidence as provided under

Article 40 of the Qanun-e-Shahadat Order, 1984. The contention of learned Counsel for the appellant that case of appellant does not fall under Article 40 of the Qanun-e-Shahadat Order, 1984, has also no force because the discovery of any fact on the information of accused in custody of police is admissible under Article 40 of the Order *ibid*. Although, in order to apply Article 40 of the Order, the prosecution must establish that information given by the accused led to the discovery of some fact deposed by him and the discovery must be of some fact which the police had not previously learnt from any other source and that the knowledge of the fact was first derived from the information given by the accused. In the instant case, SIP Moula Bux (PW-12) and private mashir had no previous knowledge about the school books and chappal of the deceased, which the appellant had concealed at abandoned place under the tree, so information of the appellant fully comes within the scope of Article 40 of the Order as held in the cases of NAZIR SHEHZAD and another v. The STATE (2009 SCMR 1440) and GUL MUHAMMAD v. The STATE (2011 SCMR 670).

16. Admittedly, it was an unseen occurrence and prosecution case hinges on circumstantial evidence, therefore, utmost care and caution is required for reaching at a just conclusion of a case. It is settled by now that circumstantial evidence should form such a continuous chain that it's one end touches the dead body and another to the neck of accused.

In this regard guidance has been sought from the judgment of the Apex Court of the country in the case of The STATE v. MANZOOR AHMED (PLD 1966 SC 664).

17. In the present case, all the pieces of evidence are interconnected/linked, they give the picture of a complete chain. PWs Abdul Majeed and Sher Muhammad were independent witnesses having no relationship with complainant or enmity with appellant.

18. All the above circumstances/chain of events outweigh the claim of the appellant that he has been falsely implicated in this case and led us to the conclusion that the prosecution has successfully proved its case against the appellant. So far as, the last prayer of learned Counsel for the appellant regarding alternate sentence of the imprisonment for life instead of death is concerned, we have observed that the prosecution case is based upon circumstantial evidence as has been discussed above, the appellant as per Doctor was a young man aged about 23 years at the time of incident, these are the mitigating circumstances in this case. In the case of AMJAD SHAH v. The STATE (PLD 2017 Supreme Court 152), it is held that youthful tendency toward excitement and impulsiveness were treated by the law as a mitigating circumstance. The relevant portion is reproduced as under:-

**“9.....Reference is made to Zeeshan Afzal v. The State (2013 SCMR 1602). Another ground for mitigation in sentence of the appellant is the fact that about two months after the**

**occurrence, on 10.06.2002 the learned Trial Court whilst framing the charge has recorded the appellant's age to be 24 years and that of his co-accused to be 19/20 years. Youthful tendency toward excitement and impulsiveness are also treated by the law as a mitigating circumstance. Under Section 302(b) P.P.C. imprisonment for life is one of the lawful sentences for the commission of offence under Section 302, P.P.C. In the light of the aforesaid discussion the sentence of the appellant merits reduction from death to life imprisonment.”**

In the case of *AKHTAR v. The STATE* (2020 SCMR 2020), it is held that prosecution case is based upon circumstantial evidence, the alternate sentence of imprisonment for life provided under Section 302(b) PPC shall meet the ends of justice. Relevant portion is reproduced as under:-

**“7. It has further been observed by us that on disclosure of appellant before police, dead body of Shahid Ali was recovered from the vacant house of Aslam barber on the poination of appellant. He also got recovered the keys of house of Aslam barber from his shop. Apart from that, the appellant got recovered sky blue shirt (P.12), bag (P.9), books (P.10/1-5), register (P.11) of the deceased Shahid Ali. All, these circumstances outweigh the claim of appellant that he has falsely been implicated in this case and lead us to conclusion that prosecution has been successful in proving its case against the appellant.**

**8. So far as prayer of learned counsel for the appellant regarding alternate sentence of imprisonment for life instead of death is concerned, it has been observed by us that the prosecution case is based upon circumstantial evidence, as has been discussed in the preceding paragraphs. Although the conviction of appellant under section 302(b), P.P.C. does not call for any interference by this Court, but considering the overall circumstances of the case, we are of the view that instead of death sentence, the alternate sentence of imprisonment for life provided under section**

**302(b), P.P.C. shall meet the ends of justice.**

**9. For the foregoing, the instant criminal appeal is partly allowed. The conviction of appellant Akhtar under section 302(b), P.P.C. is maintained but his sentence of death is converted into imprisonment for life. The amount of compensation and sentence in its default as awarded by the learned courts below shall remain intact. Benefit of section 382-B, Code of Criminal Procedure is extended to the appellant.”**

19. We have come to the conclusion that prosecution has proved its case against the appellant beyond any shadow of doubt. So far as the prayer of learned Counsel for the appellant regarding alternate sentence of imprisonment for life instead of death is concerned. Admittedly, prosecution case is based upon circumstantial evidence; conviction of the appellant under Section 302(b) PPC does not call for any interference by this Court but considering the fact that prosecution case is based upon circumstantial evidence and appellant's age was 23 years at the time of incident and was quite young. These two factors are treated by the law as mitigating circumstances as held in the aforesaid judgments.

20. For the above stated reasons, instant criminal appeal is partly allowed. Conviction of appellant Syed Muhammad Iqbal Shah under Section 302(b) PPC is maintained but his sentence of death is converted into imprisonment for life. Sentence of appellant under Section 377 PPC is also maintained. However, sentence of appellant under Section 201 PPC was erroneous in law because appellant was convicted by

the trial Court under Section 302(b) PPC, hence, it is set aside. The amount of compensation in terms of Section 544-A Cr.P.C and the sentence in default thereof as awarded by the trial Court shall remain intact. Appellant is extended benefit of Section 382-B Cr.P.C. Consequently, confirmation reference made by the trial Court is answered in negative.

21. In view of the above, Criminal Appeal No.D-96 of 2013 as well as Confirmation Reference No.30 of 2013 are disposed of accordingly.

JUDGE

JUDGE

Shahid