

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

**Criminal Appeal No.D- 91 of 2020**  
[Confirmation Case No.21 of 2020]  
(Partab vs. The State)

Before:

MR. JUSTICE MOHAMMAD KARIM KHAN AGHA  
MR. JUSTICE MUHAMMAD SALEEM JESSAR

Appellant : Through Mr. Ghulamullah Chang, Advocate.

The State : Through Mr. Shahzado Saleem Nahiyoona  
Additional Prosecutor General, Sindh.

Complainant: Babu present in person.

Date of hearing: 20.06.2023

Date of judgment: 22.06.2023

**J U D G M E N T**

**MUHAMMAD SALEEM JESSAR, J.-** Captioned appeal has been directed against the judgment dated 07.11.2020 passed by learned Additional Sessions Judge-I, Tharparkar at Mithi, in Sessions Case No.98 of 2020 (**Re: The State V Partab**), emanating from Crime No.19 of 2020, registered at Police Station Nangarparkar, under sections 302 PPC, whereby the accused/appellant Partab S/o Neelo has been convicted under Section 265-H(ii) Cr.P.C and has been awarded death sentence under Sections 302(b) and 376 PPC and has also been directed to pay Rs.2,00,000/- as compensation in terms of Section 544-A Cr.P.C and Rs.1,00,000/- as fine to be paid to the legal heirs of the deceased.

2. Facts of the case giving rise to filing of present appeal, are that on 02.03.2020 complainant Baboo appeared at police station and lodged aforesaid FIR by stating that he has six sons and six daughters, out of which he had performed marriages of his five daughters while one is minor; that prior to this Partab (**appellant**) used to tease his daughter Janu for having illicit terms with him and such complaint was made to his father Neelo Kolhi and thereafter he got marriage of his daughter Janu with one Kalji Kolhi; that yesterday (01.03.2020) his above named daughter came to see them and stayed with them; that on 02.03.2020 at 0400 (night) he woke up on the voice of 'Ghurarat', his brother Hamal and son Bhagch and also woke up and with the help of torch lights they saw at the street of dry grass chownra (hut) of his son namely Bashir, situated within the compound of his house, which was lying vacant; that Partab had murdered his daughter Sht. Janu by strangling her; that on seeing them, Partab left the girl and escaped away towards eastern side by scaling over hedge of the house and they found that his daughter Sht. Janu had died; that on their commotion, other house inmates and Mohalla people also woke up and gathered there; that thereafter he approached the notables of the locality and lodged the FIR.

3. After usual investigation, police submitted challan against the appellant/accused, then learned trial Court supplied the copies to appellant/accused and framed formal charge against him at **Ex.04** to which he pleaded not guilty and claimed trial vide his plea at **Ex.5**. In order to prove the charge, prosecution examined as many as eight (08) witnesses and exhibited numerous documents and other items and thereafter prosecution side was closed at **Ex.60**. Statement of

the accused / appellant under Section 342 Cr.P.C was recorded at **Ex.61**, wherein he denied the allegations leveled against him and claimed his false implication; however, neither he examined himself on Oath nor produced any witness in his defense.

4. On conclusion of the trial, learned trial Court after hearing the learned counsel for the parties and appraisal of prosecution evidence brought on record, awarded death sentence to appellant and also sent reference to this Court for confirmation of death sentence or otherwise. Therefore, we decide the fate of appeal and reference by this single judgment.

5. Mr. Ghulamullah Chang, learned counsel for the appellant after going through the evidence has argued that complainant had not contended as a single word in his FIR even none of the PWs deposed against the appellant that they allegedly had saw the appellant while committing rape with the deceased therefore, according to learned counsel the trial Court has added an extra charge against the appellant only to strengthen rope of prosecution's case. Mr. Chang has further argued that no specific source or the mode of strangulation has been mentioned under the FIR even the police have failed to collect such type of evidence through which it could be deduced that appellant had committed murder of deceased Sht. Janu. Mr. Chang has also draws attention of the Court towards inquest report and submitted that no marks of violence or strangulation have been mentioned by the police therefore, prosecution witnesses have made dishonest improvements which belied the contents of FIR. He further stated that FIR was delayed for about six hours even then no specific allegation of causing

murder of the deceased as well committing rape with her has been mentioned. Mr. Chang further submitted that motive shown by the complainant is to the effect, the appellant allegedly was teasing with his daughter i.e. the deceased and no such evidence has been brought on record in support of the motive therefore, according to Mr. Chang the prosecution has miserably failed to establish the charge in respect of the motive. He further submitted that though other inmates were available in the house yet none from them was associated as witness besides the PWs who happen to be alleged eye witnesses had acted as mashir therefore, the PWs being in relation with the complainant as well as deceased are interested hence their testimony cannot safely be relied upon to make conviction against the appellant particularly when the appellant has been charged with an offence which carries capital punishment. Mr. Chang further submitted that per prosecution evidence the appellant allegedly was identified by them on torch light but not a single torch was secured by the police nor even was produced by them during investigation. Hence, the offence being occurred in odd hours of the night, mistaken identity of the appellant cannot be ruled out. Learned counsel has further emphasized that all the PWs had witnessed that the appellant was allegedly riding over the deceased but have not deposed even a single word whether he was strangulating her with his own hands or was committing rape with her. He further submitted that in both situations the lady being adult should have resisted or made hue and cry but she remained mum whilst he allegedly was riding over her, instead. He further submitted that according to ocular evidence the offence is unseen and the appellant had not committed the same but due to grudge with the complainant party on account of

fine imposed by the community people upon the complainant party, the appellant has been implicated him falsely only to get revenge of the grudge they have. In his last Mr. Chang has submitted that in case the appellant had allegedly teased the deceased, as alleged, but no such complaint was made by the deceased herself before her parents or by the complainant party before the elders of their community or vicinity hence the motive so claimed by the complainant party has not been proved therefore, such conduct on the part of prosecution creates lot of doubt as to the veracity of the prosecution evidence which goes in favour of the accused. In support of his contentions, Mr. Chang placed reliance upon the cases of (1) Asad Rehmat v. The State (2019 SCMR 1156), (2) Anil Phukan v. State of Assam (1993 SCMR 2236), (3) Liaquat Ali v. The State (2008 SCMR 95), (4) Pathan v. The State (2015 SCMR 315), (5) Zafar v. The State and others (2018 SCMR 326), (6) Mukhtar Ahmad v. The State (2001 YLR 1673), (7) Sheroo v. The State (2001 YLR 955), (8) Muhammad Ibrahim v. Ahmed Ali and others (2010 SCMR 637), (9) Muhammad Naeem Inayat v. The State (2010 SCMR 1054), (10) Ulfat Husain v. The State (2018 SCMR 313), (11) Mst. Shazia Parveen v. The State (2014 SCMR 1197), (12) Sabir Hussain v. The State (2014 SCMR 794), (13) Shah Bakhsh and another v. The State and 2 others (1990 SCMR 158), (14) Ghulam Mustafa v. The State (2021 SCMR 542), (15) Muhammad Sharifan Bibi v. Muhammad Yasin and others (2012 SCMR 82), (16) Muhammad Hanif v. The State (2021 SCMR 684), (17) Shaukat Hussain v. The State (2022 SCMR 1358), (18) Zulfiqar Ali v. The State (2021 SCMR 1373), (20) Gul Muhammad and another v. The State through Prosecutor General Balochistan (2021 SCMR 381),

(21) *Wajahat v. Gul Daraz and another* (2019 SCMR 1451), (22) *Muhammad Rafique alias Feeqa v. The State* (2019 SCMR 1068), (23) *Muhammad Arif v. The State* (2019 SCMR 631), (24) *Noor Ahmad v. The State and others* (2019 SCMR 1327), (25) *Muhammad Pervaiz v. The State and other* (PLD 2019 Supreme Court 592) (26) *State through Advocate General, Khyber Pakhtunkhwa, Peshawar v. Hassan Jalil and others* (2019 SCMR 1154), (27) *Muhammad Shah v. The State* (2020 SCMR 1009) and an unreported judgment of this Court dated 09.04.2020 passed in Criminal Appeal No.D-88 of 2016 [Confirmation case No.17 of 2016] and Criminal Jail Appeal No.S-160 of 2016.

6. On the other hand Mr. Shahzado Saleem Nahiyoon, Additional Prosecutor General appearing for the State and assisted by complainant opposed the appeal on the ground that appellant was seen by the PWs at the relevant time of alleged offence strangle the deceased whilst he was riding over her; therefore, the prosecution has succeeded to prove its charge against him. According to learned Additional P.G the ocular version has been supported by medical evidence; therefore, impugned judgment does not suffer from any illegality or infirmity which may warrant interference by this Court. Learned Additional P.G further points out that inspite of conducting lengthy cross examination no major contradictions have been brought on record. As far as minor discrepancies are concerned, same have occurred due to lapse of time and such minor discrepancies cannot vitiate the evidentiary value of the prosecution evidence, which otherwise has been corroborated in all material respects. Learned Additional P.G on a query being asked by the Court could not controvert the fact that at the time of alleged offence

neither the appellant nor the deceased were found in nude condition / position and therefore, charge to the extent of rape or Zina bil Jabr has not been brought on record. In support of his contentions, he placed reliance upon the case of Ali Haider alias Papu v. Jameel Hussain and others (PLD 2021 Supreme Court 362).

7. Complainant Babu who was present before the Court had relied upon learned Additional Prosecutor General and also opposed the appeal on the ground that the appellant is the person who committed murder of his daughter i.e. the deceased.

8. We have heard learned counsel for the appellant, learned Additional Prosecutor General, complainant in person and have gone through the evidence adduced by the prosecution before the trial Court.

9. Admittedly, the incident is shown to have occurred in odd hours of the night at about 04-00 a.m; however, FIR was lodged on the same day with delay of about six hours; although the distance between police station and place of occurrence is only 02 Kilometers. However, no plausible explanation has been furnished by the prosecution for such an inordinate delay. Though the delay in all criminal cases cannot be termed to be fatal for the prosecution but when a person has been charged with capital punishment and no specification has been given with regard to the commission of alleged offence then it should be dealt with very cautiously. We have gone through the FIR, found that as and when complainant party woke up upon the voice (violent sound) of the deceased and found that appellant had killed her by strangulation and while seeing the complainant party coming towards him, he (the appellant) decamped

from the scene by scaling over the hedge. Not a single word has been uttered by the complainant in his FIR regarding commission of rape with deceased. It has also not been brought on record whether at the time of their arrival in hut where the deceased as well as appellant were allegedly available and the deceased as well as appellant were in nude condition therefore, the stance taken by the prosecution at the belated stage that deceased was murdered after committing rape with her in absence of such an essential aspect of the case, it cannot be believed that any offence with regard to commission of rape was committed. If a person had come to commit rape with deceased then at least he should have removed his clothes and torn forcibly the clothes of a lady but even after his escape from the scene no such material was found or collected by the police to believe that the appellant had committed the rape as alleged. As far as medical report that semen of appellant were matched with the clothes of deceased is concerned, per medical evidence of Dr. Ramesh Kumar Ex.28 had deposed in clear terms that at the time of examination of the appellant prostatic massage penile erection was note and therefore, the semen sperms were taken which were sent to the Laboratory for matching. We with the assistance of learned counsel for the appellant as well as learned Additional Prosecutor General have gone through the DNA testing report at relevant Page-57 of the paper book where it has been mentioned by the Forensic DNA Analysis Team that **“The Item 1.0 (Vaginal swab sample of deceased Janu D/O Babu Kolhi) does not contain any Male DNA/semen stains/Sperm fraction)”**. From perusal of the above finding of the Medical Experts it has become crystal clear that the accused has not committed rape therefore,



Vaginal Swabs sample taken from her body were not found containing Semen stains/Sperm fraction. However, in the conclusion of same page it has been mentioned that "semen stains/Sperm fraction identified on Piece of cloth of deceased Janu D/O Babu Kolhi duly contributed by the appellant. Before conclusion the Experts had mentioned, as above, that swab sample of deceased Janu did not contain any Male DNA/Semen stains/Sperm fraction then how on her clothes the same were found. Such analogy shows that the police in collusion with the Medicolegal officer had most likely attempted to establish the charge against the appellant regarding commission of rape otherwise no evidence is available in this regard. In view of above factual position of record we find that the prosecution has miserably failed to establish its charge against the appellant in respect of the rape therefore, conviction and sentence awarded to the appellant by the trial Court in terms of Section 375 r/w Section 376 PPC is without any substance therefore, the same is hereby set aside. Hence the appellant is hereby acquitted of the charge under Section 376 PPC.

10. Now reverting back to the main offence. Admittedly, all the PWs have deposed that appellant was strangling the deceased and after seeing the complainant party whilst going towards him, he succeeded in making his escape good by scaling over the hedge wall. It is surprising enough that the appellant at the relevant time was not in a possession of any rope, cloth or any weapon etc even then was not followed by the complainant party. Prosecution has relied upon a piece of evidence that the appellant was found inside the hut whilst he was riding over the deceased and nothing has been secured by the police even the deceased at the time of her autopsy

was not found with rigorous marks or marks of violence over her neck as pointed out by learned Additional P.G. On the other hand the appellant at the time of his arrest was found with certain marks of violence and scratches on his neck from back.

11. The source of identification as disclosed by the prosecution was through torch light but not a single torch either was secured or was produced by the complainant party; however, all the PWs had remained constant while deposing before the trial Court that they saw the appellant whilst riding over the deceased and strangling her though nothing incriminating was shown to be taken by the appellant or was secured while he was found available at the relevant time. However, the plea taken by the appellant that brother of deceased namely Bhagchand had caused injuries to her sister Sht. Parvati and therefore such private Faisla was held and Rs.10,000/- (Rupees Ten Thousand) fine was imposed upon the complainant therefore in order to get revenge of such grudge they have implicated him in this case is concerned, not a single witness or even the persons before whom private Faisla was held, were examined in support of his plea therefore, said plea has not been corroborated by any evidence which is hereby discarded. The violence marks and some scratches found on the neck of the appellant from his back corroborates the ocular and other material evidence thus we find that the appellant murdered the deceased by strangulation and uphold his conviction for this offence under Section 302(b) PPC.

12. With regard to sentencing we find that the prosecution has not prove the motive for the murder and as such we reduce the sentence under Section 302(b) PPC from the death penalty to life

imprisonment with all other fines and compensation in the impugned judgment remaining intact.

13. The upshot of our discussion is that instant appeal is partly allowed with the confirmation Reference being answered in the NEGATIVE.

JUDGE

JUDGE

Hyderabad.  
Dated.22.06.2023.

Tufail