IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Spl. Anti-Terr. Jail Appeal No.D-73 of 2019

Present:-
Mrs. Justice Rashida Asad, J.
Mr. Justice Khadim Hussain Soomro, J.

Appellant: Shahnawaz Almani through Mr. Ubedullah Malano, Advocate

Respondent: Syed Sardar Ali Shah, Additional Prosecutor General Sindh

Date of hearing: 22.08.2023
Date of announcement: .10.2023

J U D G M E N T

KHADIM HUSSAIN SOOMRO, J; Through this instant Appeal, the appellant has assailed the judgment dated 15.05.2019, passed by learned Anti-Terrorism Court, Naushehro Feroze in Spl. Case No. 84 of 2014 [Re: State Versus Shahnawaz Almani] arising out of Crime No.314 of 2014 under Sections 364, 302, 376, 201 PPC & 6/7 ATA, 1997 of Police Station, Moro, whereby the appellant is convicted and sentenced as under:

i). convicted for the offence punishable u/s 364-A PPC and sentenced to suffer R.I. for 'Life Imprisonment.'

ii). Also convicted for the offence punishable u/s 376(3) PPC and sentenced to suffer R.I. for Life Imprisonment and to pay a fine of Rs.100,000/-, in case of failure to pay fine, the appellant shall suffer S.I for one year.

iii). Further convicted for the offence punishable u/s 302(b) PPC and sentenced to suffer Imprisonment for Life as ta'zir and pay compensation of Rs.200,000/- u/s 544-A Cr.P.C. In case of failure to pay compensation accused shall suffer S.I. for one year more.

iv) Further convicted for the offence punishable u/s 201 PPC and sentenced to suffer R.I. for three years and to pay fine of Rs.50,000/-, in

case of failure to pay fine, accused shall suffer S.I. for six months more.

v). Also convicted for the offence punishable u/s 7(1)(a) of Anti-Terrorism Act, 1997, sentenced to suffer R.I, for Imprisonment for life and to pay fine of Rs.100,000/ in case of failure to pay fine, appellant would suffer S.I, for one year more.

The learned trial court has also held that the compensation if recovered shall be paid to the legal heirs of deceased Baby Marvi. All the sentences awarded to the appellant/accused shall run concurrently with the benefit of section 382-B Cr.P.C.

2. The brief facts of the prosecution case are that on 11.09.2014 at 1500 hours, complainant Rasool Bux appeared at Police Station, Moro, and lodged the FIR stating therein that on 09.09.2014, his niece, baby Marvi, aged about 7 years, went out of the house in the street, wherefrom accused Shahnawaz son of Ali Murad Almani forcibly abducted her in order to murder her. The Complainant, along with PW, namely, Loung, Shahid, and other neighbors made a search of the accused and baby Marvi but could not succeed; thereafter, the complainant went to the Police Station, Moro, and lodged FIR. During the course of the investigation, the accused, Shahnawaz, confessed to his guilt. He revealed that after kidnapping the minor girl, he raped and murdered her. He then concealed her dead body in a crop field in Manjhandri. The police recovered the dead body from the crop field near the Moro bypass on his pointation.

3. After registration of F.I.R. and conducting a usual investigation, I.O. submitted challan before the Court against the accused for trial. The Presiding Officer of the trial Court took oath as prescribed under Section 16 of the Anti-Terrorism Act at Exh.1, and copies of police papers were supplied to the accused vide receipt at Exh.2, Charge framed at Exh.3; however, accused pleaded not guilty and claimed to be tried vide plea at Exh.4.

4. To substantiate the charge, the prosecution examined complainant Rasool Bux at Exh.5, who produced FIR at Exh.5-A and receipt of the dead body at Exh.5-B, photographs of the deceased at Exh.5-C to 5-E, and his further statement at Exh.5-F. PW-2 Loung was examined at Exh.6. PW-3 Shahid Almani was examined at Exh.7. PW-4 Abdul Rasheed was examined at Exh.8, who produced a memo of the arrest of accused at Exh.8-A, memo of recovery of the dead body at Exh.8-B, Danistnama of deceased at Exh.8-C, memo of wardat at Exh.8-D, memo of securing clothes of deceased at Exh.8-E, memo of inspection of place of incident at Exh.8-F. PW-5 ASI Ghulam Qasim was examined at Exh.09, who produced entry No.30 at Ex.9-A. PW-6 Ghulam Nabi was examined at Exh.10. PW-7 HC Mangho Khan was examined at Exh.11. PW-8 Tapadar Ghazi Khan at Exh.12, who produced a sketch of wardat at Exh.12-A. PW-9 Dr. Shahnaz was examined at Exh.13, and she produced a postmortem report of a deceased baby minor girl at Ex.13-A, lash chakas form at Ex.13-B, final postmortem report at Ex.13-C and chemical examiner's report at Exh.13-D. PW-10 ASI Ammer Bux was examined at Exh.14. PW-11 Inspector Ghulam Hussain Sahito was examined at Exh.15. Thereafter, learned DDPP for the State closed the prosecution side vide statement at Ex.16.

5. The trial court recorded the statements of the accused under section 342, Cr.P.C, wherein he denied the prosecution allegations and pleaded innocence. However, he neither examined himself on oath u/s 340(2) Cr.P.C nor led any evidence in his defense. After hearing the parties and assessment of the evidence brought on record, the learned trial court convicted and sentenced the appellant, Shahnawaz Almani, as detailed above.

6. Heard and perused the material available record minutely.

7. Learned Counsel for appellant contended that the appellant has been falsely implicated in the present case by the complainant party; that no eye witnesses have seen the appellant while committing rape and subsequent murder of victim baby Marvi and

the circumstances have not been proved to make a chain of circumstances against the accused-appellant; that the witnesses being closely related to the deceased are interested witnesses, hence they have falsely deposed against the appellant; that there was delay of two days in lodging the F.I.R. for which no explanation has been furnished; that there was no enmity of the appellant and his family members; however, there was matrimonial dispute as the sister of present/accused is the wife of Ayaz and Mst. Nazia did not want to reside with Ayaz, so he has implicated the present applicant in the present case. According to the dead body recovery memo, the dead body was recovered at the night time but neither the memo nor the eye witness disclosed the source of light on the basis of which the dead body was identified; that it was an unseen/un-witnessed occurrence; that upon circumstantial evidence, one cannot be convicted and awarded capital punishment; that there are material inconsistencies in the evidence of the prosecution witnesses. He has lastly contended that since the prosecution fails to prove the instant case beyond a reasonable shadow of doubt, that the learned trial Court has erred in law in finding the accused/appellant guilty as such, the conviction and sentence against the accused/appellant should be set aside. In support of his contentions, learned Counsel for the appellant has relied upon the cases of Muhammad Abid v. The State another (PLD 2018 Supreme Court 813), Sajjan Solangi v. The State (2019SCMR 872), Ghous Bux v. Saleem and 3 others (2017P.Cr.LJ836), Gul Hassan alias Gulan v. The State (2022 P.Cr.LJ Note 80), Abdul Jabbar and another v. The State (2019 SCMR 129) and Muhammad Bilal v. The State and others (2021 SCMR 1039).

8. On the other hand, the learned Additional Prosecutor General contended that the appellant has been nominated in the F.I.R that mere relationship between the P.Ws is no ground to discard their evidence, that all the P.Ws have fully supported the case of prosecution, that at trial, the prosecution successfully

established last seen evidence. He has further submitted that the evidence of P.W-5/complainant Rasool Bux, PW-6 Loung, and PW-7 Shahid, who had lastly seen the deceased/baby with the accused/appellant and on the query, He revealed that he was taking her to her father, Ghulam Nabi; that there are two aspects of the case; one was of kidnapping, and other was committing rape and subsequent murder. The dead body of the deceased was recovered on the pointation of the appellant in a very crippled condition. Neither is there a proof of matrimonial dispute, nor was such suggestion made during cross-examination in the trial. No doubt, there was no eye witness who saw the accused committing the murder; however, two witnesses, Loung and Shahid saw the accused while kidnapping the baby as the appellant was her maternal cousin; that is why the eyewitnesses did not react at the spur of the moment when the baby was taken away by him. All the PWs have fully implicated the present appellant at the time of evidence. He further argued that the complainant and prosecution witnesses had no enmity whatsoever with the appellant; that WMO, who conducted the postmortem, opined that the death of the deceased occurred due to torture, assault on the body caused hemorrhage, paralyzes, and shock; and was also victimized of rape, therefore, he prayed for dismissal of the instant appeal. In support of his contentions, he relied upon cases of Allah Ditta v. The Crown (1969 P.Cr.LJ 1108), Abdus Samad v. The State (PLD 1964 Supreme Court 167), Muhammad Amin v. The State (2000 SCMR 1784), Muhammad Naseem alias Deemi v. The State (2011 SCMR 872) and Khair Muhammad and another v. The State (2019 P.Cr.LJ 26).

9. We have considered the arguments advanced before us and perused the material available on record carefully.

10. The meticulous re-appraisal of the evidence so produced by the prosecution is entailing that the complainant Rasool Bux Almani, P.W-1, who deposed that the deceased Marvi, aged about 7

years, was his niece. On 09.09.2014, in the evening time, baby Marvi went outside the house to play in the street. It was about 7.00 p.m. time when the accused Shahnawaz forcibly kidnapped baby Marvi for committing her rape and murder. He met PWs Loung and Shahid, who also disclosed that they had seen the accused Shahnawaz while taking baby Marvi with him. They searched everywhere but did not find the baby Marvi and accused Shahnawaz for two days, thereafter on 11.09.2014 at about 3.00 p.m. time, he appeared at the Police Station, Moro, and lodged FIR. Police arrested the accused Shahnawaz. On 11.09.2014 at about 2100 hours, the accused Shahnawaz voluntarily led the Police to Manjhandri crops situated near bypass Moro and showed the dead body of baby Marvi in the presence of mashirs. Police also called the parents of the deceased, namely, Ghulam Nabi and Mst. Shahzadi also identified the dead body of baby Marvi. ASI Ghulam Qasim Mashori prepared such a memo, inquest report, and Lash Chakas Form, and after a postmortem examination, the dead body was returned to him under receipt. He also produced two photographs of the deceased and one photograph of her dead body. P.Ws Loung and Shahid, being eyewitnesses, gave the same story of the incident as narrated by the complainant, and they categorically stated that the appellant, who was a maternal cousin of the deceased, therefore, they could not react on the spur of the movement, while he was taking away the deceased with him.

11. As far as the contention regarding the last seen evidence is concerned, we observe that the foundation of the "last seen together" theory is based on principles of probability, cause and connection, and cogent reasons that the deceased in the normal and ordinary course was supposed to accompany the accused, the proximity of the crime scene, small time gap between the sighting and crime, no possibility of third person interference as well as the time of death of the victim.

12. The evidence of P.W-10 Ghulam Nabi, who is the father deceased/victim, deposed that the deceased baby Marvi, aged about seven years, was his daughter. On 09.09.2014, his daughter was kidnapped, and he went in search of her. PWs Loung, Shahid, and Rasool Bux informed him that they had seen present appellant Shahnawaz taking minor girl Marvi with him. On 11.09.2014, on the pointation of present appellant dead body of his daughter was recovered by police under the Manjhandri trees near Moro bypass, where he identified the dead body of his daughter Marvi. His brother Rasool Bux lodged the FIR against the appellant on 11.09.2014. He was also examined by police. From the evidence of eyewitnesses who had seen present appellant Shahnawaz taking minor girl Marvi with him and had never returned; and later she was found dead in crop, which clearly shows that the deceased-baby was lastly seen with the appellant who took her in front of them. Thus, the last seen principle is absolutely applicable against the appellant in the present circumstances. Therefore, the appellant is connected in a chain of events that occurred leading to the recovery of the deceased baby girl on the pointation of the appellant. Therefore, it is a link to the chain of circumstances against the appellant. Such piece of evidence connects the circumstances i.e. the deceased knew the appellant, who was her maternal cousin. It is worth mentioning here that the complainant, Ghulam Nabi, father of the deceased baby, is relative of the appellant, and there is no ill will on their part to implicate him by leaving the real culprit. Moreover the incident took place within a short gap between the sighting and the occurrence of the offence, consistent with the prosecution evidence. Reliance is placed on the case of Mst. ROBINA BIBI versus THE STATE (2001 SCMR 1914).

13. As it is evident from the facts narrated in the FIR as well as the evidence of the complainant, and other P.Ws that the incident was un-witnessed because the offence was committed in Manjhandri crop, as is clear in the sketch of vardat produced by P.W-12/Tapedar Ghazi Khan in his evidence, even otherwise, the

defense has not disputed the place of vardat which is Manjhandri crop. The prosecution has, therefore, relied upon circumstantial evidence viz. last seen of the deceased in the crop with appellant, medical evidence, and report of chemical examiner.

14. In order to prove the unnatural death of Baby Marvi, the prosecution has examined Dr. Shahnaz at Exh.13, Women Medical officer, who stated that the dead body of deceased Marvi aged about 7 years daughter of Ghulam Nabi Almani was brought to Taluka Hospital, Moro through PC Mangho Khan Dahar of PS Moro, on 12.09.2014 for postmortem examination and report. Senior Women Medical officer started postmortem examination at 12:15 a.m and completed it at 01:30 a.m. On the external examination of dead body, Senior Women Medical Officer found the following injuries pm her son:

1. Skull was ruptured, brain matter came out. Maggots present in wound.

2. Skin and walls of left side of chest ruptured.

3. Left side of abdomen ruptured; intestine loops came out. Maggots present in wound.

4. Infected wound present on left arm.

5. Vaginal swabs taken and preserved for sending to Chemical Laboratory, Rohri for chemical examination.

15. The cause of death, as mentioned, was due to torture, assault on the body caused hemorrhage paralyzes and shock. We, therefore, hold that Baby Marvi died her unnatural death as described by the Senior Women Medical officer.

16. The perusal of chemical report shows that four sealed cloth parcels, each with 02 seals, seals perfect and as per the copy sent, were received at the office of the Chemical Examiner. The relevant portion of the chemical report is reproduced as under:

"DESCRIPTION OF ARTICLES CONTAINED IN THE PARCEL

1. Contains one small glass bottle containing one vaginal cotton swab of deceased Marvi D/o Ghulam Nabi Almani ..... Parcel No.1.

2. Contains one small glass bottle containing one vaginal cotton swab of deceased Marvi D/o Ghulam Nabi Almani ..... Parcel No.2.

3. Contains one small glass bottle containing one vaginal cotton swab of deceased Marvi D/o Ghulam Nabi Almani ..... Parcel No.3.

4. Contains one small glass bottle containing one vaginal cotton swab of deceased Marvi D/o Ghulam Nabi Almani ..... Parcel No.4.

RESULT OF CHEMICAL EXAMINATION

Human semen and human blood has been detected in each vaginal cotton swab of above said glass bottle No.1, 2, 3 and 4.

17. On careful examination of the Chemical Examiner's report and statement of P.W-9 WMO Dr. Shahnaz (supra), the case of the prosecution cannot be doubted with tainted glasses on the point of committing rape of the deceased baby before she was murdered. Therefore, the finding of the learned trial Judge on Points No.2&3 stands proved is very much justified with the facts of the case. The said Doctor had also supported the injuries on the person of the deceased baby due to torture, assault on the body, caused hemorrhage and paralyzes, and shock, and thus, medical evidence is consistent with the Chemical Examiner's report.

18. The appellant had the opportunity to lead evidence in his defence, but he had not led any evidence proving his innocence. The appellant and the complainant are admittedly relative, and the

P.Ws are relatives of the both side viz the complainant and the appellant.

19. As far as the contention of the learned counsel for the appellant is concerned that upon circumstantial evidence, one cannot be convicted and awarded capital punishment, this plea is also misconceived because there is no bar or hindrance to pass the sentence upon a killer when the chain of guilt is found not to be broken and irresistible conclusion of the guilt is surfacing from the evidence, which is connecting the accused with the commission of that offence without any doubt or suspicion. If the circumstantial evidence brought on the record is of such nature, then the conclusion would be in the shape of conviction and no other conclusion shall be drawn by any stretch of imagination in such a case, for the guilt of the appellant, penalty of life imprisonment shall be a normal event. Reliance is placed upon the cases reported as Khuda Bukhsh v. The State (2004 SCMR 331); Sheraz Tufail v. The State (2007 SCMR 518); Israr Ali v. The State (2007 SCMR 525); Ghulam Nabi v. The State (2007 SCMR 808) and Muhammad Akhtar v. The State (2007 SCMR 876). In the case of Muhammad Akhtar (supra) it is held as under:-

> "5. After having gone through the statements of Abdul Shakoor (P.W.1) and Muhammad Naeem (P.W.2) we have no hesitation in our mind to hold that Muhammad Mursaleen (deceased) was taken away by the petitioner from his house whose dead body was recovered subsequently. The conduct of petitioner also remained unusual as he could not furnish any plausible justification that where Muhammad Mursaleen (deceased) was left who had been admittedly taken by him from his house. It is to be noted that blood-stained Toki was also recovered at the pointation of petitioner as a result of his disclosure hence the question of applicability of section 103, Cr.P.C. does not arise as pressed time and again by the learned Advocate Supreme Court on behalf of petitioner but in such an eventuality Article 40 of the Qanun-e-Shahadat Order, 1984 would figure in. The Toki (Exh.P.1) was found stained with human blood as per the report of Chemical Examiner. Dr. Muhammad

Mushtaq (P.W.3) has conducted the post-mortem examination of dead body of Muhammad Mursaleen on 19-2-2002. According to whom injury No.1 i.e. "an incised wound 7.5 x 3 c.m. on left side of neck, 1 c.m. below lobule of left ear", injury No.5 i.e. "an incised wound 11 x 2 c.m. on right and back of neck at upper part 1 c.m. below injury No.4 second cervical vertebrae on right part was cut in the line of the incised wound" and injury No.6 i.e. "an incised wound 7 x 2 c.m. on back of right side of neck at its junction with the trunk, 4 c.m. below to injury No.5. Intervertebral disc between 6th and 7th cervical vertebrae was cut and spinal card was also cut at the level of injury No.6. Upper border of back part of right first rib was exposed. Cervical plura on the right side was exposed in the depth of the wound but not cut", which resulted in the death of Muhammad Mursaleen due to "acute cardio pulmanary arrest as a result of haemmoragic and nurogenic shock" caused by heavy cutting weapon and no doubt the Toki is a sharp-edged weapon and injury No.1 as mentioned hereinabove could have been caused by it. It is worth while to mention here that act of sodomy was also committed with Muhammad Mursaleen (deceased) as the anal swabs were found stained with semen. The prosecution has succeeded in establishing the accusation by cogent and concrete evidence as discussed hereinabove.

"6. We have dilated upon at length the prime contention of learned Advocate Supreme Court on behalf of petitioner that reliance could not have been placed on the last seen evidence. "It is to be noted that the ' above question has been examined time and again in different cases and a few are mentioned hereinbelow for ready reference:

1969 SCMR 558, 1969 PCr.LJ 1108, PLD 1991 SC 718; 1999 ALD 48(i), PLD 1991 SC 434, 1991 SCMR 1601, 1998 PCr.LJ 722, PLD 1959 SC (Pak.) 269, PLD 1978 SC 21, 1991 PCr.LJ 956, PLD 1964 Quetta 6, 1971 PCr.LJ 211, 1980 PCr.LJ 164, 1998 SCMR 2669, PLD 1964 SC 67, PLD 1971 Lah. 781, 1972 SCMR 15, 1974 PCr.LJ 463, PLD 1971 Kar. 299, PLD 1977 SC 515, 1997 SCMR 1416, 1988 PCr. LJ 205, NLR 1988 Cr. 599, 1997 SCMR 1279, PLD 1978 BJ 31 and 1997 SCMR 20".

> " 7. We have perused the dictum laid down in the abovementioned authorities. The consensus seems to be that "last seen evidence itself would not be sufficient to sustain charge of murder and such evidence further required to link accused with the murder of his companion i.e. incriminating recoveries at accused's instance, strong motive or proximity of time when both last seen together and time of murder, accused required to explain demise of his companion only when such requirements fulfilled". PLD 1997 SC 515, AIR 1927 Lah. 541, PLD 1956 FC 123, 1972 SCMR 15, PLD 1964 SC 167 and PLD 1966 SC 644".
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> " 8. The further consensus in such-like cases appear to be that "last seen evidence carries weight depending upon varying degree of possibility and facts and circumstances of each .case. Before inferring guilt merely from inculpatory circumstances, such circumstances, held, must be found to be incompatible with innocence of accused and incapable of explanation upon any other reasonable hypothesis than that of guilt". PLD 1977 SC 515, AIR 1922 Lah. 181, AIR 1922 All. 340, PLD 1955 BJ 1, 1974 PCr.LJ 463, AIR 1932 Lah.243, PLD 1971 Kar.299, PLD 1953 FC 214 and PLD 1964 SC 167."

20. We have come to the conclusion that no direct evidence of the crime in question was available, and the prosecution case was structured upon circumstantial evidence of last seen, recovery of dead body of deceased baby from Manjhandri crop, pointation of place of occurrence by the appellant, corroborated by positive report of chemical report regarding commission of rape with the deceased baby, medical evidence. Furthermore, the appellant was given full opportunity during cross-examination in trial to shatter the confidence-inspiring evidence adduced by prosecution witnesses, but the appellant failed to make any dent in the case.

21. The most important factor which cannot be ignored is the recovery of the dead body at the pointation of the appellant from a place which was in his exclusive knowledge and is sufficient to establish the accusation leveled against the appellant. It is well-settled that factum of last seen evidence requires corroboration,

and the evidence alone that the deceased having been last seen in the company of the accused itself would be sufficient to sustain the charge of murder against the accused. The recovery of the dead body at the pointation of the accused from the place which was exclusive to his knowledge lends full corroboration to the last seen evidence. Besides that, medical evidence also supports the eye account as furnished by prosecution witnesses and discussed hereinabove.

22. All the above noted segments of evidence have led to one important conclusion that it was a merciless action of the appellant who had raped the innocent minor girl of 07 years of age and brutally murdered her. Therefore, the events and the circumstantial evidence proved that the appellant is the person who had committed this heinous offence of rape and murder and deserves no leniency. No reason or mitigating circumstance for awarding a lesser sentence to the appellant is available in this case. We, however, find that these offences do not fall within the purview of the ATA, as it has been held in the case of Ghulam Hussain v. State (PLD 2020 SC 61) regardless of the severity, shock value, brutality, gruesomeness, or horror of an offence, it cannot be characterized as an act of terrorism unless it is committed with the specific intent or purpose outlined in clauses (b) or (c) of subsection (1) of section 6 of the aforementioned Act which is lacking in the present case. Resultantly the appeal is dismissed however the convictions and sentences are only upheld with regard to the non ATA offences so charged.

In view of the above, the instant appeal is disposed of in the above terms.

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