Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Jail Appeal No. S – 105 of 2004

Dates of hearing : 30.01.2013 and 31.01.2013.

Appellant : Muhammad Amin through
Ms. Nasira Shaikh Advocate.

Respondent : The State through
Mr. Shahzado Saleem Nahyoon, APG

J U D G M E N T

NADEEM AKHTAR, J. – **This Criminal Jail Appeal is directed against the judgment delivered on 10.06.2004 by the Additional Sessions Judge, Hyderabad, in Sessions Case No.193 of 1990, whereby the appellant was convicted under Section 302 PPC for causing the death of a minor girl ; namely, Zahida, aged about seven (07) years. Through the impugned judgment, the appellant was sentenced to suffer imprisonment for life, and also to pay fine of**

Rs.50,000.00 to the legal heirs of Zahida, and in case of default thereof, to suffer rigorous imprisonment of two years. The appellant was extended the benefit of Section 382-B CrPC.

2. The relevant facts of the case are that an FIR bearing No.58/1990 was lodged by the complainant Ali Muhammad on 02.06.1990 at 07:30 am with the Police Station Tando Jam, District Hyderabad, reporting the death of his minor grand-daughter Zahida, aged about seven years, caused by the appellant. It was stated in the FIR that the complainant was a labourer, and his son Ahmed along with his family was living with him ; Zahida was the elder daughter of Ahmed, and she was also living with him ; on 01.06.1990, Zahida left the house where they all were living together, but she did not return ; the complainant and his son Ahmed left the house in search for Zahida when they met Muhammad Bukhsh, Ahmed alias Porho and Muhammad Moosa, who informed them that they had seen Zahida around 07:30 pm going with the appellant towards the garden ; after receiving this information, the complainant party proceeded towards the garden of Deenal Thebo ; they heard the cries of Zahida coming from the water course of the garden ; when they reached near the water course, they saw that Zahida was being strangulated by the appellant and she was crying ; the complainant party gave *hakaals* to the appellant, but on seeing them, he killed Zahida, threw her into the water course, and started running away ; the appellant was apprehended by the complainant and other eye-witnesses, who also took out Zahida from the water course, but she had already died ; she had marks of strangulation, and also the marks of bites on her neck and cheek ; the complainant party remained during the night at the scene of the crime with the appellant and the dead body of Zahida ; on the next morning (02.06.1990), the complainant lodged the FIR against the appellant, alleging that he took Zahida to the garden with the intention to commit zina with her, and during such attempt, he killed her by strangulating her.

3. After registering the FIR of the complainant on 02.06.1990, SIP Ahmed Nawaz, who was posted at the Police Station Tando Jam and was on duty, proceeded to the place of the incident at Village Morri Mangar along with his subordinate staff and the complainant. The police party found the dead body of Zahida lying under a mango tree near the water course of the garden. After examining the body, the said SIP prepared the *Mashirnama* of the place of the incident, and the *Laash Chakas Form / Danistnama* (inquest report), in the presence of the complainant and the *Mashirs*, Bukhshan and Allahdino, who attested the said documents. Thereafter, the dead body of Zahida was sent by the said SIP to Rural Health Centre (RHC) Tando Jam for postmortem through Police Constable Muhammad Ashraf. The appellant was arrested by the said SIP and was brought to the Police Station Tando Jam on 02.06.1990, where he recorded the statements of the PWs Ahmed (Zahida's father), Muhammad Bukhsh and Muhammad Moosa, under Section 161 CrPC. The said witnesses were produced on 03.06.1990 before the ACM Tando Jam, where their statements under Section 164 CrPC were recorded on the same day. The appellant was also produced on 03.06.1990 before the ACM Tando Jam, for recording of his confessional statement.

4. The postmortem of Zahida was conducted at the RHC Tando Jam by the Medical Officer Dr. Abdul Hameed Halepota, who issued and signed the Postmortem Report dated 03.06.1990 (Exh.20-A). Thereafter, the dead body of Zahida was returned to her legal heirs for burial. According to the postmortem report (Exh.20-A), the death of Zahida was caused due asphyxia and venous congestion as a result of throttling. Further, teeth marks were found on the right cheek, extravasation of the blood into the subcutaneous tissue under the finger mark adjacent to the muscle of the neck was lacerated, lacerating the shock of the cardio axillary was also seen, hyoid bone and throat cartilage were found fractured, larynx and trachea were found congested and fractured, and the injuries were found to be ante mortem.

5. On 11.04.1991, formal charge was framed against the appellant by the VIth Additional Sessions Judge, Hyderabad, vide Exh.3, charging him with the intentional and voluntary murder of Zahida by throttling her, thereby committing an offence punishable under Section 302 PPC. The appellant pleaded not guilty. At the trial of the appellant, the prosecution examined ten (10) witnesses ; namely, the complainant / PW-1 (Exh.6), who produced the FIR (Exh.7) lodged by him, Ahmed (Zahida's father) / PW-2 (Exh.8), Ahmed alias Porho / PW-3 (Exh.9), who produced his statement under Section 164 CrPC (Exh.10), Muhammad Bukhsh / PW-4 (Exh.11), who produced his statement under Section 164 CrPC (Exh.12), Allahdino / PW-5 (Exh.13), who produced the *Mashirnama* of the place of the incident and arrest, and the *Danistnama* (Exhs.14, 15 & 16), Police Constable Muhammad Ashraf / PW-6 (Exh.17), who produced the receipt of the dead body of Zahida (Exh.17-A), Muhammad Moosa / PW-7 (Exh.18), who produced his statement under Section 164 CrPC (Exh.18-A), Tappedar Allah Bukhsh / PW-8 (Exh.19), who produced the site sketch (Exh.19-A), Dr. Saleem Akhtar / PW-9 (Exh.20), who produced the postmortem report (Exh.20-A), SIP Ahmed Nawaz / PW-10 (Exh.21), who produced *Laash Chakas Form* (Exh.21-A).

6. The statement of the appellant under Section 342 CrPC (Exh.24) was recorded on 08.02.2002, wherein he denied to have committed the murder of Zahida ; pleaded himself to be innocent ; and further pleaded that he was of unsound mind. In support of his defense, the appellant examined only one witness ; namely, Yar Muhammad Mirbahar / DW-1 (Exh.25), who claimed that the appellant was his nephew. The learned trial court framed the following three points for determination :-

> **"*1. Whether deceased baby Zahida aged about 7-years died due to unnatural death ?***
>
> ***2. Whether accused Muhammad Amin killed baby Zahida aged about 7-years intentionally by throttling her ?***

3. What offence, if any, committed by accused ?"

The learned trial court gave the findings on points No.1 and 2 as proved, and sentenced the appellant with life imprisonment and fine of Rs.50,000.00, and in default thereof, rigorous imprisonment of two years. The benefit of Section 382-B CrPC was extended to the appellant.

7. Ms. Nasira Shaikh, the learned counsel for the appellant, submitted that there were serious contradictions in the evidence of the prosecution witnesses, especially PW-1 and PW-2, who were the real grandfather / complainant and the real father, respectively, of Zahida. She further submitted that the postmortem of Zahida was conducted by an unauthorized person who was not a Medico Legal Officer, and the manner in which the postmortem was conducted, was suspicious. In support of her contentions, she referred to the evidence of PW-1 and PW-2, wherein PW-1 had stated that PW-2 had informed him that Zahida was missing, but PW-2 had stated in his evidence that this fact was brought to his notice by PW-1. Regarding the postmortem, it was contended that the Medical Officer who had conducted the postmortem, was not produced by the prosecution as he had died. It was urged that, in the absence of the evidence of the said Medical Officer, the postmortem report was inadmissible in evidence. This submission was made by the learned counsel in addition to her objection that the said Medical Officer was not authorized to conduct the postmortem. It was further contended that there was a delay in preparing and submitting the postmortem report, as the postmortem was conducted on 02.06.1990, but the report was prepared on 03.06.1990. It was also contended that according to the postmortem report, the postmortem started at 09:00 a.m. on 02.06.1990 and was completed at 10:50 a.m. Whereas, the police constable Muhammad Ashraf (PW-6), who was entrusted with the dead body with the responsibility to take the same for postmortem, had said in his evidence that he reached the hospital at

09:00 a.m. with the dead body and the dead body was returned to him at 09:15 or 09:30 a.m.

8. Further submissions of the learned counsel for the appellant were that there was delay in lodging the FIR ; there was also delay in recording the statements of the prosecution witnesses under Sections 161 and 164 CrPC ; no *Mashirnama* was prepared, no recovery was made, and there was no report of chemical examination ; according to the prosecution, the incident took place after *Maghrib*, therefore, it was not possible for the alleged witnesses to identify the appellant in the absence of any light ; and, since all the alleged eye-witnesses were either close relatives of Zahida, or were the neighbors of her father and grandfather, their evidence was not credible. It was emphasized that the appellant was a person of an unsound mind. In the end, it was urged that the learned trial court committed a serious and grave error by misreading the evidence on record, and by ignoring the material irregularities during the investigation.

9. In support of her submissions, the learned counsel for the appellant relied upon (1) *Shahzad Tanveer V/S The State*, *2012 SCMR 172,* (2) *Gul Muhammad V/S The State*, *1972 SCMR 435,* (3) *Ghulam Mohi-ud-Din V/S The State*, *1993 PCrLJ 1849,* (4) *Ghulam Nabi and 2 others V/S The State*, *2009 MLD 49,* (5) *Muhammad Ramzan and another V/S The State*, *2009 PCrLJ 553,* (6) *Umer V/S The State*, *2009 PCrLJ 1119,* (7) *Muhammad Aslam V/S The State*, *2008 YLR 1608,* (8) *Allah Ditta V/S The State*, *2006 PCrLJ 84,* (9) *Muhammad Pervaiz V/S The State*, *2006 PCrLJ 221,* (10) *Sobho and 2 others V/S The State*, *PLD 2004 Karachi 8,* (11) *Jamshed alias Jammi V/S The State and others*, *2004 PCrLJ 1239,* (12) *Arfan Ali V/S The State*, *2003 YLR 1054,* (13) *Abdul Sattar and others V/S The State*, *2002 PCrLJ 51,* and (14) *Pir Jan and another V/S The State*, *1997 PCrLJ 1646.*

10. On the other hand, Mr. Shahzado Saleem Nahyoon, the learned APG, submitted that there was no contradiction, as alleged or otherwise, between the ocular and oral evidence produced by the prosecution, and the same was sufficient to convict the appellant for murdering Zahida. He pointed out that the Investigating Officer (PW-10) had stated in his evidence that the appellant was produced before the ACM for recording of his confessional statement, where the same was recorded. He submitted that PW-10 was not confronted on behalf of the appellant that the statement given by him regarding recording of the confessional statement of the appellant, was false. He further submitted that the statements of the prosecution witnesses and the appellant were required to be recorded within 14 days under Section 173 CrPC, which were duly recorded within time. He contended that there was no delay in lodging the FIR, and the gap of a few hours between the time of the incident and the lodging of the FIR, was due to the fact that the incident had taken place at night and also due to lack of the conveyance at the village, which was sufficiently and satisfactorily explained by the complainant. It was urged that a gap of only a few hours in the given circumstances could not be termed as delay in lodging the FIR. It was further urged that the plea of unsound mind was not taken by the appellant when the charge was framed against him and was read over to him. He supported the impugned judgment, and prayed for the dismissal of this appeal. In support of his submissions, the learned APG relied upon the cases of (1) *Nazir Ahmed V/S The State*, ***2009 SCMR 523,* (2) *Shafqat Ali and others V/S The State*, ***PLD 2005 Supreme Court 288,*** (3) *Sher Dil and others V/S The State and others*, ***2003 YLR 110,*** and (4) *Muhammad Hanif V/S The State*, ***PLD1993 Supreme Court 895***.**

11. I have heard the learned counsel for the appellant and the learned APG at length, and have also examined the record minutely. I have observed that the sole defense witness DW-1 in his deposition had stated that the appellant was residing at his (DW-1's) house, and in his cross examination, he had stated that the appellant had come to his (DW-1's) house one day prior to the date of the incident. DW-1 never claimed or asserted that the appellant was with him (DW-1), or was at his (DW-1's) house when the incident occurred. On the contrary,

DW-1 had admitted in his cross examination that he was not present when the appellant was arrested. DW-1 also never claimed or asserted that the appellant was not present on the date, time and at the place of the incident ; or that he was not alone with Zahida and some other person(s) was / were also present on the date, time and at the place of the incident ; or that Zahida was not with him ; or that he was not found with Zahida by the prosecution witnesses. It may be noted that none of the eye witnesses were confronted by the defense side that the appellant had not taken Zahida with him on the date, time and at the place of the incident, or he was not present with her when the incident happened. In view of the above, the allegations by the prosecution to the effect that the appellant had taken Zahida with him on the date, time and at the place of the incident, he alone was present with her when the incident happened, and he was found with her by the eye witnesses, not only remained un-rebutted, but such facts / allegations also stood admitted before the trial court. The burden to prove the above facts / allegations was on the prosecution, which stood proved in view of the above. The above views expressed by me are fortified by the case of *Mst. Nur Jehan Begum V/S Syed Mujtaba Ali Naqvi*, *1991 SCMR 2300*, wherein the Hon'ble Supreme Court was pleased to hold that where on a material part of his evidence, a witness is not cross examined, it may be inferred that the truth of such statement has been accepted ; statement of a witness which is material to the controversy of the case particularly when it states his case and the same is not challenged by the other side directly or indirectly, then such unchallenged statement should be given full credit and is usually accepted as true unless displaced by reliable, cogent and clear evidence.

12. There was no contradiction in the evidence of the complainant / PW-1, Zahida's father / PW-2, and other eye-witnesses ; namely, PW-3, PW-4, and PW-7, as all of them had testified that when they reached at the place of the incident after hearing the cries of Zahida, they found the appellant sitting on the chest of Zahida with both his hands around her neck ; the appellant was strangulating Zahida ; after seeing them, the appellant threw Zahida in the water course and tried to escape ; when they fished out Zahida from the water course, she was

already dead ; and, the appellant was apprehended by them. It is to be noted that no contradiction whatsoever was pointed out by the learned counsel for the appellant with regard to any of the above facts witnessed by the eye-witnesses. The minor contradictions, as claimed by the learned counsel for the appellant, were of no significance ; firstly, as the same did not relate to the actual act of the commission of the offence ; secondly, as the condition of the dead body of Zahida and the marks found thereon described in the postmortem report (Exh.20-A), fully corroborated the evidence of the eye-witnesses ; and, lastly, the allegations made by the prosecution against the appellant stood proved in any event as held above. Similarly, there was no contradiction in the evidence of the other prosecution witnesses.

13. In his evidence, PW-9 Dr. Saleem Akhtar produced the post mortem report as Exh.20-A. He identified the handwriting and the signatures of the Medical Officer Dr. Abdul Hameed Halepota, who had conducted the postmortem of Zahida and had issued the postmortem report (Exh.20-A). In his evidence, PW-9 had stated that he had worked with the said Medical Officer at the Rural Health Centre Tando Jam for two years, and had confirmed that the postmortem report (Exh.20-A) was issued by the said Medical Officer. PW-9 was not confronted at all by the defense side with the suggestion or question that the said Medical Officer was not authorized to conduct the postmortem, or that the postmortem was not conducted by him, or that the postmortem report (Exh.20-A) was bogus, concocted, false, manipulated, fabricated, etc. Since the entire contents of the postmortem report (Exh.20-A) remained un-rebutted, the same stood admitted and proved before the trial court. The burden to prove the allegations relating to the postmortem report (Exh.20-A), was on the appellant, but he hopelessly failed in discharging such burden, and in view of his failure, the burden never shifted to the prosecution. Therefore, the objections raised by the learned counsel for the appellant with regard to the authenticity and admissibility of the postmortem report (Exh.20-A), have no force.

14. Regarding the plea taken by the appellant that he was of unsound mind, it is to be noted that in his statement under Section 342 CrPC, he had stated that he was of unsound mind prior to the incident. He never claimed that he was of unsound mind on the date of the incident, or that such mental condition was still subsisting when his said statement was being recorded. In his evidence, the sole defense witness DW-1 had claimed that the appellant was of unsound mind, and he was admitted 2–3 times at the Mental Hospital Hyderabad. DW-1, however, admitted in his cross examination that no document was filed or produced by him in support of this assertion. The burden to prove that the appellant was of unsound mind, was on the defense side, but it miserably failed in discharging the same. As such, it was not proved that he was of unsound mind. The submission made by the learned counsel for the appellant in this behalf is, therefore, rejected.

15. As per the FIR, the unfortunate incident took place on 01.06.1990 at about 08:00 p.m., and the FIR was lodged by the complainant on 02.06.1990 at 07:30 a.m., that is, after 11 hours and 30 minutes on the next morning. It was an admitted position that the incident happened at a village ; there was no police station at the village ; and, the nearest police station was situated at Tando Jam, which was at some distance from the village. The complainant had categorically stated in his cross examination that the distance between the police station and the village was about six miles, he did not go to the police station during the night due to the fear of dacoits, and he reached the police station between 06:30 to 07:00 a.m. on the very next morning. The complainant was not confronted by the defense side with any suggestion that there was any malafide on his part, or he deliberately delayed the lodging of the FIR. The facts that a minor girl was brutally murdered after sunset at a village which was about six miles away from the nearest police station, and at the place of the incident the dead body was lying and the appellant had been detained, fully justify the date and time of the lodging of the FIR. In fact, in the given circumstances, the FIR could not have been lodged earlier than when it was lodged. In the above circumstances, I am of the view that there was no delay on the part of the complainant in lodging the

FIR. The submission made by the learned counsel for the appellant in this context is, therefore, rejected.

16. The learned counsel for the appellant relied upon a number of cases in support of her submissions, which are briefly discussed below :

A. In the case of *Shahzad Tanveer* (supra), the postmortem report did not bear the FIR number, and it was not signed by the doctor. It was held in the said case that the omission on the part of the Investigating Officer suggested that FIR had been lodged much after the postmortem examination, and the medical evidence did not fully support the prosecution case. The cited case has no relevance with the instant case, as the FIR number and the signature of the doctor were appearing on the postmortem report, and the FIR was admittedly lodged much prior to the postmortem examination.

B. In *Muhammad Ramzan* (supra), FIR was recorded after preliminary investigation. Whereas, in the present case the FIR was lodged first and then the investigation had started.

C. In the case of *Gul Muhammad* (supra), the question of appreciation of evidence was discussed in view of the fact that there was no recovery memo to show recovery of blood stained clothes from the accused. In the instant case, there was no question of recovery or recovery memo, as the appellant was found strangulating Zahida with his bare hands. However, the dead body of Zahida was recovered and the *Mashirnama* was prepared accordingly.

D. In ***Pir Jan*** (supra), the complainant had not satisfactorily explained the delay of Five (05) days in lodging the FIR, there was also a delay of Five (05) days in recording the statements of eye-witnesses by the police, and there were contradictions and discrepancies in the ocular testimony. In the case in hand, I have already held that there was no delay in lodging of the FIR, the gap of few hours had been explained satisfactorily by the complainant, and there was no contradiction or discrepancy in the ocular testimony. Moreover, there was no delay in recording of the statements of eye-witnesses, as their statements under Section 161 and 164 CrPC were recorded on 02.06.1990 and 03.06.1990, respectively.

E. In ***Muhammad Pervaiz*** (supra), there was a gap of two to three hours between the injury and the death, as per the postmortem report issued by the doctor. There was no such gap in the instant case, as Zahida had died instantaneously, and she was already dead when her body was found by the eye-witnesses. In fact, the postmortem report, which remained un-rebutted, confirmed that all the injuries suffered by Zahida were ante mortem.

F. In ***Allah Ditta*** (supra), the FIR was lodged with the delay of two days while the distance between the place of occurrence and the police station was 15 kilometers, the complainant was not an eye-witness, and there were only two prosecution witnesses who were closely related to the deceased. In the case in hand, the complainant himself was one of the eye-witnesses, there were a number of prosecution witnesses out of whom only two, that is, PW-1 and PW-2 were closely related to Zahida, and the remaining were admittedly not related to her at all. Moreover, there was no such delay in the present case in lodging of the FIR.

G. The case of ***Muhammad Aslam*** (supra) was not an appeal, but was an application for suspension of sentence. In the said case, no weapon had been recovered from the accused and he had not been convicted by the trial court in the main offence under Section 302 PPC. In the case in hand, the appellant has been convicted for murdering Zahida under Section 302 PPC. As far as the question of recovery of weapon is concerned, it was the case of the prosecution that the appellant had killed Zahida with his bare hands and not with a weapon.

H. In ***Arfan Ali*** (supra), both the eye-witnesses were residents of a locality which was situated about 60 to 70 miles away from the place of occurrence, and their presence at the place of the occurrence was doubtful. In the instant case, all the eye-witnesses were admittedly the residents of the same village where the incident had occurred.

I. In the case of ***Ghulam Mohi-ud-Din*** (supra), the identification parade had become doubtful as the occurrence had taken place at dark night, and the accused was not known to the eye-witnesses. There was no occasion for the identification parade for identifying the appellant, as he was seen and caught red-handed by the eye-witnesses at the place of the incident.

J. In the cases of ***Ghulam Nabi*** and ***Sobho*** (supra), it was held that ocular testimony having come from interested and closely related witnesses, alone could not be relied upon to justify conviction ; private witnesses were not associated by the investigating officer ; and, the evidence collected by the prosecution and witnesses examined in the Court, were discrepant and not confidence inspiring. In this context, the learned APG relied upon the case of ***Muhammad Hanif V/S the State***, ***PLD 1993 Supreme Court 895***, wherein it was held *inter alia* by the Hon'ble Supreme Court that the two eye-witnesses, who, being the real father and the real

sister of the deceased, were closely related to the deceased, and their presence was natural at the time and place of the occurrence which was successfully established by the prosecution ; their testimony was not only consistent, trustworthy and inspired confidence, but was also corroborated by the medical evidence and the promptly lodged FIR giving details of the occurrence ; experts' evidence may it be medical or that of a ballistic expert, is entirely in the nature of confirmatory or explanatory of direct or other circumstantial evidence ; if there is direct evidence which is definite and trustworthy, the confirmatory evidence is not of much significance and cannot in any case outweigh the direct evidence. The ocular evidence having stood fully corroborated, the conviction recorded by the trial court under Section 302 PPC was restored by the Hon'ble Supreme Court. The learned APG also relied upon the case of *Sher Dil* (supra), wherein the learned Full Bench of the Federal Shariat Court was pleased to hold *inter alia* that relationship in itself is not a yardstick or standard for discarding evidence which otherwise is trustworthy and comes from one who normally could have been expected to have witnessed the occurrence.

17. It is apparent that the cases cited and relied upon by the learned counsel for the appellant are clearly distinguishable from the facts and circumstances of this case, and as such the same are of no help to the appellant. There was more than sufficient and unchallenged ocular and medical evidence against the appellant before the learned trial court to convict him for the murder of minor Zahida, and the case against him was proven beyond any shadow of doubt. The findings of the learned trial court are based on sound reasoning and correct and proper appreciation of the evidence on record. In fact, the learned trial court took a lenient view by not awarding the sentence of death to the appellant, and also extended the benefit of Section 382-B CrPC to him. As such, the impugned judgment does not call for any interference by this Court.

As a result of the above discussion, this appeal is dismissed.

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