

Present: Manzoor Ahmad Malik, Syed Mansoor Ali Shah and Qazi Muhammad Amin Ahmed,

JJ

MUHAMMAD PERVAIZ---Appellant

Versus

THE STATE and other---Respondents

Criminal Appeal No.37-L of 2016, decided on 6th May, 2019.

(On appeal from the judgment dated 7-10-2013 passed by the Lahore High Court, Lahore in Criminal Appeal No.1511 of 2009).

(a) Penal Code (XLV of 1860)---

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Art. 121---Reappraisal of evidence---Husband accused of murdering his wife in the matrimonial house---Failure on part of husband to satisfactorily explain cause of death---Adverse presumption---Scope---Silence or implausible explanation by the accused husband could not be equated with failure within the contemplation of Art. 121 of Qanun-e- Shahadat, 1984---Prosecution was not absolved from driving home the charge by itself on the strength of positive proof---Grievously unsafe to convict suspects on presumptions or upon failure to establish their innocence---Accused was acquitted of the charge of murder in circumstances.

(b) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Accused was alleged to have murdered his wife in the matrimonial home---Trial Court convicted the accused under S.302(b), P.P.C and sentenced him to death, which sentence was reduced to imprisonment for life by the High Court---Held, that once the deceased's brother and his accomplice, both purported eye-witnesses, had visited the deceased to take her back, apparently there was no occasion for them to change their plans, and in case they were allegedly present in the next room, there was no compulsion for the accused-husband to kill his wife at the risk of retaliation or prosecution---Prosecution script was far from being plausible and it was so viewed by the High Court itself when it observed that presence of purported eye-witnesses may be suspicious at the time of occurrence---By extending the benefit of doubt to the accused, appeal was allowed and he was acquitted of the charge of murder.

(c) Criminal trial---

----Conviction---Proof---Suspicion could not substitute legal proof nor a suspect could be condemned on the basis of moral satisfaction in the absence of evidentiary certainty.

(d) Penal Code (XLV of 1860)---

----S. 302(b)---Qatl-i-amd---Reappraisal of evidence---Accused and co-accused assigned similar role of strangling the deceased---Same set of evidence forming basis of acquittal of the co-accused but conviction of accused---Held, that the evidence of prosecution qua the co-accused was rejected by the courts below and he was acquitted---Role assigned to the acquitted co-accused was inexorably intertwined with the accused's alleged participation in the crime, thus it would be unsafe to maintain the conviction of accused in such circumstances---Appeal was allowed and accused was acquitted of the charge of murder.

Nawab Ali Mayo, Advocate Supreme Court for Appellant.

Mehmud ul Islam, Advocate-on-Record (with caveat) for Respondent.

Nemo for the Complainant.

Mazhar Sher Awan, Additional Prosecutor General for the State.

Date of hearing: 6th May, 2019.

JUDGMENT

QAZI MUHAMMAD AMIN AHMED, J.---Muhammad Pervaiz, appellant is in receipt of a guilty verdict; he was indicted for committing qatl-e-amd of Kausar Bibi, no other than his better half; it is

affirmed by the learned High Court vide impugned judgment dated 7.10.2013 vires whereof are being challenged through leave of the Court.

2. Prosecution case is structured on the statement of deceased's brother, Muhammad Arshad, PW; according to him, the marriage was on the rocks as the bride failed to bring dowry to the expectation of her in laws. Upon a message by the deceased, Muhammad Arshad, PW along with Mehmood, PW visited the former to take her back, however, upon threats by the appellant they preferred to stay overnight when in midst thereof they were attracted by the hue and cry to see the deceased being strangled by the appellant with the assistance of Khalid co-accused; they attempted to rescue the deceased without success. Upon indictment, the accused claimed trial to confront prosecution evidence; they blamed dacoits to have murdered the deceased during the fateful night. While acquitting the co-accused, the learned trial Judge convicted the appellant under clause (b) of Section 302 of Pakistan Penal Code, 1860 and sentenced him to death with a direction to pay Rs.100,000/- as compensation or to undergo six month S.I. in the event of default, a view affirmed by the learned High Court albeit with alteration of death penalty into imprisonment for life with benefit of Section 382-B of the Code of Criminal Procedure.

3. Learned counsel for the appellant contends that the appellant could not have been convicted merely upon his failure to satisfactorily explain as to what befell upon his life during the fateful night. He adds that presence of witnesses is extremely doubtful and even otherwise cannot sustain the charge after they had been disbelieved qua identically placed co-accused; the bottom line is that it would be unsafe to maintain conviction. Contrarily, the learned Law Officer vehemently defends appellant's conviction on the ground that plea advanced by him being preposterous was rightly rejected which in retrospect established his presence at the spot, thus there was no space to entertain any hypothesis of his innocence.

4. Homicidal death is not in dispute; appellant's plea that

dacoits intruded the household and strangled the deceased has not found favour with the Courts below. The appellant has also not denied his presence, however these factors by themselves cannot hypothesize presumption of appellant's guilt in the absence of positive proof. Silence or implausible explanation cannot equate with failure within the contemplation of Article 121 of Qanun-e-Shahadat Order, 1984, thus does not absolve the prosecution to drive home the charge by itself on the strength of positive proof. It would be grievously unsafe to convict suspects on presumptions or upon failure to establish their innocence. Possibilities are infinite and do not necessarily include the guilt alone.

A criminal case is to be essentially decided on the basis of evidence adduced by the prosecution. Once the witnesses had visited the deceased to take her back, apparently there was no occasion for them to hold in abeyance the purpose of their detour and in case they were present and in the next room, there was no compulsion for the appellant to do away with the deceased at the risk of retaliation or a certain prosecution. The script is far from being plausible and it is so viewed by the learned High Court itself in the following words "Presence of PWs may be suspicious at the time of occurrence". It is astonishing that despite above observation, the High Court preferred to maintain the conviction. Suspicions are after all suspicions and cannot substitute the legal proof nor a suspect can be condemned on the basis of moral satisfaction in the absence of evidentiary certainty. Yet another circumstance to cast away the conviction is rejection of prosecution evidence qua Khalid co-accused. Role assigned to the acquitted co-accused is inexorably intertwined with appellant's alleged participation in the crime and thus even strongest corroboration, otherwise hopelessly lacking cannot rescue the charge. It would be unsafe to maintain the conviction, therefore by extending the benefit of doubt, Criminal Appeal No.37-L/2016 is allowed, impugned judgment is set aside. The appellant shall be released forthwith, if not required in any other case.

MWA/M-23/S Appeal allowed.

