

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

JJ

MUHAMMAD AZHAR HUSSAIN and anohter---Appellants

Versus

THE STATE and another---Respondents

Criminal Appeal No.11-P/2017 and Jail Petition No.726 of 2017, decided on 2nd May, 2019.

(On appeal from the judgment dated 19-4-2016 passed by the Peshawar High Court, Mingora Bench (Dar-ul-Qaza) Swat in Cr.As. 178 and 216-M of 2014 with M.R. 9-M and 10-M of 2014).

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

----S.302(b)---Qatl-i-amd---Reappraisal of evidence---Benefit of doubt---Accused and co-accused were convicted under S. 302(b), P.P.C and sentenced to death for killing a minor---Doubtful confessional statements---Fate of the prosecution's case was hinged upon confessional statements made by the accused and co-accused before a Magistrate---Both of them arrived before the Magistrate on the same day, one after another and gave confessions in a comfortable unison, in tune with the prosecution case, which reasonably excluded hypothesis of a voluntary disclosure, free from the taints of inducement or persuasion---Such confessional statements seemed to be more of anegotiated settlement rather than a volitional representation, and there was remarkable similarity in both the statements, in terms of sequential order as well as the pattern, and surprisingly both such statements were very exhaustive---Testimony of one of the main prosecution witnesses who last saw the minor with the accused was in conflict with the confessional statements---Evidence of said witness could not be accepted without excluding confessional statements from consideration and vice versa---In both the confessional statements, the accused and co-accused stated to have thrown weapon of offence, a churri in the river, however according to recovery memo, it was recovered with blood stains from inside bushes a day before confessional statements were recorded---Both the accused and co-accused were entitled to the benefit of doubt in such circumstances and were acquitted accordingly.

(b) Criminal Procedure Code (V of 1898)---

----S. 364---Confessional statement of accused, recording of---Procedure---Practice of using a printed form to administer warnings to the accused before recording his statement---Confession may entail formidable consequences for an accused facing indictment and thus it was incumbent upon the Magistrate to ensure that the maker consciously comprehended the consequences of his choice---Magistrate himself, face to face, was to faithfully communicate to the accused all the relevant warnings,as contemplated by S.364 of the Code of Criminal Procedure,1898, which was a surer way to establish that the confession was free from all taints---Supreme Court observed that it did not approve the practice of a printed form to administer warnings to the accused and obtaining his signatures on the same.

Khalid Mehmood, Advocate Supreme Court and Zahoor Qureshi, Advocate-on-Record for Appellant. Petitioner through Jail.

Mujahid Ali Khan, Additional Advocate General, Khyber Pakhtunkhwa for the State.

Date of hearing: 2nd May, 2019.

ORDER

QAZI MUHAMMAD AMIN AHMED, J.---Muhammad Azhar Hussain, appellant in Criminal Appeal No. 11 -P of 2017, was tried along-side Al-Haj-ud-Din, petitioner in J.P. No.726 of 2017 for committing qatl-i-amd of Fida-ur-Rehman; they were convicted under clause (b) of Section 302 of Pakistan Penal Code, 1860 and sentenced to death with direction to pay compensation in the sum of Rs.100,000/-each or to undergo six months' S.I. in the event of default vide judgment dated 28.6.2014 upheld by the learned Peshawar High Court vide impugned judgment dated 19.4.2016; bound by a common thread these are being decided through this single judgment.

2. Fida-ur-Rehman, deceased, aged 4/5, went missing; he was spotted lying dead in a maize field. According to autopsy report dated 24.8.2012, his neck was found slit with sharp edge weapon; medical officer observed certain marks of resistance as well as a rounded small piece of glass in his hand. As the investigation progressed, the accused named above were hauled up by the police; they were produced before a Judicial Magistrate on 5.9.2012 when they, one by one, confessed the guilt; their confessional statements are prosecution's mainstay. It is alleged that both the accused were jointly carrying on with one Mst. Khadija and on the fateful day they went to visit her while she was alone; as they were busy in foreplay, the deceased surprised them; he threatened disclosure, however the accused persuaded him for silence in lieu of Rs. 20/-. Later in the day they again came across the child, followed him and finally intercepted near a maize field; they subdued the child, constricted his neck with the string and afterward slit it with a knife. During the trial, Saleema Bibi alias Naseem Bibi, mother of Muhammad Azhar Hussain, appellant appeared as PW-22; according to her statement, she saw Al-Haj-ud-Din while taking a small child in his lap heading towards the maize field; accused inquired from the lady about her son who according to her was about to set out to a different location. Amongst the array of witnesses, the prosecution has primarily relied upon the confessional statements to drive on the charge.

3. Learned counsel for the convicts contends that enormity of the crime notwithstanding, reliance on the confessional statements by the courts below was fraught with multiple errors, heavily impinging upon the principle of safe administration of criminal justice; according to him, the statements were inherently flawed; these were contradicted by prosecution's own witness, Saleema Bibi, PW-22, a dichotomy that escaped notice of the courts below. The learned Law Officer has vehemently defended the impugned judgments by highlighting the gruesome nature of the crime. According to him, there was no earthly reason either for the devastated family or the police to swap the real offenders; every hypothesis of their innocence stood excluded, concluded the learned Law Officer.

4. The fate of the prosecution's case is hinged upon confessional statements, made by the convicts before a Magistrate and it is on the basis of their disclosures that they have been handed down the ultimate corporal penalty, irreversible in nature and thus warrants a most careful scrutiny. Though examined separately, nonetheless their arrival before the Magistrate on the same day, one after another on 5.9.2012 is quite intriguing; two individuals in an extreme crisis situation, conducting themselves in a comfortable unison, both being in tune with the prosecution, reasonably excludes hypothesis of a voluntary disclosure, free from the taints of inducement or persuasion; it appears to be more a negotiated settlement rather than a volitional representation; there is a remarkable similarity in both the statements, in terms of sequential order as well as the pattern these were reduced into writing, otherwise surprisingly exhaustive. A person making his breast clean is not expected to be that expressive. The statements contain prosecution's encyclopedia with all the relevant details required to prosecute the case; it does not appear to be an exercise by a repentant to bring himself at peace with his conscious. Another predicament for the prosecution is conflict between testimony of Saleema Bibi, PW-22 with the confessions. Going by the later, both the convicts remained together right from intercepting the child to finally dumping him in the field whereas according to the former she saw Al-Haj-ud-Din alone while taking the child in his lap towards the field. This is also not in line with the disclosure that the accused first constricted his neck with the string before they jointly threw him in the field. These positions are irreconcilable; evidence of Saleema Bibi, PW-22 cannot be accepted without excluding confessional statements from consideration and vice versa. Similarly, in both the statements, the accused stated to have thrown weapon of offence, a churri in the river, however according to memo, exhibit PW-6/ 11, dated 4.9.2012 it was recovered with blood stains from inside the bushes a day before confessional statements were recorded; if Al-Haj-ud-Din had led to the recovery of weapon he had no occasion to omit this important investigative step in his exhaustive narrative and in case it is presumed as factually incorrect, would tremor the very basis of the

confessions. We have also not felt comfortable with the printed form, purportedly used to administer warnings to the accused before recording of their statements. A confession may entail formidable consequences for an accused facing indictment and thus it is incumbent upon the Magistrate to ensure that the maker consciously comprehends the consequences of his choice and thus it is most important that the Magistrate himself, face to face, faithfully communicates to the accused all the relevant warnings, as contemplated by Section 364 of the Code of Criminal Procedure, 1898, a surer way to establish that the confession is free from all taints, thus we would not approve convenience procuring accused's signature on a printed format. On an overall analysis of the prosecution case, confessional statements cannot be relied upon without potential risk of error. In the absence of evidentiary certainty, it would be unsafe to maintain the convictions on moral satisfaction that certainly cannot equate with legal proof. The convicts are entitled to the benefit of doubt. Criminal Appeal No. 11-P of 2017 is allowed and as a natural corollary Jail Petition No.726 of 2017 is converted into appeal and allowed. Impugned judgments are set aside. They shall be set at liberty forthwith, if not required in any other case.

MWA/M-20/S Appeal accepted.