P L D 2019 Balochistan 75

Before Muhammad Hashim Khan Kakar and Abdullah Baloch , JJ

ATTAULLAH---Appellant

Versus

The STATE---Respondent

Criminal Jail Appeal No.7 of 2018, decided on 17th June, 2019.

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

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Delayed FIR---Delayed examination of witness by police---Contradiction in statements of witnesses---Dishonest improvement---Scope---Accused was charged for committing murder---Complainant reached at the place of occurrence at 2:00 pm, but the FIR was lodged at 6:00 pm and the dead body was shifted to the hospital for medical examination at 6:30 pm---Contents of fard-e-bayan were silent about the weapon used in the crime, but in his court statement complainant dishonestly improved and stated that firing was made with TT pistol---Complainant had stated that murder was committed at the behest and instigation of co-accused and for such purpose two muffle faced persons brought the accused at the place of occurrence, however, the court statement of complainant was silent in such behalf---Complainant had not witnessed the crime directly, thus, his statement was not helpful to the case of prosecution---Complainant had recieved information about the occurrence at 12:00 pm, but the sole eye-witness of the occurrence contradicted the case of prosecution and stated that the occurrence had taken place at 12:30 pm---Eye-witness had appeared before the Investigating officer on the following day of occurrence for recording his statement---Appeal was accepted, in circumstances.

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

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Art. 40---Qatl-i-amd---Recovery of weapon---Information received from accused to be proved---Scope---Accused was arrested after 5 days of the occurrence whereas accused, in the presence of police constable, confessed his guilt and recorded his disclosure on the day of his arrest and the said disclosure was followed by the recovery of TT pistol---Investigating officer in his cross-examination admitted that no crime empty was recovered from the place of occurrence, while infact according to record and more particularly from the statement of a witness it appeared that three empties were recovered from the place of occurrence, which were taken into possession through seizure memo---Prosecution ought to have sent the three collected empties and the TT pistol to Forensic Science Laboratory (FSL) for matching with empties and it was the FSL report which could confirm that the recovered TT pistol was the same through which the deceased was murdered, but that was not done---Recovered TT pistol could not be presumed to be the same through which the murder of the deceased was committed or that the same was recovered on the pointation of the appellant---Without recovery of any incriminatory article or discovery of new facts, disclosure of accused recorded in police custody was not admissible---Prosection had not

succeeded in establishing the recovery of TT pistol on the pointation of appellant, hence the same was not helpful to the case of prosecution---Appeal was allowed.

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

----S. 302(b)---Qanun-e-Shahadat (10 of 1984), Arts. 37, 38 & 39---Qatl-i-amd---Confession caused by inducement, threat or promise---Confession by accused in police custody---Scope---Investigating officer had recorded the disclosure of the appellant and according to the prosecution same was recorded voluntarily---Investigating officer did not produce the appellant before the Judicial Magistrate for recording his confessional statement under S.164, Cr.P.C. on the date of recording his disclosure, but to the contrary the appellant was produced before the Judicial Magistrate on the last date of remand for recording such confessional statement---Delay so occasioned in recording such confessional statement had lost its evidentiary value---Judicial Magistrate, who recorded the confessional statement of the appellant admitted in his cross-examination that earlier when the appellant was produced before him for remand, he never showed his willingness to record such confessional statement---Even otherwise, prior to recording his confessional statement the appellant informed the Judicial Magistrate that he was tortured, which fact was also recorded in his confessional statement---Judicial Magistrate had put a question to the appellant that as to why he was recording such confessional statement, to which the appellant replied that he was recording his statement so that the compromise could be effected; meaning thereby the appellant was deceived and put on a false impression and inducement that in case of recording his confessional statement the matter would be compromised---Such confessional statement could not be presumed to have been recorded voluntarily or free from interference or influence, thus, the same was not admissible under the law.

Mst. Tasleem and another v. State 2013 MLD 1331 rel.

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

----S. 302(b)---Qatl-i-amd---Medical evidence---Evidentiary value---Medical evidence is only used for confirmation of ocular evidence regarding seat of injury, time of occurrence and weapon of offence used, etc, but medical evidence itself does not constitute any corroboration qua the identity of accused person to prove his culpability.

Muhammad Sharif and another v. The State 1997 SCMR 866 ref.

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

----S. 154---Information in cognizable cases---Prompt registration of FIR---Object---Main object of prompt registration of FIR is to rule out the possibility of deliberation, consultation and inquiry---Element of delay in lodging the crime report is treated with caution because there is a tendency to involve innocent people during the interval.

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

----S. 161---Delayed examination of witness by police---Effect---When statement under S.161, Cr.P.C. is delayed; such evidence may not be given that sanctity as is

generally given to the evidence of a witness whose statement has been recorded promptly soon after the occurrence.

(g) Qanun-e-Shahadat (10 of 1984)---

----Arts. 38 & 39---Confession to police officer---Confession of accused while in custody of police officer not to be proved against him---Scope---Disclosure of an accused recorded in police custody is not admissible under Arts.38 & 39 of the Qanun-e-Shahadat, 1984, unless followed by the recovery of any incriminatory evidence.

(h) Criminal trial---

----Benefit of doubt---Scope---Prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same must go to the accused and it would be sufficient to disbelieve the prosecution story and acquit the accused.

Tariq Pervaiz v. The State 1995 SCMR 1345 rel.

Agha Nadir Shah for Appellant.

Muhammad Younas Mengal, Additional P.G. for the State.

Date of hearing: 10th June, 2019.

JUDGMENT

ABDULLAH BALOCH, J.---This judgment disposes of Criminal Jail Appeal No.07 of 2018 filed by the appellant Atta Ullah son of Suqman alias Salman through Superintendent Central Prison Mach, against the judgment dated 21st December 2017 (hereinafter referred as, "the impugned judgment") passed by learned Sessions Judge, Mastung (hereinafter referred as, "the trial Court"), whereby the appellant was convicted under Section 302(b) P.P.C. and sentenced to suffer life imprisonment and to pay compensation of Rs.200,000/- (Rupees two hundred thousand) to the legal heirs of deceased Kaleem Ullah as envisaged under Section 544-A Cr.P.C. and in default thereof to further suffer six (06) months' S.I., with the benefit of Section 382-B, Cr.P.C.

2. Facts of the case are that on 11th March 2017, the complainant Hafiz Ghulam Muhammad son of Muhammad Alim lodged FIR No.03 of 2017 at Levies Thana Wali Khan Mastung, under Section 302 Q&D Ordinance read with Sections 109, 34 P.P.C., stating therein that he is actual resident of Killi Sheikh Hussaini Noza Kanak and being an employee in Civil Defence Department is residing at Quetta, while his brother and other family members are residing at Noza Kanak. It is averred in the FIR that on the day of occurrence at about 12.00 Noon he was present in his house at Quetta, when his brother-in-law Abdul Rehman informed him on phone that he was informed by Muhammad Hashim on phone that Kaleem Ullah went towards shops and was coming back to home, when in the way near grapes Orchard, he was killed by means of firing. On such information, he (complainant) immediately rushed to Noza Kanak, where Muhammad Hashim on further query disclosed that he was waiting for leave off of his children from school, when in the meanwhile he heard firing shots and saw that two persons were

standing in grapes Orchard, out of whom one person fell down, while the other was escaping, thus he followed and identified the said person as Atta Ullah son of Suqman, who told that he killed Kaleem Ullah due to personal affairs. Hence, he went near Kaleem Ullah and saw that he was lying in the pool of blood and expired. The complainant further averred that on query it has come into his knowledge that at the behest and instigation of one Ghulam Sarwar son of Muhammad Ayub, two muffled face persons had brought the appellant at the place of occurrence to commit the murder of his deceased brother.

3. Pursuant to above FIR, the investigation of the case was entrusted to PW-12 Pir Muhammad, Risaldar/I.O., who during investigation visited the place of occurrence; prepared site map; shifted the dead body to hospital; carried out inquest report; obtained death certificate; took into possession blood stained earth from the place of occurrence and the blood stained clothes of deceased from his relatives; arrested the appellant on 15th March 2017; recorded his disclosure and recovered the crime weapon on his pointation; sent the blood stained articles and crime weapon to FSL for analysis; got recorded the confessional statement of appellant under Section 164 Cr.P.C. and remanded the appellant to judicial custody by submitting the challan in the trial Court.

4. At the trial, the trial Court indicated the charge to the appellant, who refuted the same and claimed trial. The prosecution in order to establish the charge produced the evidence of twelve (12) witnesses, whereafter the appellant was examined under section 342, Cr.P.C. The appellant has also recorded his statement on oath under section 340(2) Cr.P.C. but did not produce any witness in his defence. On conclusion of trial and after hearing arguments, the learned trial Court convicted and sentenced the appellant as mentioned above. Whereafter the appellant has filed the instant appeal.

5. Learned counsel for appellant contended that the impugned judgement is perverse and contrary to material available on record; that all the prosecution witnesses have made contradictory statements with each other and even have made dishonest improvements from their earlier depositions; that the sole eye-witness of the occurrence namely Muhammad Hashim appeared as PW-2 in the Court, but he has failed to justify his presence at the relevant time or witnessing the crime directly; that the alleged confession of the appellant is result of pressure, coercion, false impression and blackmailing and even the same with recorded after considerable delay, rendering its evidentiary value not worth credence; that the prosecution has failed to establish the charge through consistent and confidence inspiring evidence, hence the impugned judgement deserves to be set-aside.

6. On the other hand, the learned Additional Prosecutor General vehemently opposed the arguments so advanced by the learned counsel for appellant and while supporting the impugned judgment has contended that the FIR was lodged promptly without any delay, wherein the appellant was nominated in it with specific role of firing and furthermore not only the crime weapon was recovered on his pointation, but the appellant has confessed his guilt by recording his disclosure and confessional statement under Section 164 Cr.P.C., thus the impugned judgement is not open for any interference by this Court.

7. Heard the learned counsel and perused the available record. In order to establish the charge the prosecution produced direct, circumstantial and medical evidence through twelve (12) witnesses. The sole eye-witness of the occurrence is PW Muhammad Hashim, while the complainant namely Hafiz Ghulam Muhammad appeared as P.W.1. The contents of FIR Ex.P/1-A reveal that the occurrence was taken place at about 12.00 Noon. The Fard-e-bayan of the complainant Ex.P/1-A reflect that on the day of occurrence he was present in his house in Quetta, when informed about the occurrence, thus he proceeded to Noza Kanak and as per his cross-examination he reached there at about 2.00 p.m. and met with PW-2 Muhammad Hashim, who provided him the details of occurrence along with the name and parentage of the culprit. Since, the complainant had reached at the place of occurrence till 02.00 p.m. thus the occurrence was required to be reported to the police promptly, but this has not been done so and it appears that the FIR was lodged at 6.00 p.m. and even the dead body was shifted to hospital for medical examination at 6.30 p.m. No explanation in such behalf has been tendered that as to why the complainant party waited for four hours in lodging the FIR and nominating the present appellant. Hence, under such circumstances the elements of deliberation and consultation cannot be ruled out of consideration and question also arises that if the complainant knew the culprit than as to why the FIR was not lodged promptly. The main object of prompt registration of an FIR is to rule out the possibility of deliberation, consultation and inquiry. The element of delay in lodging the crime report is treated with caution because there is a tendency to involve innocent people during the interval.

8. Perusal of contents of fard-e-bayan filed by the complainant reflects that it is contradictory to the Court statement of PW-1 Hafiz Ghulam Muhammad, while the statement of PW-1 is contradictory to the statement of sole eye-witness PW-2 Muhammad Hashim. Likewise, the statements of both PW-1 and PW-2 are contradictory with the statements of PW-3 Naimatullah. PW- I in his fard-e-bayan stated that he was present in his house when he was informed about the occurrence, while in his Court statement he stated that he was present in his office when received such information. The contents of fard-e-bayan are silent about the weapon used in the crime, but in his Court statement he made dishonest improvement and stated that firing was made with T.T. pistol. Though motive was not mentioned in the fard-e-bayan and only it was stated that the murder was committed at the behest and instigation of Ghulam Sarwar and for such purpose two muffled face persons brought the appellant at the place of occurrence, however, the Court statement of PW-I is silent in such behalf. Even otherwise, PW-1 has made certain dishonest improvements from his earlier deposition. Since, PW-1 has not witnessed the crime directly, thus his statement is not helpful to the case of prosecution.

9. Another important aspect of the case is that the complainant PW-1 in his Court statement has stated that he was informed about the occurrence by his brother in law namely Abdul Rehman that he was informed by PW-2 Muhammad Hashim about the occurrence. However, PW-2 contradicted the same and stated that after the occurrence he had informed the relatives of the deceased through PW-3 Naimatullah, while PW-3 Naimatullah has contradicted the statement of PW-2 and

stated that he was informed about the occurrence by a person namely Babay. Furthermore, according to PW-1 he received information about the occurrence at about 12.00 Noon. Meaning thereby that the occurrence had taken place prior to 12.00 Noon, but surprisingly the sole eye-witness of the occurrence has contradicted the case of prosecution and stated that the occurrence had taken place at 12.30 p.m. Now question arises that if the occurrence had taken place about 12.30 p.m. then as to how the complainant had received information about the occurrence at 12.00 Noon.

10. Though, the occurrence had taken place on 11th March 2017, but the sole eye-witness PW-2 appeared before the Investigating Officer on the following day of occurrence for recording his statement. There is also no explanation as to why the statement of such an important witness was recorded at belated stage. According to settled norms of justice in a criminal case when section 161 Cr.P.C. statement is delayed; such evidence may not be given that sanctity as is generally given to the evidence of a witness whose statement has been recorded promptly soon after the occurrence.

11. Now adverting to the disclosure of the appellant recorded whilst in police custody. According to settled norms of justice the disclosure of an accused recorded in police custody is not admissible under Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984, unbless followed by the recovery of any incriminatory evidence. In the case in hand, the occurrence had taken place on 11th March 2017, while the appellant was arrested on 15th March 2017, whereas in presence of PW-6 Ghulam Habib, Constable, the appellant has allegedly confessed his guilt and recorded his disclosure on 16th March 2017 and the said disclosure of the appellant was followed by the recovery of T.T. pistol bearing No.CAL-30 Mauser. It has further been observed that the Investigating Officer in his cross-examination has admitted that no crime empty was recovered from the place of occurrence, while infact according to record and more particularly from the statement of PW-5 it appears that three empties were recovered from the place of occurrence, which were taken into possession through seizure memo Ex.P/5-A. Be that as it may, in order to establish the recovery of crime weapon pursuant to disclosure allegedly made by the appellant, the prosecution ought to have sent the three collected empties and the T.T. pistol to FSL for matching with empties and it was the FSL report which confirms that the recovered T.T. pistol was the same through which the deceased was murdered, but this has not been done so. Thus, under peculiar circumstances it cannot be presumed that the recovered T.T. pistol was the same through which the murder of the deceased was committed or that the same was recovered on the pointation of the appellant. Since, without recovery of any incriminatory article or discovery of new facts, the disclosure of an accused recorded in police custody is not admissible, thus being not proved and establish neither the disclosure of the appellant is admissible under the law nor the prosecution has succeeded in establishing the recovery of T.T. pistol on the pointation of appellant, hence the same are not helpful to the case of prosecution, which are hereby discarded from consideration.

12. Another important feature of the case is that the Investigating Officer has recorded the disclosure of the appellant on 16th March, 2017 and according to the

case of prosecution such disclosure was recorded voluntarily without any pressure or coercion. If it was the case, then as to why the Investigating Officer has not produced the appellant before the Judicial Magistrate for recording his confessional statement under Section 164 Cr.P.C. on the date of recording the disclosure, but to the contrary he waited till the last date of remand i.e. 29th March 2017, when the appellant was produced before the learned Judicial Magistrate Mastung for recording such confessional statement. The delay so occasioned in recording such confessional statement has lost its evidentiary value. Furthermore, it has further been established through the record that the same is not volunteer. PW-11 Muhammad Zakria, Judicial Magistrate, who recorded the confessional statement of the appellant admitted in his cross-examination that earlier when the appellant was produced belore him for remand, he never shown his willingness to record such confessional statement. Even otherwise, prior to recording his confessional statement the appellant informed the Judicial Magistrate that he was tortured, which fact was also recorded in his confessional statement. Besides, when the Judicial Magistrate put a question upon the appellant that as to why he is recording such confessional statement, to which the appellant replied that he is recording his statement so that the compromise may be effected. Meaning thereby the appellant was deceived and put on a false impression and inducement that in case of recording his confessional statement the matter will be compromised. Hence, under these peculiar circumstances of the case, it cannot be presumed that such confessional statement was recorded voluntarily or it was free from interference or influence rather it does not appears to be volunteer, thus, the same is not admissible under the law and even not helpful to the case of prosecution. Reliance in this regard is placed on the case of Mst. Tasleem and another v. State 2013 MLD 1331, wherein it has been held as under:

> "11. From the perusal of confessional statement, it is manifest that such statement is not on prescribed pro forma. It was recorded on 9th July 2010 whereas appellant Mst. Tasleem was arrested on 5th July, 2010 hence the confessional statement was recorded after 6 days of her arrest. In reply of question No.4 it is evident that when she was asked that whether she was beaten, tortured or maltreated by police, she replied" yes "I am maltreated by S.H.O. Abdul Malik Kamagner" and in question No.4 she was asked that what are the circumstances which are inducing you to confess? She answered "my cousin compelled me to confess". It is surprising that despite answers to above these questions learned Magistrate not only proceeded further but also endorsed a note which shows 'for the following reasons, I find that confession is voluntarily in nature" this shows that concerned Magistrate has completely negated the mandatory requirements of law, though she (appellant/accused) categorically stated in response to question No.4 that she was not only maltreated by S.H.O. but her cousin compelled her to confess. We are in agreement with learned counsel for the State that any lapse on the part of Magistrate in recording confession cannot always be treated as fatal to the evidentiary value of confession but it is to be evident that the said lapse has not in any way adversely affected the voluntariness or truthfulness of the confession. Thus it is quite safe to say that emphasis is upon voluntariness and truthfulness of the confession which has to be

gathered/collected from the responses/answers given by the confessor to mandatory questions. Once it is found that confessor was subjected to maltreatment before production for confession or where confessor states that he/she is making confession due to compulsion of some body else, the confession cannot be taken as voluntary or truthful."

13. The medical evidence in this case has been furnished by PW-8 Dr. Abdul Salam Qazi, Medical Officer, who has confirmed the unnatural death of deceased. However, the fact remains that medical evidence is only used for confirmation of ocular evidence regarding seat of injury, time of occurrence and weapon of offence used, etc. but medical evidence itself does not constitute any corroboration qua the identity of accused person to prove their culpability. Reliance in this regard can be place on the case of Muhammad Sharif and another v. The State (1997 SCMR 866).

14. The reappraisal of entire prosecution evidence would establish the fact that the FIR was not lodged promptly and more particularly the sole eye-witness did not appear before the Investigating Officer on the said date rather his statement was recorded at belated stage. Besides all the star witnesses of the prosecution have made contradictory statements with each. The prosecution has also failed to establish the recovery of crime weapon, and proved that the disclosure as well as the confessional statement of the appellant was volunteer and true, all these facts and legal defects have badly damaged the case of prosecution. The prosecution is duty bound to prove its case beyond any reasonable doubt and if any single and slightest doubt is created, benefit of the same must go to the accused and it would be sufficient to disbelieve the prosecution story and acquit the accused. Reliance in this regard is placed on the case of Tariq Pervaiz v. The State 1995 SCMR 1345, wherein the Hon'ble Supreme Court has held that, "The concept of benefit of doubt to an accused is deep-rooted in our country. For giving him benefit of doubt it is not necessary that there should be many circumstances creating doubt if there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused then accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

For the above reasons, the appeal is accepted. The impugned judgment dated 21st December 2017 passed by learned Sessions Judge, Mastung is set-aside and the appellant Attaullah son of Suqman is acquitted of the charge under Section 302(b) P.P.C. The appellant being in custody; is ordered to be released forthwith, if not required in any other case.

SA/43/Bal. Appeal accepted.

;