

1991 M L D 631

[Peshawar]

Before Wali Muhammad Khan and Mahboob Ali Khan, JJ

SHAKIL KHAN--Appellant

Versus

THE STATE--Respondent

Criminal Appeals Nos. 33, 34, 36, Murder Reference Nos. 5, 6 and Criminal Revision No. 25 of 1989, decided on 18th December, 1990.

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

---S.302/34---Appreciation of, evidence---Confessional statements of both accused had been materially corroborated by the recoveries of fragments of dead body, weapon of offence, clothes, quilt etc. all blood-stained on pointation of respective places by them---Recoveries were effected from such a place where nobody could possibly have any access except the accused---Prosecution witnesses had no enmity or ill-will against accused so as to falsely involve them in the murder case---Conviction of accused was maintained in circumstances.

Mst. Asghari and others v. The State PLD 1989 SC 492 distinguished.

1984 P Cr. L J 2011; 1988 P Cr. L J 1453; 1989 P.Cr.L J 2056; PLD 1,983 SC 88; PLD 1971 Pesh. 41; PLD 1974 Pesh.90; 1980 SCMR 402; PLD 1985 Lah.554; 1988 MLD 2340; 1989 P Cr. L J 437; 1985 SCMR 1455 and 854 and 1984 P Cr. L J 122 ref.

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

---S.302/34---Sentence, mitigating circumstance---Murder was neither premeditated nor prep-learned but was the result of provocation---Female co-accused was not attributed any effective role---Sentence of death of each accused was altered to one of imprisonment for life in circumstances with benefit of S.382-B, Cr.P.C.---[Sentence).

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

---S.302/34---Appreciation of evidence---Confession of an accused person has to be accepted as a whole or rejected as a whole particularly when there is no ocul-r evidence whatsoever connecting accused with the crime and nothing can be engrafted into the same or presumption drawn against confessor.

Saeed Akhtar Khan for Appellant (in Criminal Appeal No. 33 of 1989). Khalid Malik for Appellant (in Criminal Appeal No. 34 of 1989). Mirza Abdullah Jan and Khalid Rehman Qureshi for the Complainant. Muhammad Aslam Khan, A.A.-G. for the State.

Dates of hearing: 4th and 9th December, 1990.

JUDGMENT

WALI MUHAMMAD KHAN, J.--Shakil Khan convict-appellant in CrA.No.33 of 1989 and Mst. Shaheen Akhtar convict-appellant in Cr.A.No.34 of 1989 were tried under sections 302/201/34, P.P.C. for causing the murder of Fiaz Khan deceased, in furtherance of their common intention, by delivering him blows on his head with a hammer, on 5-12-1985, at 'Peshinwela' and concealment of his dead body, by Mr. Miftahuddin Khan, Additional Sessions Judge-I, Haripur and sentenced to death subject to confirmation by this Court, vide his order dated 16-10-1989, under section 302/34, P.P.C. and a fine of Rs.10,000 each or in default to suffer one year R.I. each, half of the fine if realized was ordered to be paid to the legal heirs of the deceased as compensation under section 544-A, Cr.P.C. The order of the learned Sessions Judge, however, is silent about the offence under section 201/34, P.P.C. Both the convict-appellants have challenged their conviction and sentences through different Appeals Nos.33 of 1989 and 34 of 1989 respectively while the learned Additional Sessions Judge has made references for the confirmation of death sentences which are registered as Murder Reference No.5 and 6 of 1989. Mst. Shaheen Akhtar convict-appellant has also submitted a separate appeal from Jail which is registered as Jail Cr. Appeal No.36 of 1989. Javed Khan lodger of the F.I.R. in the instant case has preferred revision petition under section 439, Cr.P.C. for the enhancement of the line and increase in the compensation awarded which is registered as Cr.R.No.25/89. We propose to dispose of all the aforesaid appeals, murder reference and Cr.Revision through this single judgment.

2. The background of the instant tragedy briefly stated is that Fiaz Khan deceased, husband of Mst. Shaheen Akhtar and step-maternal-uncle of Shakil convict appellants, had gone abroad in search of his livelihood and was staying in Saudi Arabia since 1983. During his absence Shakil used to look after his wife Mst. Shaheen Akhtar and his children. Mst. Daryai Khanum a step-sister of the deceased and mother of Shakil accused also used to stay in the house of the deceased along with his other family members. The deceased came to Pakistan somewhere during the last days of November, 1985 and disappeared from 5-12-1985. His whereabouts could not be known for about 5/6 months which aroused suspicion in the minds of his relatives and other co-villagers. An anonymous application was received by the Inspector General of Police which according to the normal procedure reached the S.H.O. for investigation under the endorsement of the superiors. After obtaining sanction under section 156(3) from the Ilaka Magistrate, necessary investigation in the matter commenced but no clue whatsoever could be found by the Investigating Officer about the fate of the deceased. On 1-7-1986 Javed Khan who posed himself to be the aunt's son of the deceased, lodged the report before Nisar Muhammad Khan SHO, PW 11, which was recorded in form of 'Murasla' Ex P/1. later on incorporated in F.I.R. EX.PA, charging convict-appellants for doing away with the deceased on account of illicit relations inter se the two appellants and also on account of mis-appropriation of Rs. One Lac which had been remitted by the deceased to the accused. The same day while proceeding to the spot for investigation of the case in the company of Channan Khan (P.W. 7) and Jumma Khan (not produced), Javed Khan complainant (P.W. 6) pointed to a Suzuki and told the S.H.O. that accused Shakil was sitting in the said Suzuki. The SHO stopped the same and apprehending Shakil accused started interrogating him regarding the occurrence. Shakil accused made a clean breast of the entire tragedy from start to finish and confessed his guilt implicating Mst. Shaheen Akhtar accused as equally responsible along with him for the murder of the deceased. He expressed his willingness to point out various places where the deceased was given blows with hammer, the place he was originally buried, the place where the dead body after being brought out from the ground was cut into pieces and then thrown in the well of the latrine and also the various places where the weapons of offence, clothes of the deceased and other articles had been concealed and memo. to this effect was prepared which is Ex. PW 7/3. Thereafter Shakil accused led the police to the house of the deceased wherefrom at his pointation 'cot' EX.P 9 at which the deceased was asleep at the time of occurrence and bulb Ex.P 10 were taken into possession vide memo. Ex.PW 7/4. A 'churri' Ex. P 11 was also recovered from inside the western room at the pointation of the accused Shakil which was also taken into possession vide

EXPW 7/5. He also pointed out the place where the dead body of the deceased was originally buried inside the room wherefrom it was taken out after 4 months and then, after cutting it into pieces thrown into the well of the latrine wherefrom pieces of the clothes of the deceased Ex.P12, Chadar Ex.P13, mattress Ex.P14 and fragments of the dead body were recovered vide memo. EX.PW7/6. Blood-stained earth was also recovered vide memo.Ex.PW7/7 and hammer Ex.P 15 was taken into possession vide memo Ex.PW 7/8. The clothes and the earth were sent to the Chemical Examiner for his report. The fragments of the dead body were identified, by Habibullah Khan PW 3, to be that of Fiaz Khan deceased and a memo. to this effect was also prepared by the Investigating Officer which is Ex.PW 7/11 on the file.

Mst. Shaheen Akhtar accused was arrested on 5-7-1986 and she also confessed her involvement in the commission of the crime and led the police to her house where from at her instance quilt Ex.P 19 having blood-stains, a file (Reti), Ex. P 20, 'Gainthi' Ex.P 21 and spade Ex.P 22 were recovered in the presence. of Channan Khan .P.W. 7. Shaol Khan co-accused was produced before S. Asmat Ali Shah EAC (P.W.2) who recorded his confessional statement at 10-15 a.m. on the following day viz. 2-7-1986. His confessional statement Ex. P.W. 2/2 is on the file. Police custody was obtained for Mst. Shaheen Akhtar accused and during the continuation of police custody she was produced before the same EAC on 8-7-1986 and her confessional statement Ex. P.W. 2/6 was also recorded. On the completion of the investigation challan was put in the Court of Ilaqa Magistrate who in his turn sent up both the accused for trial to the Court of Session. Necessary charge-sheets were framed against both the accused to which they pleaded not guilty and claimed trial.

3. The prosecution produced as many as 11 witnesses in support of their version but none of them supplied ocular testimony of the account and they are either connected with the recoveries of certain items, or confessional statement of the accused (judicial or extra judicial) and the investigation of the casa to which brief references have already been made and shall be referred to while discussing the respective contentions of the learned counsel for the parties. The learned trial Judge on the, appraisalment of the evidence, produced by the prosecution felt convinced about the guilt of the accused-appellants and convicted and sentenced them as enumerated in the earlier part of the judgment:

4. Dr. Iftikhar Ahmad P.W. 1 examined the fragments of the dead body of the deceased brought out from the well of the latrine by the police in the presence of Habibullah Khan P.W. 3 and Chanan Khan P.W. 7 and found skull cut at the base with fracture left forehead bones with some scalp hair present, upper arms of both sides, lower arms of both sides, hands of both sides, right shoulder girdle, with interior chest wall, left shoulder girdle with posterior chest wall, posterior abdominal wall, pelvis, right thigh, legs of both sides, foot (right and left). According to him the skin and viscera were completely absent while some portions of muscles with some parts of the body were present. In his opinion the cause of death was due to blunt injury to the skull. Probable time that elapsed between injury and death was instantaneous and death and post mortem examination about 6 and 7 months.

5. The fragments of the dead body including piece of skull with hairs were sent to Dr. Inayatpur Rehman for examination. He opined that the pieces of the dead body were that of male sex as, in his view the cutting of the hairs was 'boy-cut'. The Chemical Examiner's report Ex.PW 11/6 reveals that all the articles sent to him in 9 parcels were found stained with human blood. Ex.PW 2/2 is confessional statement of Shakil accused-appellant recorded on 2-7-1986 by S. Asmat Ali Shah P.W.2 while Ex.PW 2/6 is the confessional statement of Mst. Shaheen Akhtar accused-appellant recorded by-the same Magistrate on 8-7-1986. The other documents have already been referred to in detail and need not to be repeated.

6. Mr. Saeed Akhtar Advocate leaned counsel for Shakil accused-appellant emphatically argued that the prosecution had failed to establish beyond doubt that the fragments recovered from the well of the latrine situated inside the house of the deceased were that of the deceased Fiaz; that the occurrence is undoubtedly not witnessed by any one; that the confessional statement of the accused-appellant being retracted could not

be made the basis of conviction of the accused-appellant; that there were no material corroborations of the so called confessional statement and that the alleged recoveries were concocted and made. at the back of the accused-appellant by the police; that net independent witness from the locality was made- to witness the pointation by the accused-appellant; that Chanan Khan P.W. 7 belonged to a different village 'Pandori' distant about Z miles from toe place of recovery and being involved in so many criminal cases was a stock witness and unreliable; that Habibullah P.W. 3 who allegedly identified the dead body did not show the presence of accused Shakil at the time of the recovery of the fragments which negates the prosecution theory that these were recovered at the instance and pointation of Shakil accused; that the motive alleged was neither proved nor reasonable in view of the differences in the ages of the accused inter se and finally that there was material contradiction in the time of occurrence shown in the charge-sheet and the confessional statements, resulting in vitiation of the entire proceedings. In support of his arguments he relied on the judgment of Supreme Court in case of Mst. Asghari and others v. The State reported as PLD 1989 SC 492 by which the august Supreme Court set aside the death sentence awarded by the Sindh High Court vide their judgment reported as 1984 P Cr. L J 2011. He also relied on 1988 P Cr. L J 1453 and 1939 PCr.LJ 2056. He also argued in the alternative that if the confessional statements are accepted even then the offence would fall under Exception IV of section 300, P.P.C. culpable homicide not amounting to murder and punishable under section 304, Part I, P.P.C. As a second alternative he submitted that in view of the peculiar circumstances of the case lesser penalty will meet the ends of justice.

7. Khalid Malik Advocate learned counsel for Shaheen Akhtar accused appellant submitted that the confession of his clientness was undoubtedly recorded during the time when she was already in police custody and prima facie its genuineness is not free from doubt. According to him there was no corroboration of her confessional statement and the alleged recovery of gainthy, spade etc which is normally available in the agriculturists' houses does not supply the requisite corroboration inasmuch as these articles were not used in the commission of the offence. The recovery of quilt which is stated to be bloodstained is not sufficient to corroborate the confession.

8. Muhammad Aslam Khan Assistant Advocate-General for the State and Abdullah Jan Mirza Advocate counsel for the complainant strenuously rebutted the arguments of the learned counsel for the accused-appellants one by one and cited several authorities including PLD 1983 SC 88, PLD 1971 Pesh. 41 PLD 1974 Pesh. 90, 1980 SCMR 402, PLD 1985 Lah. 554, 1988 MLD 2346, 1985 P Cr. L J 437; 1985 SCMR 1455 and 854 and 1984 P Cr. L J (Peshawar) 122.

9. We have patiently considered the arguments of the learned counsel on either side. The facts of the judgment of the Supreme Court reported as PLD 1989 SC 492 are apparently identical with the facts of the present case and the learned counsel for the appellants therefore laid great stress that the accused appellants in the instant case also deserve clean acquittal. We have perused the said judgment again and again and are of the view that the facts of the cited case are distinguishable from the facts of the present one. The fragments of the dead body in the cited case were wrapped in the plastic bag and were recovered from the courtyard of the house of the deceased in that case whereas the recoveries in the instant case were made from the well of the latrine. The substance of the confessional statement of the accused in the cited case is not discussed in the cited judgment but the perusal of the confessional statement of the accused in the instant case shows that the police could not possibly lay hand at the fragments unless the secret had been divulged to them by the two appellants. The recovery of blood-stained chhuri in the cited case was made from outside the house and the same was exposed to weather and therefore the opinion of the august Supreme Court that the blood could not remain on the churri for such a long interval is not attracted to the recovery of the blood-stained chhuri in the instant case as it was lying inside the room which remained uninhabited during the time from the date of occurrence till the recovery of the chhuri. The hammer and spade produced by the witnesses in the said case were not blood stained whereas the hammer i.e. the weapon of offence here, concealed in the pit of latrine was opined by the Chemical Examiner to be blood-stained. The motive alleged in the cited case was also not accepted whereas the motive in the instant case is disclosed for the first time in the confessional statements.

We are therefore of the considered opinion that the instant case is to be considered on its own merits and that the cited judgment of the august Supreme Court is not of much help to the accused-appellants.

10. It is undisputed that Shakil appellant is the step-sister's son of the deceased Fiaz while Mst. Shaheen Akhtar accused-appellant is .the wife of the deceased. It is also not denied that both of them lived together during the absence of Fiaz deceased and the development of illicit relations inter-se between them cannot be ruled out. The remittance by Fiaz deceased to the accused is natural and in view of the illicit relations, the squandering of the same by the accused appellants is obvious. The conduct of both of them not to make a report in the police station regarding the missing of the deceased for, such a long time also points to their guilty conscience. The lodging of the F.I.R., the arrest of Shakil accused, his readiness to disclose every thing though he suppressed it for such a long time and then the pointation of the places where the fragments of the dead body and the blood-stained articles had been concealed on the same day is a coincidence but -in the absence of any motive for the police to involve Shakil accused-appellant falsely for the murder of the deceased, we have no doubt in our minds that all this is a reality, particularly when he is not shown present in the village during the course of 156(3), Cr.P.C. investigation. He was produced before the Magistrate on the following day of his arrest and he reiterated what he had disclosed to the I.O. in his confessional statement. S. Asmat Ali Shah P.W. 2 in his statement in Court stated on oath that the confession was voluntary and that he has observed all the formalities.

11. Mst. Shaheen Akhtar accused-appellant was arrested on 5-7-1986 and she also confessed the part of her guilt attributed to her by Shakil accused and her confessional statement is corroborated by the recovery of quilt having stains of blood, concealed in an almirah.

12. Doubtless, the confessional statements have been retracted and according to the judicial pronouncements a retracted- confession cannot be made the sole basis for the conviction of the confessor unless materially corroborated by other material evidence in the case. The confessional statements of both the accused-appellants have been materially corroborated through the recoveries of the fragments of dead body, weapon of offence, clothes, quilt etc. all bloodstained and also on the pointation of the respective places by the two appellants. The recoveries were effected from such a place where nobody could possibly have 1 any access than the inmates of the house, admittedly the two appellants, the others being children. Mst., Daryai Khanum is the mother of Shakil accused. Both the accused had not put any responsibility on her for the murder of deceased or the concealment of the dead body. Habibullah P.W. 3 has no enmity with the accused to falsely implicate them. Chanan Khan P.W. 7 may be involved in the catalogue of cases but he too has no ill will or enmity against the accused appellants so as to involve them falsely in the murder of Fiaz deceased. The deceased could not be traced uptill now and it was never suggested on behalf of the accused-appellants that he may still be alive. In the normal course of events he would have appeared by now after coming to know that his kith and kin are being tried for his murder. We have no doubt in our minds that Fiaz deceased has been done to death and the fragments recovered are of his dead body and not of any one else. We are therefore convinced that the two appellants are responsible for the homicide of the deceased and were rightly convicted by the learned trial Judge vide his impugned judgment. .

13. Nevertheless the nature of the offence and the sentence awarded by the learned trial Judge needs further proof. In the case in hand there is no ocular evidence and the confessional statements of both the appellants are the only piece of evidence connecting them with the instant crime. It is an established principle of law that the confession of an accused-person has to be accepted as a whole or rejected as a whole particularly when there is no ocular evidence whatsoever connecting them with the crime and nothing can be engrafted into it presumption drawn against the confessor. It is stated in tire confession of Shaki appellant that he came from Rawalpindi at 3.00 p.m. on 5-12-1985 and no sooner did he enter the house he saw his maternal-uncle Fiaz asleep and Mst. Shaheen Akhtar accused informed him that she was beaten by the deceased previous night and that the deceased had taken oath that he would kill both of them and thereafter marry the younger sister of Shaheen Akhtar co-accused who was betrothed to Shakil. He added that he got provoked on the false

charge levelled against him and also because of the intention of the deceased marry with hi would-be-wife. He further stated that Mst. Shaheen Akhtar accused-appellat provided him with a hammer with which he delivered a blow on the head of the deceased resulting in his death. This part of the confessional statement cannot ignored because Mst. Shaheen Akhtar appellant too has, more or less, narrate the same version in her confessional statement. Shakil was aged 22 years at the time of occurrence and was definitely younger in age than Mst. Shaheen Akhtar, appellant who was also mother of 4 children and being maternal-aunt was, in the ordinary course of nature, in a position to exercise dominating influence over Shakil accused-appellant. There is no evidence regarding the illicit relations between the two accused-appellants. Shakil accused, in his confessional statement has not confessed that he had illicit relations with his co-accused Mst. Shaheen Akhtar rather he dubbed it as a false charge. In view of the contents of the confession of Shakil accused the murder was neither premeditated nor pre-planned but the result of provocation caused to him ex consequential the intention of the deceased disclosed to him by Mst. Shaheen Akhtar his co-accused. The subsequent conduct of Shakil appellant in the concealing of the dead body is unbecoming of a gentleman, but once a crime is committed the suppression of the guilt by the offender and the concealment of the evidence is a natural phenomena. The learned trial Court has not passed any sentence under section 201/34, P.P.C. and as such his subsequent conduct becomes irrelevant so far as the homicide of the deceased is concerned. In the circumstances we are inclined to hold that while maintaining the conviction under section 302, P.P.C. the lesser penalty provided under the law would amply meet the ends of justice so far as the case of Shakil accused-appellant is concerned.

14. As regards Mst. Shaheen Akhtar appellant she is not attributed any effective role. All that she is involved for is the communication of the intention of the deceased to kill her and Shakil and providing him with hammer. In her case too we feel that the death penalty is not called for and the lesser penalty would meet the ends of justice. .

.15. The upshot of the above discussion is that we partly accept Criminal Appeal No: 33 of 1989 and Criminal Appeals Nos. 34 of 1989 and 36 of 1989 and by maintaining the conviction of both the appellants under sections 302/34, P.P.C. modify the sentence of death awarded to them to that of imprisonment for life. The other sentences shall remain intact.

16. The murder reference is accordingly not confirmed.

17. Criminal Revision too bereft of any substance is dismissed.

18. Since the death sentence of both the appellants is modified to that of imprisonment for life, they shall enjoy the benefits of section 382-B, Cr.P.C.

N.H.Q./1157/P

Appeals partly accepted.