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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

Criminal Appeal No.1978 of 2015
(Rani Bibi v. The State, etc.)

JUDGMENT

Date of hearing: 24.10.2017

Appellant by: M/S Shabbir Ahmed and Mian Liaquat Ali, Advocates.
Complainant By: Malik Allah Yar, Advocate.
State by: Mr. Haroon ur Rasheed, DDPP.

Ch. Abdul Aziz, J. This judgment shall dispose of the afore-captioned appeal which is arising out of judgment dated 31.07.2001 passed by the learned Additional Sessions Judge, Jhang in a trial of case FIR No.437/1998 dated 21.08.1998 under sections 364,201,302,109,148,149 PPC registered at Police Station City Chiniot, District Jhang. Vide the impugned judgment, the learned trial court while acquitting co-accused Mst. Manzooran Bibi convicted and sentenced Rani Bibi (appellant) along with Muhammad Yousaf, Amir and Bashir as under:-

> **Under section 302 (b) PPC** to undergo rigorous life imprisonment.

2. Succinctly stated the case of the prosecution as unfolded by Sher Muhammad (PW.3) in complaint (Exh.PA/2) is to the effect that his real brother namely Asghar Ali was married with Mst. Rani daughter of Ameer (appellant) one year before the registration of the F.I.R. Muhammad Yousaf son of Ameer (co-accused) who was the real brother of the appellant was not happy with this marriage and had openly expressed his resentment in the presence of two witnesses

namely Dost Muhammad and Shehbaz (given up). According to complaint (Exh.PA/2), Asghar Ali (deceased) and Mst. Rani (appellant) were living in their house situated in Bhutto Colony, Faisalabad Road, Chiniot. On 22.05.1998 Yousaf, Bashir, Ameer and Mst. Manzooran (co-accused) visited the couple on the above mentioned address and in the presence of Sher Muhammad (PW.3) and Riaz Ahmed (PW.4) and Sanatta (given up PW) took them along to their house. When Asghar Ali (deceased) and Rani (appellant) did not return, Sher Muhammad (PW.3) visited their house and inquired about Asghar Ali but got no satisfactory reply. Since he got no clue of his brother, hence, the complainant got registered the instant case.

3. The matter was investigated by Abdul Hameed SI (PW.8). He arrested Muhammad Yousaf, Ameer and Bashir Ahmed (co-convicts) on 25.08.1998 and during interrogation they disclosed on 26.08.1998 that they had murdered Asghar Ali (deceased) and in pursuance of disclosure they led to the recovery of the dead body of Asghar Ali (deceased) from the courtyard of his (deceased's) house. The investigating officer after recording the statements of the PWs under section 161 Cr.P.C., proceeded with the investigation of the case, during which initially he arrested Yousaf, Bashir and Ameer (co-convicts) who on 26.08.1998, made a disclosure regarding the murder of Asghar Ali (deceased) and led to the recovery of his dead body. Abdul Hameed SI (PW.8) prepared the rough site plan of the crime scene (Exh.PM) as well as the injury statement (Exh.PB) and inquest report (Exh.PB/1). After fulfilling the remaining formalities, Abdul Hameed SI (PW.8) sent the dead body to Civil Hospital, Chiniot for the purpose of postmortem examination under the escort of Muhammad Akram C-640 (PW.5). Rani Bibi (appellant) and Mst. Manzooran Bibi were arrested by Muhammad Siddique SHO on 02.09.1998. Subsequent to their arrest, Rani Bibi (appellant) and

Manzooran Bibi (since acquitted), pointed out the place of the burial of the deceased. After the completion of investigation report under section 173 Cr.P.C. was prepared and accordingly placed before the court for trial.

4. The prosecution, in order to prove its case against the appellant produced eight PWs which include **Sher Muhammad (PW.3)** and **Riaz Ahmed (PW.4)** who deposed about the circumstantial evidence i.e. last seen evidence, the recovery of dead body of the deceased on the pointation of the accused and the motive, **Dr. Mushtaq Bashir (PW.1)** who furnished the medical evidence and **Abdul Hameed SI (PW.8)** who conducted the investigation of this case.

5. The postmortem examination of the dead body of Asghar Ali was conducted by Dr. Mushtaq Bashir (PW.1) on 26.08.1998 at about 1:30 p.m. During examination, Dr. Mushtaq noted the following injury:-

> 1. Fracture 20 cm x ½ cm was present on the left side of the skull, decomposed brain matter was visible through the fracture to some extent".

According to the opinion of the doctor, the death in this case occurred due to haemorrhage, shock and injury to vital organ (brain) resulting from injury No.1, which was sufficient to cause death in ordinary course of nature. According to the doctor, the injury was ante mortem and was caused by blunt edged weapon. The probable time that elapsed between injury and death was immediate and between death and postmortem examination 3 to four months.

6. The learned trial court examined Mst. Rani (appellant) and her co-accused under section 342 Cr.P.C. The appellant in response to question "Why this case against you and why the PWs have deposed against you", replied as under:-

> "The deceased was real brother of the complainant. The complainant and the deceased were inimical to each other. The deceased might have been murdered by the complainant party or

> his instance. As I was legally wedded wife of the deceased and I have been involved along with my family just to restrain from Pairvi of my deceased husband."

The appellant neither made statement under section 340 (2) of Cr. P.C. nor produced any evidence in her defence. On the conclusion of trial, the appellant was convicted and sentenced as stated above, hence, the instant appeal.

7. Learned counsel for the appellant contended that there is an inordinate delay of about three months in the registration of FIR and such delay is not explained in any manner; that the instant case is comprising upon circumstantial evidence wherein the necessary links to connect the appellant with the commission of offence are missing from the chain of circumstances; that the prosecution miserably failed to prove the motive which it took at the time of registration of FIR; that the learned trial court failed to appreciate that the last seen evidence furnished by the witnesses was not in consonance with the principle of proximity of time and distance; that on the same set of evidence the co-accused of the appellant namely Mst. Manzooran Bibi has been acquitted by the learned trial court; that despite the fact, the discrepancies and shortcomings of the prosecution case are giving rise to doubt about the involvement of the appellant in the commission of offence but the learned trial court withheld its benefit from the appellant and such approach is contrary to the settled principles of Criminal Jurisprudence.

8. On the other hand, learned DDPP assisted by learned counsel for the complainant vehemently controverted the arguments advanced on behalf of learned counsel for the appellant and submitted that though there is a delay in the registration of FIR but the same stands explained; that the delay in reporting the matter to the police occurred due to the fact that initially the complainant had been making efforts for the recovery of his brother at his own; that the guilt of the

appellant stands established on the basis of circumstantial evidence comprising upon the evidence of last seen, the recovery of dead body on the pointation of the co-convicts of the appellant, the pointing out of the place of burial of the deceased by the appellant and the motive; that the chain of last seen evidence reasonably connects the appellant with the commission of crime, hence she was rightly convicted by the trial court.

9. Arguments heard and record perused.

10. The case of the prosecution, so to speak, primarily hinges upon the circumstantial evidence, which was in the nature of last seen evidence, the recovery of dead body of the deceased on the pointation of the co-convicts, the pointation of the place of burial of the deceased by the appellant and the motive. In support of the above strings of circumstantial evidence Sher Muhammad (PW.3) and Riaz Ahmed (PW.4) appeared as witnesses during the trial.

11. A wade through the prosecution case reveals that the wheel of law in the instant case was set in motion by Sher Muhammad (PW.3) through a written complaint (Exh.PA/2) which was presented in the police station on 21.08.1998 and resultantly formal F.I.R (Exh.PH) was chalked out by Zahid Hussain HC/968 (PW.6). According to the detail provided in Exh.PA/2, real brother of Sher Muhammad (PW.3) namely Asghar Ali was married with Mst. Rani daughter of Ameer (appellant) one year before the registration of the F.I.R. Muhammad Yousaf son of Ameer (co-accused) who was the real brother of the appellant was not happy with this marriage and had openly expressed his resentment in the presence of two witnesses namely Dost Muhammad and Shehbaz (both having been given up by the prosecution). According to complaint (Exh.PA/2), Asghar Ali (deceased) and Mst. Rani (appellant) were living their house situated in Bhutto Colony, Faisalabad Road, Chiniot. On 22.05.1998 Yousaf,

Bashir, Ameer and Mst. Manzooran (co-accused) visited the couple on the above mentioned address and in the presence of Sher Muhammad (PW.3), Riaz Ahmed (PW.4) and Sanatta (given up PW) took them along to their house. When Asghar Ali (deceased) and Rani (appellant) did not return, Sher Muhammad (PW.3) visited their house and inquired about Asghar Ali but got no satisfactory reply. Resultantly, he approached the police through complaint (Exh.PA/2).

In the above backdrop, it is noticed that the story of the prosecution revolves around the statements of two witnesses namely Sher Muhammad (PW.3) and Riaz Ahmed (PW.4). They appeared in the dock in support of the evidence of last seen, recovery of dead body as well as the motive part of the prosecution case. So far as the evidence of last seen is concerned, it evinces from their statements that Asghar Ali (deceased) was seen last time alive in the company of the appellant and his co-accused on 22.05.1998, while leaving his house situated in Bhutto Colony Faisalabad Raod, Chiniot in the company of appellant and her co-convicts. According to the case of the prosecution subsequent to that neither any person saw Asghar Ali (deceased) alive nor heard about him. As per settled principles, the evidence of last seen is always regarded as a weak type of evidence and such evidence itself is not sufficient to award conviction. In order to award or uphold the conviction of a person on the basis of last seen evidence, the prosecution is required to place on record some other independent piece of evidence, which may provide sufficient corroboration. In the absence of such corroboration, it is not considered safe to award the conviction solely on the basis of last seen evidence. In this respect, the reference can be made to the case of *Altaf Hussain v. Fakhar Hussain and another* **(2008 SCMR 1103)** wherein the Hon'ble Supreme Court of Pakistan observed as under:-

> "It is settled principle of law that the last seen evidence is a weakest type of evidence unless corroborated with some other piece of evidence which is conspicuously missing in this case."

12. In view of above, before giving finding on the last seen evidence, it would be appropriate to have a look on the remaining prosecution case and to see whether there is any other independent evidence which provides corroboration to the case of the prosecution or not.

It divulges from the record that at the time of registration of F.I.R, Sher Muhammad (PW.3) came forward with a twofold motive. According to him, Yousaf (co-accused/convict) was not happy with the marriage of Asghar Ali (deceased) and Rani Bibi (appellant) as in this respect he had openly expressed his resentment before two witnesses namely Dost Muhammad and Shahbaz. Likewise, he also asserted that Yousaf etc. had borrowed an amount of Rs.60,000/- from Asghar Ali and on his demand, they were not returning the said amount, due to which even Rani Bibi (appellant) was not happy with Asghar Ali (deceased). So far as the earlier part of the motive is concerned, it is noticed that two persons namely Dost Muhammad and Shahbaz, before whom Muhammad Yousaf expressed his resentment, were not produced as witnesses before the court. From the non-production of the two witnesses, it follows that the most important piece of evidence relating to the motive part of the prosecution case, was withheld and that too without assigning any legally acceptable explanation. In such circumstances, this Court is not left with any other option but to draw an inference that had the prosecution produced these witnesses, they would not have supported its case. Such an inference is in accordance with Article 129, Illustration (g) of Qanun-e-Shahadat Order, 1984. For advantage sake, the foregoing provision is being reproduced below:-

> "**129. Court may presume existence of certain facts.** The Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and the public and private business, in their relation to the facts of the particular case.
>
> **Illustrations**
>
> The court may presume:
> (g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it."

It is further noticed that Sher Muhammad (PW.3) while appearing in the witness box himself admitted that the marriage was solemnized with the blessing of the family members. Not only this, he stated in unequivocal terms that Muhammad Yousaf (co-convict) also participated in the marriage ceremony. In this respect, it would be appropriate to reproduce the relevant extract from the testimony of Sher Muhammad (PW.3) which is as under:-

> "My brother Asghar Ali deceased contracted marriage with the accused Mst. Rani with my consent. The parents of Mst. Rani accused also were present in the marriage as a willing party. Yousaf brother of the accused Mst. Rani also participated in her marriage with the deceased."

So far as the lending of an amount of Rs.60,000/- is concerned, neither the date and time nor the person to whom the said amount was given, was brought on record by Sher Muhammad (PW.3). The above features of the prosecution case, reasonably reflect that the prosecution case, so far as it relates to the motive, has no scintilla of truth. It goes without saying that the motive, more so in case of circumstantial evidence, is like backbone of the prosecution case. Once the motive is alleged, the prosecution is obliged to prove it. Failure to do so is to adversely affect the case of none other than the prosecution. While holding so, this Court is enlightened by the observation of the Hon'ble Supreme Court of Pakistan in case of

Noor Muhammad v. The State and another **(2010 SCMR 97)** wherein it has been held that:-

> "Prosecution though not called upon to establish motive in every case, yet once it has set up a motive and fails to prove the same, then prosecution must suffer the consequence and not the defence".

13. According to the case of the prosecution, the dead body of the deceased was recovered on 26.08.1998 at the pointation of Ameer, Bashir and Yousaf (co-convicts) from the house of the deceased situated in Bhutto Colony Faisalabad Road, Chiniot. Admittedly at the time of the recovery of the dead body, neither the appellant was present at the crime scene nor made any such disclosure. An in depth analysis of the prosecution case reveals that Rani Bibi (appellant) and her co-accused Manzooran Bibi (since acquitted by the trial court) made a disclosure on 02.09.1998 while in police custody and pointed out the place of burial of the dead body of the deceased. Though the learned DDPP argued with vehemence that such piece of evidence is admissible under Article 40 of Qanun-e-Shahadat Order, 1984, yet this Court is not in agreement with him. In order to address the arguments of the learned law officer, it would be in fitness of things to have a look as to how Article 39 and 40 stand incorporated in Qanun-e-Shahadat Order, 1984, hence are being reproduced below:-

> "**39. Confession by accused while in custody of police not to be proved against him**. Subject to Article 40, no confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
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> **40. How much of information received from accused may be proved.** When any fact is deposed to as disclosed in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

A wade through the above provisions reveals the intent of the legislatures, which can be gathered to the effect that a statement of an accused made in the custody of the police, is inadmissible under Article 39. It further evinces that Article 40 is an exception to what is contemplated in the earlier Article. According to Article 40, a statement of an accused made in the police custody, can be brought on record only if it leads to the discovery of a fact, perceivable through senses. In order to attract the provision of Article 40, the prosecution is obliged to prove that the information given by the accused led to the recovery of a fact, which was not previously known to anybody. A simple statement of an accused regarding the facts which are already in the knowledge of police or any person, does not fall within the purview of Article 40 and instead will fall within the ambit of Article 39 of the Qanun-e-Shahadat Order, 1984. From above, it can safely be gathered that the alleged statement and disclosure of Rani Bibi (appellant) was an inadmissible piece of evidence and should not have been brought on record by the learned trial court. It will not be out of context to make reference to the case reported as *Haji Muhammad Jan and another v. The State* **(2014 P Cr L J 571)** wherein, while interpreting Article 39 and 40 of Qanun-e-Shahadat Order, 1984, it was observed as under:-

> "We have considered the submissions of the learned counsel for the appellants in regard to disclosure memo and we concur the view of the learned counsel for the appellants that it can hardly fall within the ambit of Article 40 of Qanun-e-Shahadat, 1984, because an admission under the Article must lead to discovery of some new fact or resulted in recovery of property of the case, mere statement about the facts already in knowledge is not admissible. The learned counsel for the appellants was correct to submit that the disclosure made, cannot be used as an admission within the meaning of Article-39 of Qanun-e-Shahadat, whereby, confession of an accused in custody recorded by the police not to prove against him. In the instant case neither any recovery of effected on the basis of alleged disclosure, nor some new fact discovered, therefore, the disclosures were out of consideration being not admissible."

14. It is equally important to mention here that a heavy duty is cast upon the Presiding Officer of a court at the time of recording of the evidence. He is legally obliged to bring on record, only the evidence which is legally admissible. He must be at his toes to discard evidence, which is inadmissible in nature. Likewise, if any objection is raised either by the defence or by the prosecution, regarding the admissibility of any evidence, the learned Presiding Officer of the court is to decide the fate of such an objection there and then. It is not appreciable on his part to dispense with his order regarding such an objection till the final pronouncement of the judgment. Such an approach on one hand is likely to frustrate the very wisdom and intent of the legislatures, whereby it is desired that an inadmissible piece of evidence should not be made part of the record and on the other hand reflects adversely about the legal acumen of the court. It will not be out of place to mention here that the very purpose of creation of judicial system is to administer justice and to achieve such object, the courts have to strive hard with full vigilance and application of judicious mind. Any slackness on the part of the court is likely to damage the repute of judicature and can result into loss of faith in the judicial system by the litigants. Such a purpose can only be achieved, if the proceedings before the courts are conducted strictly in accordance with the law of the land. While embarking upon the similar issue the learned Division Bench of the Hon'ble High Court of Sindh in the case of *Asif Jameel and others v. the State* **(2003 MLD 676)** observed as under:-

> "At the time of recording of evidence heavy responsibility lies upon the prosecution and defence counsel to be alert so that inadmissible evidence should not come on the record. As soon such evidence is tendered by the prosecution or defence counsel, then the other party should immediately raise objection to the admissibility of such question/evidence and the Court should decide the same then and there and prevent it from coming on the record, if it is found to be inadmissible in evidence. If for any

> reason, the prosecution or defence does not raise such objection to the admissibility of evidence then it is the duty of the Judges to check such evidence, because the Judge has to play an active role while recording the evidence of witnesses. The evidence should not be recorded in a mechanical manner. A distinction has to be made between admissible and inadmissible evidence and only admissible evidence shall be allowed to come on record. If any inadmissible evidence is brought on the record, then it will adversely reflect upon the conduct of the prosecutors and defence counsel on their alertness, ability and knowledge of law etc., while tendering such evidence. At the same time it also reflects adversely upon the conduct of the Court in which, such evidence is recorded, allowed or brought on the record. Not only that, but it will unnecessary burden the record, which is ultimately to be discarded, and wastage of energy and Court's time, which can be utilized to some other work."

There is another aspect which renders the alleged disclosure and pointation of the appellant, mentioned above, of no legal significance. The perusal of the statement of the appellant recorded under section 342 Cr.P.C. reveals that this piece of evidence which otherwise is inadmissible in nature was also not put to her. Before proceedings further, it would be in fitness of things to observe here that the examination of an accused under section 342 Cr.P.C. after the closure of prosecution evidence is not a mere formality but a legal requirement, which in no manner can be dispensed with. The primary purpose of such an examination is to apprise an accused with all the circumstances which are incriminating in nature, so as to enable him or her to address them properly. Any omission on the part of the court is likely to jeopardize the final decision of the Court. The law is settled that if the accused, facing the trial is not confronted with such circumstances, no conviction can be awarded on the basis thereof. While holding so, this Court is guided by the observation of the Hon'ble Supreme Court of Pakistan in the case of *Muhammad Shah v. The State* **(2010 SCMR 1009)** which is being reproduced below for advantage sake:-

> "It is well settled that if any piece of evidence is not put to the accused in his statement under section 342 Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained."

15. It is intriguing to observe here that Rani Bibi (appellant) was implicated in the case with similarity of evidence with Manzooran Bibi (her mother). However, surprisingly the learned trial court proceeded to acquit Manzooran Bibi whereas handed down conviction of imprisonment for life to the appellant on the same set of evidence. It needs no mention that the accused persons, who stand implicated in a case with allegations of alike nature, are entitled to similar treatment. For this good reason, the Hon'ble Supreme Court of Pakistan has consistently held that the evidence, which is disbelieved qua an accused, it cannot be used for awarding conviction to another accused. Reference in this respect can be placed to the case of *Akhtar Ali and others v. The State* **(2008 SCMR 6)** wherein the Hon'ble Supreme Court of Pakistan has observed as under:-

> "It is settled law that eye witnesses found to have falsely implicated five out of eight accused then conviction of remaining accused on the basis of same evidence cannot be relied upon without independent corroboration. See Ghulam Muhammad's case PLD 1975 SC 588, Sheral alias Sher Muhammad's case 1999 SCMR 697 and Ata Muhammad's case 1995 SCMR 599."

16. In the above backdrop, this can safely be concluded that except the evidence of last seen, the prosecution has not been able to place on record any other circumstance which may connect the appellant even remotely with the commission of crime. So far as the evidence of last seen is concerned, it is important to mention here that according to the PWs, Asghar Ali (deceased) left his house situated in Bhutto Colony, Faisalabad Road, Chiniot in the company of the appellant and his co-accused and subsequently went missing. Surprisingly, the dead body of the deceased was later recovered from the same house and that too

after about three months of the occurrence. The evidence of last seen is very easy to knit but extremely difficult to prove. Besides parallel corroboration, the prosecution is obliged to prove the proximity of time and of distance, so far as the last seen evidence is concerned. As per the case of the prosecution, the deceased left his house in the company of appellant and his co-convicts and went to their house situated in Pindi Bhattian. However, the dead body was recovered not from Pindi Bhattain but from the house of none other than the deceased himself. This aspect of the case casts doubt regarding the correctness of the claim of Sher Muhammad (PW.3) and Riaz Ahmed (PW.4) and renders them unworthy of any credence.

17. The circumstances mentioned above, cumulatively, make the appellant entitled to honourable acquittal from the case. Resultantly, the instant appeal is **ACCEPTED**, conviction and sentence of Rani Bibi (appellant) is set aside and she is acquitted of the charge. Rani Bibi (appellant) shall be released forthwith if not required to be detained in any other criminal case.

18. Before parting with this judgment, I consider it appropriate to observe here that the appellant was arrested in the instant case on 02.09.1998 as a young lady of 24-years of age and has spent approximately two decades in the judicial custody. Despite the case to her extent being of no admissible evidence, she spent all the springs of her life in the darkness of the prison. Since the appellant and her co-convicts were from the poor segment of our society, hence, were not in position to afford the luxury of a defence counsel from their own resources. Resultantly, they challenged the judgment of conviction through jail appeals in the year 2001. However, unfortunately, it transpired in the year 2014 that no appeal was preferred on behalf of the appellant, consequently, the instant appeal was filed in the year 2015. From above, it is unearthed that the ill-fated lady was left to

anguish in the jail solely due to lackluster attitude of the jail authorities. The miseries of the appellant though have come to an end after about eighteen years, yet this Court feels helpless in compensating her but feel persuaded to issue direction to the Inspector General of Prisons, Punjab, Lahore to make sure that in future the youth of the persons like appellant is not rusted in the darkness of barracks of the jail due to the mistake of some official of Prison Department. The office is directed to forward the copy of this judgment to the Inspector General of Prisons, Punjab, Lahore with expectation that he will draw proper future strategy to save some other person from undergoing such like agony.

(Ch. Abdul Aziz)
Judge

Approved for Reporting

(Ch. Abdul Aziz)
Judge

Najum*