THE HIGH COURT OF SINDH AT KARACHI

Criminal Acquittal Appeals No. 101 and 102 of 2021

Present: Mr. Justice Muhammad Iqbal Kalhoro
Mr. Justice Abdul Mobeen Lakho

Date of Hearing	:	10.02.2022
Date of Judgment	:	10.02.2022
Appellant	:	Mst. Jeema through Ms. Amna Usman advocate
Respondent No.1/ State	:	Through Mr. Ali Haider Saleem Additional Prosecutor General Sindh
Respondents/accused	:	N.R

JUDGMENT

ABDUL MOBEEN LAKHO, J.- Mst. Jeema appellant has assailed judgment dated 16.01.2021 passed by learned I-Additional Sessions Judge, Karachi West/MCTC, in S.C.No.1288/2014 and 1289/2014 arising out of (FIR No.26/20211 under Sections 302/376/34 PPC and FIR No.48/2011 under Sections 201/297/34 PPC, registered at PS Piyaro Lund), whereby after full-dressed trial, the respondents/accused were acquitted of the charges, hence the appellant/complainant has preferred instant Acquittal Appeal against the impugned judgment.

2. Brief facts of the prosecution case as narrated in the judgment dated 16.01.2021 reads as under:

> "Succinctly, the case of prosecution propounded in FIR No.26/2011, u/s 376, 302, 34 PPC registered on **06/05/2011** by one Mst. Jheema wife of Ratno Bheel at P.S Piyaro Lund, Tando Allah Yar is that on 07.04.2011 at around 08:00 a.m. in the morning her daughter Shrimati Dhani aged about 13/14 years left house to pluck ladyfingers from the field spread at the area of five acres, the way, accused Nishoo Kolhi and Ramjee Bheel caught hold her, forcibly dragged her into banana crops and committed rape upon her, thenceforth, administered Kerato (spry/pesticides used for killing of insects) to her. She returned to home and

narrated the same story to complainant but she lost her breath in the way towards hospital. According to complainant, one Munshi Raja Meghwar of their landlord Maqsood Qaymkhani was informed about the incident with her daughter who asked her to bury the dead body and within three days justice will be done with her. Subsequently, she was kept on false hopes and she moved application to MIT/Hon'ble High Court, Sindh where-after her FIR was registered. During the course of investigation, dead body of her deceased daughter was found missing from the grave and same was recovered on poiritation of accused Dhanoo on **09/07/2011**. Thereafter, she registered the second FIR No.48/2011 u/s 201, 297, 34 PPC against accused Nishoo, Ramjee, Dhanoo, Akhtar, Imtiaz, Haji Maqsood Qaymkhani, Rajoo, SIP Ghulam Muhammad and Dr. Agha Nasim with the allegations that accused Nishoo, Dhanoo, Akhtar and Imtiaz with connivance to accused Haji Maqsood Qaymkhani, Rajoo, SIP Ghulam Muhammad, Ramjee and Dr. Agha Naseem trespassed into the burial place of her daughter near to her house, excavated the grave of Shirimati Dhani, uplifted her dead body and hidden the same at some unknown place with sole object that the said dead body may not be exhumed by the medical board to ascertain the real cause of her death, more particularly, the act of rape committed upon her and administered poison (Kerato/pesticide) thereby an attempt was made to convert murder of Sherimati Dhani as natural death and removed the dead body of Sherimati Dhani from her grave with intention to cause disappearance of material evidence with object to screen accused Nishoo and Ramjee from legal punishment."

3. After completing investigation, challan was submitted against the respondents before the competent Court of law. Both the cases were amalgamated and amended charge was framed to which accused did not plead guilty and claimed trial. During the trial, prosecution produced 14 PWs to prove its case. Thereafter, prosecution side was closed.

5. Statements of accused were recorded under section 342, Cr.P.C. wherein they denied their involvement in the occurrence and pleaded their innocence. The respondents neither opted to record their statements under section 340(2), Cr. P.C. in disproof of the charge levelled against them nor produced any evidence in their defence.

7. On the conclusion of the trial, the learned trial Court, vide judgment dated 16.01.2021, acquitted the respondents/accused holding that the prosecution had failed to prove its case against them beyond shadow of

doubt. As already stated hereinabove, the complainant had assailed this judgment in the present appeal.

8. Learned counsel for the appellant argued that there was sufficient incriminating material against the respondents, but the learned trial court has failed to appreciate the same .and passed the impugned judgment in slipshod manner; that evidence of the prosecution witnesses was trustworthy and confidence inspiring; that the prosecution has successfully proved its case against the respondents beyond shadow of reasonable doubt, but the learned trial court has recorded acquittal in favour of the respondents on the basis of flimsy grounds. Lastly, it is argued that judgment of the Trial Court is perverse and arbitrary. In support of her submissions, learned counsel has placed reliance upon the cases reported as PLD 1996 SC 305, 2001 SCMR 1474, 2006 SCMR 1197, 2019 SCMR 1982 PLD 2020 SC 295.

9. Learned Additional Prosecutor General Sindh could not point out any incriminating evidence against the respondents despite his strenuous efforts in this regard.

8. We have heard the learned counsel for the complainant as well as learned Additional Prosecutor General at length and have gone through the Impugned Judgment.

9. Primarily the prosecution case is based on dying declaration allegedly made by the deceased to her mother, who is complainant, last seen evidence, extra-judicial confession of accused, discovery of dead body on the pointation of accused and medical examination/autopsy conducted by Medical Board.

10. As regards to the alleged dying declaration made by the deceased before her mother/complainant is concerned, we have gone through the evidence of complainant, who has deposed that she was all alone when her daughter returned and narrated the incident to her. The statement of complainant is contradicted by her husband PW Ratno, who deposed that at the time of incident, entire family was available at home except him and his elder son who was on his work. Complainant during her cross-

examination has stated that she sent Kirshan rikshaw-wala to her brother PW Jayram, who brought him within 5/6 minutes, however said Kirshan was not examined by the prosecution to support the version of the complainant. PW Jayram in evidence has stated that he saw deceased lying in injured condition outside the door of the house of Jheema, but surprisingly no one was attracted or called from the vicinity by the complainant though it was admitted by P.W Ratno that other houses of their *bradari* (clan) were situated near his house. The law is settled by now that dying declaration like statement of interested witness requires close scrutiny, being week type of evidence needs corroboration which is conspicuously missing in the present case. Even otherwise, it is not been explained by the complainant as to why she did not report the matter to the police immediately after dying declaration was made to her by the deceased. This conduct of the complainant is unnatural and casts cloud over the factum of dying declaration.

11. As regards last seen evidence, we have gone through the evidence of P.W Baboo Bheel, cousin of the deceased, who in his evidence has stated that on 07.04.2011, he had gone to the land for irrigating purpose, when at about 7:30 a.m. Mst. Dhani went pass him and proceeded towards fields of Maqsood Qaim Khani where ladyfingers were cultivated. He further stated that after sometime he had heard hue and cry of Mst. Dhani from Banana field, he proceeded towards the Banana field and when reached near, he saw Ramjee and Nashoo were fleeing from there holding bottle of Kerato (pesticide). He identified both of them, whereas Mst. Dhani in trance condition proceeded towards her house. He further stated that he went to his field for irrigating purpose. However, after sometime, he went to his house where he came to know that due to critical condition Mst. Dhani was taken to hospital and after sometime dead body of Mst. Dhani was brought at her home in ambulance. The evidence of P.W Baboo Bheel appears against the natural conduct as after hearing hue and cry of Mst. Dhani, he noticed accused Nishoo and Ramjee fleeing with bottle of Kerato (pesticide), and thereafter, found that she was running towards her house, he did not go behind Mst. Dhani to ask what happened and returned to the field for

irrigating the land, which make his testimony highly doubtful. It is further observed that during cross-examination, though PW Baboo admitted that other farmers of Maqsood Qaim Khani were available in the field, but no one from them was examined by the police in order to support the version of P.W Baboo. P.W Nursingh, who is close relative of the deceased though claimed that he saw accused, Mst. Dhani and P.W Baboo, but has failed to give any plausible explanation of his presence at the relevant time. Even otherwise, he is not eye witness of the alleged incident.

12. So far the recovery of dead body on the pointation of respondent Dhanoo is concerned, the prosecution claimed that accused Dhanoo had pointed out the place of burial in presence of P.W Muhammad Ashraf Hakro and Ali Hassan Hakro, however, prosecution examined P.W Muhammad Ashraf Hakro who categorically stated that he did not see any dead body present there except accused Dhanoo pointed out to them to have seen the dead body lying there with no implication that he had ever hidden or buried any dead body after removing the same from its actual burial place. Even the owner of land/sugarcane namely Ghulam Qadir Hakro, from where the alleged dead body was exhumed was not investigated by the I.O in order to get clarification, therefore, in such circumstances, the recovery of the dead body is highly doubtful.

13. As far as alleged confession made by the respondents before the police is concerned, it is settled principle of law that confession made before police is inadmissible being hit by Article 38 of the Qanun-e-Shahadat Order, 1984, hence it has no evidentiary value.

14. We have also gone through the medical evidence produced at trial, as per prosecution case that alleged incident took place on 07.04.20211, the dead body of deceased was buried without postmortem examination, complainant registered FIR on 06.05.2011 and dead body was exhumed on 21.07.2011 by the Special Medical Board, which was comprising of five senior doctors and in their postmortem report it was observed as under:

- As soft tissues (skin and musculature) were found decomposed so mark of violence/torture on the neck or other parts of body could not be verified.

- Opening of cavities showed, putrefactive process of higher intensity, structural details of internal viscera were found obliterated and all the viscera were converted in to brittle earthy material and unable to provide any evidence of violence.
- No evidence of sexual assault observed in this belated stage due to advanced decomposition.
- No any product of conception observed.
- Bonny thoracic cage and pelvic bony frame was intact.
- No mark of bonny injury were found on the skeletal remnants.
- No evidence of any physical violence (in the form of fracture) noticed on the bony skeleton.

15. According to the Special Medical Board no anatomical cause attributed to death could be ascertained due to advanced stage of decomposition. However, preserved biological specimen for chemical analysis for presence of any toxic substance responsible for death. Specimen of DNA was also sent for analysis and kept final opinion reserved till receipt of report. Chemical and DNA reports were placed on record and it was opined that all 17 substances were found negative and no toxic substance was detected in the dead body in order to establish the allegation of administering poison/pesticide "Kerato" to the deceased. However, human sperm were detected on Article 12 (Green Ghagro with Izarband) and CAMB Lahore held complainant and her husband as biological parents of the said dead body.

16. So far as detection of human sperm on cloths of deceased is concerned, the findings of the learned trial Court are cogent and well-reasoned. Relevant portion of the impugned judgment is reproduced as under:

> "As regards to detection of human sperm on cloths of deceased is concerned, complainant (PW-1) stated **"It is correct to suggest that the clothes of deceased were delivered to the police by me."** Narsing (PW-2) stated **"The worn cloths of deceased Dhani at the time of crime were delivered to the police by us."** Baboo (PW-3) stated **"The cloths of the deceased were delivered to the said police by the complainant in my presence."** Ratno (PW-6) stated **"On 07.05.2011 police again came and inspected place of incident. Police also secured one empty bottle of the poison and cloths of the deceased."** I.O/Inspector Muhammad Bux (PW-

13) stated **"The clothes of deceased were given by complainant which were clean and washed."** I.O/PI Ghulam Muhammad (PW-14) stated **"Complainant produced her witnesses Ratno Bheel, Narsingh and Baboo along with last wearing clothes of her deceased daughter which had already been washed and cleaned."** Captain Shoukat Hussain (PW-9) convener of Special Medical Board produced chemical report as Exh. 17/A and stated **"The chemical examiner in his report stated human sperm detected in Article 12 sent to him."** The deceased was buried in stitched wearing clothes/dress is confirmed by Narsingh (PW-2) **"In stitched cloths the dead body was buried."** The evidence adduced clearly established the factum of two different wearing clothes/dresses of deceased. One which the deceased was lastly wearing at the time of alleged incident or rape, handed to the I.O by complainant but the same had already been washed and cleaned; where after no human sperm could be detected on her second wearing clothes/dress in which she was buried and sent to chemical lab as Article-12 as such no reliance could be placed safely on chemical report which is highly dubious after mentioning human sperm even on changed clothes/dress of deceased. Even her wearing clothes/dress at the time of alleged incident had already impaired its evidentiary value when it was washed and cleaned before handing over to I.O of the case. Hence, the report of chemical examiner is inconsequential and of no use to prosecution. I am therefore not persuaded with the arguments advanced by learned defence counsel regarding availability of human sperm on wearing clothes of deceased leading to any presumption of rape."

17. The prosecution primarily is supposed to establish guilt against the accused beyond shadow of reasonable doubt by bringing trustworthy, convincing and coherent evidence for the purpose of awarding conviction. Needless to emphasize that to convict a person on a capital charge, evidence should be of high quality and good standard which is not available on this case. In the instant case, the judgment rendered by the trial Court is by all means a fair judgment based on proper, just and legal appreciation of the evidences on record. Appellant has failed to show that the impugned judgment of acquittal is fanciful or based on no evidence. It has not been demonstrated that some material evidence was not taken into consideration by the trial Court which, in fact, had caused gross miscarriage of justice. Even otherwise, when an accused person is acquitted from the charge by a Court of competent jurisdiction then, double presumption of innocence is attached to its order, with which this Court and the apex Court normally does not interfere unless the impugned order is arbitrary, capricious, fanciful and against the record which is not present in the case. In the

acquittal appeal, interference is made only when it appears that there has been gross misreading of the evidence which amounts to miscarriage of justice. The ordinary scope of appeal against acquittal is considerably narrow and limited as held in Muhammad Usman and 2 others v. The State (1992 SCMR 498) and The State v. Muhammad Sharif and others (1995 SCMR 635). The acquittal of respondents does not suffer from any illegality so as to call for our interference with the impugned judgment. According to golden principle of benefit of doubt, one substantial doubt is enough to acquit the accused. The evidence in this case is highly discrepant and full of infirmities and as such has created a genuine doubt in our mind regarding involvement of respondents in the commission of crime. The learned trial Court has advanced valid and cogent reasons for passing finding of acquittal in favour of the respondents and we see no legal justification to disturb the same. Resultantly, the appeal fails which is hereby dismissed and the impugned judgment of acquittal is maintained.

Sd/- Abdul Mobeen Lakho
Judge
Sd/- Muhammad Iqbal Kalhoro
Judge

10/02/2022