2019 P Cr. L J 442

[Balochistan]

Before Muhammad Ejaz Swati and Abdullah Baloch, JJ

ABDUL BAQI and another---Appellants

Versus

The STATE and another---Respondents

Criminal Appeal No. 306 and Criminal Revision Petition No. 14 of 2012, decided on 19th May, 2018.

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

----S. 302(b)---Qatl-i-amd---Appreciation of evidence---Application for enhancement of sentence by complainant---Murder was unseen not directly witnessed by any of the witnesses---Entire case of prosecution rested upon circumstantial evidence, as the crime had taken place within the boundary walls of the office of the deceased at the time when all the other shops/offices were closed---Prosecution had produced circumstantial evidence in the shape of extra judicial confession coupled with the recovery of crime weapon---Matching of crime empties, had further strengthened the case of prosecution---Extra judicial confession had been recorded by accused voluntarily---Prosecution through solid circumstantial evidence had established the charge against accused---Motive had been established---Crime being unseen and there being no single witness who had directly witnessed the crime, would be mitigating circumstance---Trial Court was justified by sentencing accused to imprisonment for life---Complainant having failed to establish case for enhancement of sentence, revision petition filed by the complainant for enhancement of sentence, was dismissed, in the circumstances.

Muhammad Amjad v. The State PLD 2003 SC 704 ref.

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

----S. 302(b)---Criminal Procedure Code (V of 1898), S.164---Qatl-i-amd---Conviction on the sole basis of extra judicial confession---For awarding conviction on the basis of extra judicial confession, three-fold proof was required i.e. firstly, it was in fact made; secondly; that it was voluntarily made; and thirdly, it was truly made---Judicial or extra judicial confession could be made sole basis for conviction of an accused, if the court was satisfied and had believed that it was true and voluntary and was not obtained by torture, coercion or inducement.

The State v. Minhun alias Gul Hassan PLD 1964 SC 813 ref.

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

----Art. 40---Admissibility of information conveyed by accused---If any incriminatory material related to the case was recovered, or any fact was discovered in consequence of the information conveyed by accused, then the information so received could be admissible in evidence; because the presumption would be towards its truthfulness.

Muhammad Akram Shah for Appellants.

Yahya Baloch, D.P.G. for the State.

Nemo for the Complainant.

Date of hearing: 20th March, 2018.

JUDGMENT

ABDULLAH BALOCH, J.---This common judgment disposes of Criminal Appeal No.306 of 2012 filed by the appellant Abdul Baqi son of Abdul Karim, against the judgment dated 12th December, 2012 (hereinafter referred as, "the impugned judgment") passed by the learned Sessions Judge (Ad hoc), Quetta (hereinafter as, "the trial Court"), whereby the appellant was convicted under section 302(b), P.P.C. and sentenced to suffer life imprisonment as well as to pay Diyat amount to the legal heirs of deceased, with the benefit of section 382-B, Cr.P.C. The Criminal Revision Petition No.14 of 2012 has been filed by the complainant Saeed Ahmed against the convict for enhancement of his sentence from life imprisonment to that of capital punishment.

2. Facts of the case are that on 31st May, 2009, the complainant Saeed Ahmed lodged FIR No.66 of 2009, at Police Station Industrial Area Quetta, under section 302, P.P.C., stating therein that they are doing business of rice at old vegetable Market Sirki Road Quetta. On 30th May, 2009 at about 5.30 p.m. they along with deceased locked their office and went to home. He further averred that his father and uncle have separate keys of office. After, reaching home his uncle went out on his vehicle bearing registration No.AQC-326 and did not return. They searched him during night as well as made him phone calls, but all in vain. On the following day at about 10.00 a.m., when his cousin namely Muhammad Nadir opened the office and made him phone call that his uncle Ameer Bacha alias Naar Muhammad has been killed and the dead body is lying in office, thus he immediately reached to the office and found the dead body of his uncle lying with the pool of blood, who was murdered by unknown accused(s) by means of fire arm (pistol). Accordingly, the matter was reported to the police and the FIR was lodged.

3. In pursuance of the above FIR, the investigation of the case was entrusted to PW-7 Iftikhar Rasheed, DSP/Investigating Officer (IO), who during investigation visited the place of occurrence; carried out proceedings under section 174, Cr.P.C. by preparing inquest report; took into possession four (4) empties of pistol; two (2) lids, collected blood of deceased through cotton lying on carpet; cheque No.CA-F6362152; prepared site sketch; recorded the statements of witnesses under section 161, Cr.P.C.; took into possession the blood stained shirt, vest and cap of deceased; obtained MLC of deceased; took into possession the registration documents of vehicle owned by the deceased; obtained Call Detail Reports (CDR) of mobile phone of deceased from I.B. Department arrested the appellant and recorded his extra-judicial confession followed by the recovery of crime weapon; prepared the sketch of place of occurrence on the pointation of appellant; took into possession the golden ring wearing by the appellant, Rs.40,000/- cash and narcotics certificate; obtained FSL reports in affirmative. On completion of investigation submitted the challan in the trial Court.

4. At the trial, the prosecution produced seven (07) witnesses, whereafter the appellant was examined under section 342, Cr.P.C. He neither recorded his statement on oath under section 340(2), Cr.P.C. nor produced any witness in his defence. On conclusion of the trial and hearing the arguments, the learned trial Court convicted and sentenced the appellant as mentioned above. Whereafter the convict filed Criminal Appeal No.306 of 2012, while the complainant filed Criminal Revision No.14 of 2012 for enhancement of his sentence.

5. Learned counsel for appellant contended that the prosecution has failed to produce any direct or indirect or circumstantial evidence against the appellant to establish his guilt for commission of charge; that the learned trial Court while awarding conviction to the appellant has mainly emphasized upon the extra-judicial confession of the appellant, but has failed to consider this material aspect of the case that the same was recorded when the appellant was in police custody, hence the same is not admissible under Articles 38 and 39 of Qanun-e-Shahadat Order, 1984; that even otherwise the sole extra-judicial confession of the appellant whilst in police custody is not admissible until and unless supported by other incriminatory evidence; that excluding the alleged disclosure of the appellant, the prosecution has failed to produce any single iota of evidence establishing the guilt of the appellant; that the prosecution has failed to establish the charge through confidence inspiring evidence, thus the impugned judgment passed by the trial Court is not only perverse, but also contrary to record as well as based upon misinterpretation of law, hence deserves to be set aside.

6. Learned counsel appearing on behalf of State opposed the arguments advanced by the learned counsel for appellant and supported the impugned judgment passed by the trial Court and contended that since the incident was unseen, thus the extra-judicial confession of the appellant followed by the discovery of new facts coupled with the recovery of crime weapon are sufficient evidences to make basis conviction of the appellant; that the circumstantial evidence produced by the prosecution have established the past illicit relation of the appellant with the deceased, the matching of empties recovered from the place of occurrence prior to the arrest of the appellant with the crime weapon that was recovered on pointation of appellant that the appellant has failed to point out any single iota of evidence against the police to prove their ill-will or ulterior motive for false implication of the appellant, thus after considering all these material aspects of the case, the trial Court has rightly convicted and sentenced the appellant through the impugned judgment, which otherwise is not open for interference by this Court, despite several opportunities learned counsel for complainant remained absent.

7. Heard the learned counsel and perused the available record with their able assistance. It is evident from the perusal of record that the unnatural death of deceased Ameer Bacha alias Nazar Muhammad by fire arm and receiving multiple bullet injuries are not disputed. The defence has admitted the unnatural death of deceased, but pleaded false implication. PW-6 Dr. Noor Baloch, Police Surgeon Civil Hospital Quetta, examined the deceased and confirmed that the deceased had received multiple entrance and exit wounds by fire arm on his person and further opined the cause of death due to skull (brain) injury. PW-6 issued medical

certificate Ex.P/6-A, which confirms the unnatural death of deceased. The MLC is also supported by the FSL report of blood stained cotton and wearing clothes of deceased, wherein the expert has opined that the same are stained with human blood.

8. Adverting to the statements of prosecution witnesses, suffice to state here that the prosecution in order to substantiate the charge has produced the evidence of seven witnesses. The complainant of the case appeared as PW-1, who reiterated the contents of FIR. According to this witness on the day of occurrence after locking the office they along with their deceased uncle went home, whereafter again his uncle went out from the house and did not return till late hours of night. They also made search of the deceased, but all in vain, however, on the following day when the office was opened by his cousin Muhammad Nadir, the dead body of his uncle was found in the office with the pool of blood, whereafter the police was informed and the investigation proceedings were commenced. PW-2 is the recovery witness of blood stained articles, crime weapon, empties of pistol, CDR and other incriminatory articles. PW-3 is the recovery witness of cash amount of Rs.40,000/- recovered from the possession of the appellant as the witness of extra-judicial confession of appellant Ex.P/3-B, whereby he has confessed his guilt for committing the murder of deceased and taking away his vehicle, cash amount lying in the pocket of deceased as well as the mobile phone that was in the use of the deceased. PW-4 is also the recovery witness of CDR of mobile phone. PW-5 is the recovery witness of the registration documents of vehicle owned by the deceased, while PW-7 is the Investigating Officer of the case who counted the steps taken by him during the course of investigation.

9. The admitted feature of the case is that the instant crime of murder of deceased is unseen as not witnessed directly by any of the witness. Initially the appellant was arrested by the Investigating Officer due to suspicion as on the day of occurrence the appellant remained in contact with the deceased, which fact first time revealed after obtaining the CDRs of both the mobile phones of deceased and the appellant, while after his arrest and during investigation, the appellant has confessed his guilt by recording his extra-judicial confession, which was followed by the recovery of crime weapon. PW-3 Muhammad Ijaz stated that on 6th July, 2009 at about 10.30 p.m. the I.O. was investigating the appellant and the appellant during investigation confessed his guilt by stating that about six months ago he was sitting in Baloch Khan Chowk and was drinking cold drink, when the deceased Ameer Bacha alias Nazar Muhammad being landlord came over there in his Alto Suzuki vehicle and he made acquaintance with him, whereafter he served cold drink to him and subsequently they became friends and not only visiting terms, but also sex relation was developed with the deceased. On 30th May 2009 at Noon the deceased Nazar Muhammad phoned him on his mobile Sim No.0303-8863224 from his mobile Sim No.0300-3812705 and directed him to come at his office situated at old vegetable Market. Hence, at 9.00 a.m. the deceased again made him phone call and advised him to come near Jailani Hospital, hence he rushed over there, when the appellant took him in his personal vehicle to his office, where besides him and the accused no one was there, hence he took out his licensed pistol and made 5/6 firing shots upon the deceased, who become injured and died at the spot. It is

further averred in the disclosure memo that thereafter he (appellant) took out from the pocket of deceased cash amount of Rs.6000/- or Rs.7000/-, his mobile phone and the keys of his vehicle, thereafter he went out and locked the office from outside and started the vehicle and proceeded towards Surkhab, where he sold out the vehicle of deceased upon one Sadiq Alkozai at Rs.95,000/- and out of said amount he purchased a Rado watch and a golden ring, while sold out his mobile phone at Rs.3000/- and placed his Sim No.0303-8863224 in the mobile phone of Nazar Muhammad and started using the same. The appellant further disclosed that since he was working for the Narcotics Department and accordingly an ID card was issued to him. According to the averments of extra judicial confession, on 4th July 2009 the appellant was beaten by unknown persons at Killi Lundi on the allegations for spying for the Narcotics Department and accordingly he reported the matter to the police station Kuchlak. The appellant also admitted that he can recover the crime weapon from his house, whereas he handed over the remaining amount of Rs.40,000/- to the Investigating Officer as the sale proceeds of the vehicle owned by the deceased. Accordingly, the extra-judicial confession of the appellant was reduced into writing by the IO as Ex.P/3-B. It has further been observed that thereafter, the police taken the appellant to his house and recovered the licensed T.T. pistol on his pointation.

10. Admittedly, the entire case of prosecution rests upon the circumstantial evidence as the crime had taken place within the boundary walls of the office of deceased at the time when all the other shops/offices were already closed/shuttered down and in the case in hand the prosecution has produced the circumstantial evidence in the shape of extra judicial confession coupled with the recovery of crime weapon as well as the CDRs proving the previous link of the appellant with the deceased.

11. In order to prove the averments made in the extra judicial confession, the prosecution has produced the Call Detail Reports of mobile phone numbers remained in the use of deceased i.e. 0300-3812705 and the mobile phone No.0303-8863224 owned by the appellant. The Call Detail Reports of both the mobile phones owned by the deceased and the appellant have established the fact that prior to the incident both the deceased as well as the appellant were remained in contact with each other and on several occasion, they made/received phone calls from each other. It is further evident from the CDRs that on the day of occurrence, the deceased had made five phone calls to the appellant and even the appellant has received phone calls in Noon as well as at 21.46 Hours, which fully establishes the averments of the appellant made in his extra judicial confession that on the day of occurrence, the deceased had made him phone call at Noon as well as at about 09.00 p.m. for calling and taking him in his office.

12. Secondly, the appellant in the extra-judicial confession Ex.P/3-B has averred that on 2nd July 2009 he was attacked upon by two persons on the allegations that he is spying for the Narcotics Department and thereafter he reported the matter to Police Station Kuchlak. The prosecution in order to establish such averment of the appellant has produced the report of the appellant on record as Art.P/49 and daily diary report as Art.P/48 of Police Station Kuchlak. It has been observed that such contention was only known to the appellant and besides him, no one knew about

such fact. Bringing of such facts in the extra judicial confession is suggestive of the fact that the same is voluntarily and without any coercion, otherwise such fact has never come on record.

13. Thirdly, the prosecution in order to further establish the averments of the appellant made in the extra-judicial confession has recovered the crime weapon i.e. T.T. pistol from his house on the pointation of the appellant. The appellant did not disown the said pistol being licensed in his name. At this juncture, it is necessary to mention here that the Investigating Officer collected four empties from the place of occurrence on the day of occurrence i.e. 31st May, 2009, while the appellant recorded the extra-judicial confession on 11th July, 2009. However, both the crime weapon and the empties were sent to FSL for analysis. According, the FSL report Ex.P/7-G has been received, wherein it has been opined that the empties were fired from the pistol recovered on the pointation of the appellant. Thus, the recovery of crime weapon as well as the matching of crime empties has further strengthened the case of prosecution and it has further been established that the extra judicial confession has been recorded by the appellant voluntarily without any pressure or torture.

14. According to settled norms of justice for awarding conviction on the sole basis of extra-judicial confession, three-fold proof is required i.e. firstly it was in fact made; secondly that it was voluntarily made; and thirdly that it was truly made. A minute scrutiny of extra-judicial confession Ex.P/3-B indicates that all the ingredients are available in the case in hand, as the same is supported by attending circumstances. It is well settled principle of law that a judicial or extra judicial confession can be made sole basis for conviction of an accused, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement. Reliance in this regard is placed on the case of The State v. Minhun alias Gul Hassan PLD 1964 SC 813, wherein, it was held as under:

> "As far the confessions the High Court, it appears, was duly conscious of the fact that retracted confessions, whether judicial or extra-judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. It is now well settled that as against the maker himself his confession, judicial or extra-judicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement."

15. So far as the objection taken by the defence that since the extra-judicial confession has been recorded in police custody, thus not admissible under Articles 38 & 39 of the Qanun-e-Shahadat Order, 1984, is concerned, suffice to observe here that if any incriminatory material related to the case is recovered or any fact is discovered in consequence of the information conveyed by the accused person, then the information so received would be admissible in evidence within the purview of Article 40 of the Qanun-e- Shahadat Order, 1984 because then the presumption would be towards its truthfulness. It would be advantageous to reproduce hereinbelow the said Article which reads as follows:--

"40. When any fact is deposed to as discovered 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."

16. Since, the disclosure of the appellant has been followed by the recovery of crime weapon as well as the discovery of new facts which earlier was not known, therefore, the same is an admissible piece of evidence. In the case titled Muhammad Amjad v. The State PLD 2003 SC 704, the Hon'ble Supreme Court held as under:

"Further it is noted that as per Article 40, corresponding to section 27 of the Evidence Act, when any fact is revealed in consequence of information received from any accused in custody of a police officer, such information whether it amounts to a confession or not as it relates distinctly to the fact thereby discovered, may be proved. The information supplied by the appellant under Article 40 ibid relating to incriminating articles is admissible."

17. The comparative study of entire prosecution evidence has established the fact that the prosecution through solid circumstantial evidence has establish the charge against the appellant. Even otherwise, the complainant of the case has not nominated the appellant in the crime, while the arrest and nomination of the appellant in the crime is the sole result of the investigation carried out by the police, while the appellant has failed to bring on record any single iota of evidence showing or suggesting the mala fide of the police for his false implication. The motive behind the occurrence has also been established to be sole purpose of usurping the cash amount, mobile phone and the vehicle of the deceased and soon after the commission of crime the appellant sold out the vehicle of deceased. We have also perused the impugned judgment delivered by the learned trial Court and observed that the appellant was rightly found guilty of the charge. The learned trial Court has rightly appreciated the evidence so brought before him and each and every aspect of the case was discussed in detail, however, while delivering impugned judgment instead of imposing specific amount of compensation imposed Diyat amount, which in our opinion was wrongly imposed, as such, the impugned judgment is modified to the extent of Diyat amount as Rs.500,000/- (Rupees five Lac) as compensation to legal heirs of deceased as envisaged under section 544-A, Cr.P.C. Thus, with the above modification the impugned judgment is maintained.

18. So far criminal revision petition filed by the petitioner-complainant for enhancement of the sentence of the appellant from imprisonment of life to death to the appellant is concerned, we are of the view that the crime is unseen and there is no single witness, who had directly witnessed the crime, which would be a mitigating circumstance in the prosecution case. Thus, the learned trial Court was justified by sentencing the appellant to imprisonment for life. The petition has failed to describe a case for enhancement of sentence.

For the above reasons, the appeal as well as the connected criminal revision petition stand dismissed.

HBT/53/Bal. Appeal and Revision dismissed.

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