

P L D 2009 Supreme Court 709

Present: Javed Iqbal, Sayed Zahid Hussain and Muhammad Sair Ali, JJ

MUHAMMAD SHARIF---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.598 of 2005, decided on 12th June, 2009.

(On appeal from the judgment dated 17-12-1998 of the High Court of Balochistan Quetta passed in Criminal Acquittal Appeal No.211 of 1998).

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

---Ss. 302, 342 & 365---Constitution of Pakistan (1973), Art.185(2)(a)---High Court had set aside the judgment of acquittal passed by the Trial Court and awarded death sentence to the accused---Scope of appeal to Supreme Court---Principles.

From the perusal of the constitutional and legal provisions and pronouncements by the esteemed Judges, the developing trend is evident and some of the principles deducible therefrom are that:--

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(i) Where the High Court has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for life, the appeal lies before Supreme Court as of right under Article 185(2)(a) of the Constitution of Islamic Republic of Pakistan. Provision of a separate procedure for that purpose under Order XXII of the Supreme Court Rules, 1980, is a strong indicator in this regard. This itself is indicative of the importance and significance of acquittal which places the matter on different footing than others.

(ii) Supreme Court has every right of examining evidence in a criminal appeal if the interest of justice so demand for which purpose each case will have to be adjudged upon its on facts and circumstances and in case the court reaches the conclusion that the person has been dealt with in violation of the accepted principles of the administration of criminal justice then "no technical hurdles should be allowed to stand in its way of doing justice and seeing that injustice is not perpetuated or perpetrated by the decisions of the courts below".

(iii) As an ultimate court, Supreme Court must give due weight and consideration to the opinions of the courts below and normally the findings should not be interfered where the same "are reasonable and were not arrived at by the disregard of any accepted principle regarding the appreciation of evidence". But where defect is discovered about tenability of finding in that case it should be open to the court to come to its own independent finding upon re-examination of the evidence untrammelled by the opinions of the courts below.

(iv) The position of the trial Court being close to the scene of occurrence and familiar with ways and practices of the people involved having the benefit of recording evidence of witnesses, watching their demeanour, view formed by the said court should not be disregarded lightly.

(v) The benefit of any reasonable doubt must go to the accused person but where the conclusion about such a doubt leading to acquittal is wholly illogical or unreasonable, the same can be reversed by the higher court.

(vi) While giving the benefit of all doubts to the accused, the court has still to discharge the onerous function of not allowing an offender to escape justice.

(vii) The benefit of doubt if any cannot be given to the prosecution.

(viii) Mere suspicion howsoever strong or possible is not sufficient to justify conviction and all circumstances sought to be relied upon for basing conviction upon circumstantial evidence must be established beyond doubt.

(ix) Straining of evidence either in favour of the prosecution or in favour of the accused should neither be countenanced nor encouraged.

(x) While examining the views expressed by the Courts below it should be seen that the findings are not based on mere assumptions and conjectures.

(xi) The acquittal should not be interfered with, merely on the ground that another possible view of the evidence was available.

(xii) It is the fundamental duty of the prosecution to prove the guilt to the hilt and not of the accused to prove his plea of defence to the hilt and that the weakness or falseness of the defence plea is not to be taken into consideration while awarding punishment.

(xiii) That the court is to appraise evidence without being swayed away emotionally as accused is presumed to be innocent, until the guilt is proved against him by producing evidence of incriminating nature to connect him with the commission of crime beyond shadow of reasonable doubt.

(xiv) The principle that if a witness is not coming out with the whole truth his evidence is liable to be discarded as a whole is not that absolute and stand modified as his testimony will be acceptable against one set of accused, though rejected against the other subject to the rider that it must get independent corroboration on material particulars from credible, evidence based on the principle of "sifting chaff out of grain".

These are merely some of the known established principles being followed by the courts and certainly not exhaustive of situations arising from time to time and case to case.

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

---Ss. 302, 342 & 365---Qanun-e-Shahadat (10 of 1984), Art.40---Constitution of Pakistan (1973), Art.185(2)(a)---Appeal to Supreme Court---High Court had set aside the judgment of acquittal passed by the Trial Court and awarded death sentence to the accused---Re-examination, reappraisal and appreciation of evidence on record by Supreme Court, keeping in view the comparative treatment of the evidence made by the Trial Court and the High Court---Evidence brought on record by the prosecution and the defence plea of the accused had been analyzed from angles to find out as to how far the incriminating material was available to bring home the guilt and his involvement in the commission of the offence---Incident was an unseen one, the charge against accused was of the demand of ransom and murder---Father of victim, as per the evidence, was an illiterate person, unable to read or write, it was but natural if was not the meticulous consistency in his stance---Visible and obvious lapses on the part of prosecution were not understandable---Foundation of the case was raised on the ground of friendly contacts between accused and deceased; the transaction of sale of land and the business between them---No investigation, however,- was conducted on such aspect---Even the letter which became the basis for ransom demand its receipt by the father of the deceased had also a question mark---No effort was made to reach those children who delivered the said letter to the Chowkidar of the Hotel, nor even the Chowkidar was investigated---Neither the Chowkidar nor the owner of the Hotel, who read out and explained the letter to the father of deceased were produced before the court which meant that the Investigators did not perform the duty as was warranted by law---Arrest of accused itself appeared to have unfolded the whole episode---Accused made disclosures and provided solid clues; he led the investigators to the place of occurrence wherefrom the dead body and other incriminating articles were recovered; he by making confessional statement before the Magistrate solved the mystery as to how and why all that happened---Altercation that took place between the two (accused and deceased) about the payment of money, the harsh language and abuses hurled by the deceased resulting in spontaneous ugly situation of provocation taking the names of mother, sister and wife, pushing the deceased by the accused from the mountain and stoning him---No valid justification existed to disbelieve the Assistant Commissioner/S.D.M., who was an official and had neither any enmity with the accused nor any reason to misstate the facts---Chain of events, which led the investigators to ultimately unearth the facts was pointation of the place of occurrence by the accused and statement of facts given by him before the Magistrate---Being conscious of the risk of use of retracted confession, it could not be used alone as evidence for conviction, the other

evidence of linkage was necessarily to be considered---Recovery of the dead body on the lead provided and at pointation of the accused and disclosures of events as to how it so happened, the medical evidence, the report of Chemical/Serologist, the recovery of currency notes from his residence on his pointation from the box lying underneath the cot were all important pieces of corroborative evidence which could not be ignored---Later denial of every thing by the accused including the disclosures and even appearance before the Magistrate lost its worth in the light of the hard facts---Accused's plea of torture by the investigators as per his statement under S.342, Cr.P.C. also was an afterthought; some doubt, if at all, that could be entertained, was about his intention to kill---Information of facts disclosed which led to the discovery of incriminating articles and material assumed relevance and significance---Held, there remained no doubt that the disclosures made and clue provided by the accused himself and unbroken chain of events furnished sound proof leading to the conclusion that the accused was the person who was responsible for the commission of the offence, whereby the deceased lost life---High Court, in circumstances, was justified in convicting the accused.

Principles and Digest of Qanun-e-Shahadat by Justice (Rtd.) Khalil-ur-Rehman Khan, Vol. I, Emporar v. Chokhey AIR 1937 All. 497; The State v. Mohinder Singh AIR 1953 Punjab 81; State of Uttar Pradesh v. Deoman Upadhyaya AIR 1960 SC 1125; Hakim Ali v. The State 1971 SCMR 412; Sh. Muhammad Amjad v. The State PLD 2003 SC 704 and Sher Zaman v. State and others PLJ 2006 SC 931 ref.

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

---S. 302, 342 & 365---Qanun-e-Shahadat (10 of 1984), Art.121, Illus.(b)---Constitution of Pakistan (1973), Art.185(2)(a)---Appeal to Supreme Court---Grave and sudden provocation---Sentence, reduction -in---Discretion of Court---Scope---High Court had set aside the judgment of acquittal passed by the Trial Court and awarded death sentence to the accused---Re-examination, reappraisal and appreciation of evidence-on-record by Supreme Court---Provocative conduct and attitude of deceased i.e. hurling of abuses and calling bad names addressing his mother, sister and wife before his death could not altogether be ignored---Such a situation, as stated by accused, led to the incident of pushing of the deceased by him from the mountain, stoning him and covering him with stones recovered from the site---All that tend to show the resultant death of the deceased under such peculiar provocative circumstances, which may be relevant for considering the quantum of the sentence in such a context---Conviction of accused by High Court was absolutely justified, however, the peculiar facts and circumstances including that he was acquitted by the Trial Court but was sentenced to death by the High Court persuaded to adopt a lenient view in the matter of infliction of sentence as there was no apparent planning, premeditation or intention to kill the deceased; there being no preparation by the accused in that regard nor he had any crime weapon with him; filthy and vulgar abuses hurled and cursing by the deceased and thus heated altercation infuriating and giving rise to provocation; action of a man was to be judged in the background of the society to which he belonged as he was creature of his environment; in any case a serious doubt prevailing as to what actually happened just before the incident remained shrouded in mystery---Death penalty, in the facts and circumstances, manifestly appeared out of all proportions to the offence---Law itself (clause (b) of S.302, P.P.C.) empowered the Court to inflict either death penalty or imprisonment for life for which purpose however while exercising the choice, a discretion was left with the court to be exercised keeping in mind the facts and circumstances of a case---Depending upon the circumstances, the background and the facts of a case, the court was obliged to exercise option of awarding penalty--Court could inflict death penalty without hesitation, if the victim had been done to death in a ghostly, cold blooded, brutal manner or roasted alive etc.---Court, however, was expected to proceed very carefully and cautiously in the exercise of such discretion and not to ignore the gravity of the offence committed---Supreme Court found the present case, eminently a fit case in which awarding of life imprisonment would have met the ends of justice---While maintaining the conviction of accused, Supreme Court modified the sentence by converting the same from death to imprisonment for life; rest of the conviction was ordered to remain intact and benefit of S.382-B, Cr.P.C. was also made available to the accused.

Principles and Digest of Qanun-e-Shahadat Vol.II by Justice (R.) Khalil-ur-Rehman Khan; Abdul Haque v. The State PLD 1996 SC 1; Muhammad Imran alias Imrani v. The State PLD 2001 SC 956; Mst. Mumtaz Begum v. Ghulam Farid 2003 SCMR 647; Kora Ghasi v. State AIR 1983 SC 360; Iftikhar-ul-Hassan v. Israr Bashir and another PLD 2007 SC 111; Muhammad Riaz and another v. The State 2007 SCMR 1413; Muhammad Sharif v. Muhammad Javed alias

Jeda Tedi PLD 1976 SC 452; Muhammad Sharif and others v. The State 1991 .SCMR 1622; Sh. Liaquat Hussain and others v. Federation of Pakistan PLD 1999 SC 504; Tarun Bora alias Alok Hazarika v. State of Assam AIR 2002 SC 2926; Bachan Singh v. State of Punjab AIR 1980 SC 898; Machhi Singh and others v. State of Punjab AIR 1983 SC 957 and Iftikhar Ahmed Khan v. Asghar Khan and another 2009 SCMR 502 ref.

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

---S. 302(b)---Constitution of Pakistan (1973), Art.9---Murder---Sentence, quantum of--- Contemporaneous trends to be kept in view---Article 9 of the Constitution attaches great value to the "life and liberty" of human being which is most precious human right regarded by the Constitution as a Fundamental Right, therefore, as far as possible and whenever permissible (depending upon the circumstances of a case), the court may exercise its discretion in favour of lesser punishment, which also will be strictly legal having the statutory backing of S.302(b), P.P.C.---Such an. approach, is likely to be regarded as liberal, but will advance the rationale and philosophy behind the mandate of Art.9 of the Constitution.

(e) Constitution of Pakistan (1973)---

---Art. 184---Interpretation of provisions of Constitution---Duty of court---Scope---Courts including the Supreme Court are creation of the Constitution or the law; they are neither representative/legislative bodies nor supposed to legislate---Of course, courts being the custodian of the rights of the people, especially the Supreme Court, a forum provided by the Constitution itself under Art.184, is obliged and called upon on occasions to interpret any provision of the Constitution and law in the discharge of its sacred and onerous duty, and ensure that specified spheres are not transgressed by the respective organs of the State---Supreme Court thus has a peculiar and a vital role under the Constitution.

Muhammad Zaman Bhatti, Advocate Supreme Court for Appellant.

. Muhammad Azam Khattak, Addl.A.-G. Balochistan for the State.

Date of hearing: 6th May, 2009.