P L D 2003 Supreme Court 704

Present: Nazim Hussain Siddiqui, Hamid Ali Mirza and Sardar Muhammad Raza Khan, JJ

Sh. MUHAMMAD AMJAD---Appellant

versus

THE STATE---Respondent

Criminal Appeal No.352 of 2002, decided on 20th February, 2003.

(On appeal from the judgment dated 16-4-2002 of High Court of Sindh, Karachi, passed in Special Anti-Terrorism Jail Appeal No.83 of 2001)

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

----Ss. 302(a) & 365-A---Anti-Terrorism Act (XXVII of 1997), S.7(e)--Constitution of Pakistan (1973), Art. 185(3)---Leave to appeal was granted by the Supreme Court to consider as to whether Anti-Terrorism Court had the jurisdiction to try the case under the Anti-Terrorism Act, 1997; whether the circumstantial evidence, on which the conviction and sentence of the accused rested, connected the accused with commission of offence under S.302, P. P. C; whether principles of safe administration of justice had been followed in the case while appraising the prosecution evidence and whether the order with regard to payment of Diyat in addition to sentence of death under S.302(a), P.P.C. was sustainable.

(b) Criminal Procedure Code (V of 1898)---

----S. 540---Application for summoning witness under S.540, Cr.P.C.--Validity---Court has power to examine to recall and re-examine any person if his evidence appears to it essential to the just decision of the case---Just decision of a case, however, will depend upon the circumstances 11of each case---Law does not require that whenever an application is made, the same shall, under, all circumstances be granted, nor perversity in the system of criminal administration of justice can be permitted to be introduced to defeat the known established process of justice---Object of S.540, Cr.P.C. is to defend the interest of justice and not to defeat the same---Such an application cannot be allowed when the sole object is to diminish the sanctity of Trial Court and to create anomalies for creating dents in the prosecution version--Plea of calling for such witness, in the present case, was neither raised before the Trial Court nor the High Court and same was raised for the first time before the Supreme Court with the sole object to prolong the proceedings and to create doubts about the judgments delivered by Trial Court and affirmed by the High Court---Such application being totally misconceived was dismissed by the Supreme Court.

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

----Arts.37, 38, 39 & 40---Penal Code (XLV of 1860), Ss.302(a) & 365-A-Determination of criteria as to which statement could be treated as confession---Admissibility or non-admissibility of confession---Principles.

In criminal cases great responsibility rests upon, the Courts to determine if the confession is voluntary and true or is lacking within the scope -of either term "voluntary" and "true"'. If the confession directly or indirectly is the result of inducement, threat or promise from a person in authority, it would be treated as not voluntary. Voluntary and true are two different terms related with confession and each of them has its own significance. A confession, which is voluntary, is admissible in evidence even though it may be incorrect in its contents. As against above, a confession, which is not voluntary, is not admissible though it may be true, whether a confession is voluntary and true is a question of fact and is to be determined keeping in view the attending circumstances of each case. Voluntariness of confession and of being true are totally distinct. Voluntariness relates to its admissibility, while its truth is looked into for the purpose of assessing its value. Therefore, for proving confession it shall be both voluntary and true.

Article 38 lays down that a confession made to a police officer shall not be proved against a person accused of any offence. The rule embodied in above Article is for the reason that a police officer shall not be encouraged to extort confession for showing efficiency by securing convictions. Under this Article a confession made to a police officer is to be ignored even if it was made in the immediate presence of a Magistrate, as the Article 38 is independent and is not controlled by Article 39.

Article 39 deals with confessions, which are made not to a police officer but to persons other than police officers i.e. to fellow prisoner, a doctor or a visitor and makes such confessions inadmissible, if they were made while the accused was in the custody of police officer. The Articles 38 and 39 lay down different rules.

Further, it is noted that as per Article 40, 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 accused under Article 40 relating to incriminatory articles is admissible.

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

----S.302(a)---Circumstantial evidence---Sentence---Principles---Death sentence can be awarded on circumstantial evidence, provided all circumstances constituted a chain and no link is missing and their combined effect is that the guilt of the accused is established beyond any shadow of doubt.

(e) **Penal Code (XLV of 1860)---**

----S. 302(a)---Last seen evidence---Sentence---Principles---Last seen evidence though generally is regarded as a weak evidence, yet capital punishment can be awarded if an unbroken chain of circumstances from the stage of last seen evidence till death of the victim is established by conclusive evidence.

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

-Art. 40---Penal Code (XLV of. 1860), S. 302(a)---Circumstantial evidence---House in question was in possession of the accused from where the dead body was recovered; unimpeachable evidence had established that recoveries of dead body, car and other articles were made on the lead, provided by the accused---All the pieces of circumstantial evidence when combined together provided a strong chain of circumstances lead, to the irresistible conclusion that it was the accused and the accused alone, who had killed the deceased and all such evidence under Art.40, Qanun-e-Shahadat, 1984 were admissible and were proved by conclusive evidence.

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

----S. 302(a)---Evidence of last seen---Principles determining the guilt or otherwise of accused stated.

In such cases the circumstance of deceased having been last seen in company of accused is not by itself sufficient to sustain charge of murder, but further evidence is required to link him with the murder charge i.e. incriminating recoveries at accused's instance etc.

Last seen evidence for basing conviction thereon the circumstantial evidence must be incompatible with innocence of the accused and should be accepted with great caution and to be scrutinized minutely for reaching a conclusion that no plausible conclusion could be drawn therefrom excepting guilt of the accused.

Chain of facts be such that no reasonable inference could be drawn except that accused had committed offence after victim was last seen in his company.

Where the deceased was last seen in the company of the accused shortly before the time he was presumed to have met his death near the place of occurrence, inference could easily be drawn that the accused was responsible for the death of the deceased.

The evidence in the first instance be fully established and the circumstances so established should be consistent only with the hypothesis of the guilt of the accused, that is, the circumstances should be of such a nature as to reasonably exclude every hypothesis but the one proposed to be proved i.e. chain of evidence must be complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused.

In such cases each circumstance relied upon by the prosecution must be established by cogent, succinct and reliable evidence.

All the facts so established should be consistent only kith the hypothesis of the guilt of the accused.

According to the standard of proof required to convict a person or circumstantial evidence, the circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt is to be drawn have no only to be fully established but also that all the circumstances so establishes should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused and should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together should lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime.

Rehmat alias Rehman alias Waryam alias Badshah v. The State PLD 1977 SC 515; Mst. Reshman Bibi v. Sheerin Khan and others 1997 SCMR 1416; Jafar Ali v. The State 1998 SCMR 2669; Mst. Robina Bibi v. The State 2001 SCMR 1914; Charan Singh v. The State of Uttar Pradesh AIR 1967 SC 520; Pohalya Motya Valvi v. State of Maharashtra AIR 1979 SC 1949; Kishore Chand v. State of Himachal Pradesh AIR 1990 SC 2140 and Laxman Naik v. State of Orisa AIR 1995 SC 1387 quoted.

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

----Ss. 302(a) & 365-A---Anti-Terrorism Act (XXVII of 1997), Ss.2-.B, 6(b), 7 & 8---Condition precedent for applicability of Anti-Terrorism Act, 1997.

The offences committed in the present case fall in the list of scheduled offences under Anti Terrorism Act, 1997. Terrorism has the meaning assigned to it in section "6" and the relevant part is subsection (b) thereof.

Condition precedent for applicability of Anti Terrorism Act, 1997 is that the offences mentioned in the Schedule should have nexus with the objects mentioned in sections 6, 7 and 8 of the Act. If sense of fear, insecurity in the people at large or any section of the people or disturbance of harmony amongst different sections of the people is created, said provisions will be attracted. Even if by act of terrorism actual terror is not caused, yet, subsection (b) of section 6 of the Act will be applicable if it was likely to do any harm contemplated in, said subsection. It is the cumulative effect of all the attending circum4tances which provide tangible guidelines to determine the applicability or otherwise of subsection (b) of section 6. In the present case, about 300/400 people gathered at the house of the complainant and they would have destroyed the house of the accused, if the police would not have intervened. Lawyer community was also annoyed over the murder of a member of their community and had passed a resolution in this regard. Under the circumstances, the case was rightly assigned to Anti Terrorism Court for trial.

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

----Ss. 365-A & 302(a)---Kidnapping or abduction for extorting money and murder---While committing the said crime various acts are done i.e. capturing the victims and then detaining them under captivity and normally thereafter demand is made for ransom---To constitute an offence under S.365-A, P.P.C., it is not necessary that the money must have passed on to the culprit, nor it is necessary that the victim must have been released--Abduction/kidnapping may be by force or by deceitful means---Written statement which was voluntarily filed by the accused, in the present case, when he was in jail to explain his point of view saying that the death

of the deceased was accidental was prima facie false, accused had put the dead body in the dickey of the car and continued making demands for ransom, it was, therefore, a preplanned murder and so was established beyond any shadow of doubt---Supreme Court maintained the convictions and sentences awarded by the Trial Court and affirmed by the High Court---Amount of Rs.2,00,000 awarded, as Diyat, was directed to be taken as compensation to the legal heirs of the deceased under S.544-A, Cr.P.C. and not as Diyat.

Section 365-A, P.P.C. deals with kidnapping or abduction for extorting property, valuable securities etc. While committing the crime various acts are done i.e. capturing the victim and then detaining him under captivity. Normally thereafter, demand is made for ransom. More often than not these acts are done by more than one person, but in the present case every thing was done by the accused himself. To constitute an offence under this section it is not necessary that the money must have passed on to the culprit, nor it is necessary that the victim must have been released. Abduction/kidnapping may be by force or by deceitful means.

In the, present case the plea taken in the written statement, which was voluntarily filed by the accused when he was in Central Jail to explain his point of view saying that the death of the deceased was accidental, was prima facie, false. In case of accidental death normal course would have been to inform to the father of the deceased or to have taken him to the hospital. instead of doing above, the accused put the dead body in the dickey of the car and continued making demands for ransom. It was a preplanned and brutal murder and so was established beyond any shadow of doubt.

In consequence, the convictions and sentences awarded by trial Court and affirmed by High Court were maintained by the Supreme Court. An amount of Rs.2,00,000 awarded, as Diyat, shall be taken as compensation to the legal heirs of the deceased under section 544-A, Cr.P.C. and not, as Diyat.

Ch. Mushtaq Ahmed Khan, Senior Advocate Supreme Court and Ch. Muhammad Akram, Advocate-on-Record for Appellant.

Sardar Muhammad Ishaq Khan, Senior Advocate Supreme Court and Ejaz Muhammad Khan, Advocate-on-Record for the Complainant.

Muhammad Ilyas Khan, Advocate Supreme Court and Suleman Habibullah, Addl. A.-G. for the State.

Dates of hearing: 19th and 20th February. 2003.