

P L D 2007 Supreme Court 202

[Shariat Appellate Jurisdiction]

Present: Abdul Hameed Dogar, Muhammad Nawaz Abbasi, Mian Shakirullah Jan, Dr. Allama Khalid Mahmood and Dr. Rashid Ahmed Jullundhari, JJ

NAZEER alias WAZEER---Appellant

Versus

THE STATE---Respondent

Criminal Appeal No.53(S) of 2001, decided on 18th October, 2006.

(On appeal from the judgment of Federal Shariat Court, dated 8-2-2001 passed in Criminal Appeal No.128/I of 2000 with M.R.41/I of 2000).

(a) Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979)---

---S.10(3)---Penal Code (XLV of 1860), Ss.302(b) & 201---Juvenile Justice System Ordinance (XXII of 2000), S.12---Oaths Act (X of 1873), S.5---Constitution of Pakistan (1973), Art. 203-F(2-B)---Leave to appeal was granted by Supreme Court to consider; whether Juvenile Justice System Ordinance, 2000 was applicable to the case; whether judicial confession made on oath could be used against the accused for sustaining death sentence; and whether such confession made on oath was admissible in evidence and could have been acted upon.

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

--Ss. 164 & 364---Oaths Act (X of 1873), S.5---Judicial confession---Administering of oath to accused---Scope---Contention that confessional statement recorded on oath, if causes no prejudice or injustice to accused is admissible in evidence---Validity---Provisions of Ss.164 and 364, Cr.P.C. invariably apply to all sorts of statements---Confessional statement recorded under S.164, Cr.P.C. on oath is violative of S.5 of Oaths Act, 1873, which prohibits administration of oath to accused person---Rule enacted in S.5 of Oaths Act, 1873, is based on the concept that law does not compel accused to make confession and he is under no obligation to speak the truth---If accused willingly and voluntarily makes a judicial confession, his statement is an evidence---Administration of oath or affirmation to accused is considered not based on public policy and is an illegality in law---Recording of judicial confession on oath is certainly prohibited under Oaths Act, 1873---If a Magistrate records statement of accused in the manner which is prohibited under the law, he may have committed illegality in exercise of jurisdiction but if confessional statement contained true statement of facts, it may not lose the status of evidence merely because of adopting of procedure for recording confession by Magistrate which is prohibited under law, unless it is shown that accused was misled and injustice was caused to him by adopting such procedure---Such procedural illegality would assume the character of irregularity which may not render the confession inadmissible.

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

---Art.17---Offences punishable as Hadd and Tazir---Proof---Clear distinction of standard of evidence exist for proof of offences punishable as Hadd and of offences punishable as of Tazir---Evidence to prove offence punishable, as Hadd must be in terms of Injunctions of Islam and for offence punishable as Tazir, proof can be in either form provided in Art.17 of Qanun-e-Shahadat, 1984.

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

---S. 164---Confessional statement---Islamic Law and English Law---Distinction---Concept of English Law that accused is not bound to speak truth, appears to be in conflict with the concept of truth in Islam that a person must speak truth and must not tell a lie---According to rule of evidence in Islamic Law, a confession made by accused before Court is presumed to be based on truth and principle of English Law that a retracted judicial confession, if found confidence

inspiring can be made basis of conviction, is based on the rule of evidence of Islamic Law that a judicial confession if is not retracted by maker, is sufficient evidence for punishment of offence as Hadd and if a person after making confession of his guilt before a competent Court, retracts from his confession at any subsequent stage, punishment of Hadd on the basis of such confession cannot be enforced but it is valid and legal evidence to sustain conviction of a person for such offence as Tazir---Rule of evidence of Islamic Law, envisages 'that real test to believe or disbelieve a confessional statement is not the method in which confession is recorded rather it is to be seen that what is stated in confessional statement is true and confession was made voluntary---Principle of English Law that accused while appearing before Court is not bound to speak truth, is not in consonance with the concept of criminal administration of justice in Islam, according to which a Muslim whether accused or witness, must speak truth and must not tell a lie in his statement recorded by judicial officer on oath or without oath.

Al-Jami-ul-Saghir by Imam Muhammad Bin Hassan Al-Sheebani Kitabul Quda p.318 ref.

(e) Criminal trial---

---Procedure---Object of procedure for conducting criminal proceedings is to enable Court to ensure fair trial and to do justice---If in a particular case, despite departure from the rule of procedure, justice has been done and order is found just and proper, which caused no prejudice and injustice to accused, there is no necessity to undo such order and set it aside for the mere reason that a wrong procedure has been adopted.

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

---S. 164---Confessional statement of accused on oath---Validity---Mere defect of recording such statement on oath and bare denial of accused in his statement under S.342, Cr.P.C. that confession was not voluntary, without raising specific objection that accused was not prepared to make confessional statement on oath or he did not like to confess his guilt if his statement would not have been recorded on oath, would not make the statement inadmissible.

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

---S. 164---Retracted judicial confession---Recording of such confession on oath---Effect---Notwithstanding procedural violation of recording confessional statement on oath, if Court finds that confession is true and voluntary and is satisfied that by such a procedural defect no prejudice was caused to accused and there was also no failure of justice, may on the basis of such retracted judicial confession, convict an accused.

Anwara Chowdhury v. M. Majid PLD 1964 SC 813 rel.

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

---Ss. 302(a) & 302(b)---Criminal Procedure Code (V of 1898), S.164---Qatl-e-Amd---Sentence---Retracted judicial confession---Accused, in a murder case, can be awarded sentence of death under S.302(a), P.P.C. as Qisas on the basis of judicial confession, if it is not subsequently retracted---In a case in which judicial confession is retracted, if the same is found true, voluntary and confidence-inspiring such confession can be considered sufficient evidence for conviction and sentence for murder as Tazir.

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

---S. 302(b)---Offence of Zina (Enforcement of Hudood) Ordinance (VII of 1979), S.10(3)---Juvenile Justice System Ordinance (XXII of 2000), Ss.7 & 12---Reappraisal of evidence---Juvenile offender---Determination---Retracted judicial confession---Conviction on the basis of such confession---Accused after committing Zina bil Jabr with deceased girl caused her death by strangulation---On arrest, when accused was produced before Magistrate, he confessed his guilt but during trial he retracted from confession---Despite the fact that confession was retracted, Trial Court found it true, voluntary and confidence-inspiring thus convicted the accused and awarded him death penalty---Conviction and sentence awarded by Trial Court was maintained by Federal Shariat Court---Plea raised by accused was that he was a juvenile at the time of commission of offence thus capital punishment of death could not be awarded to him---Validity-

--Making of confession by accused, soon after his arrest would strongly suggest that confession was free and voluntary and was not obtained through inducement or coercion---Analysis of judicial confession of accused, in the light of medical evidence led to the conclusion that no other person, except accused was responsible for murder of deceased---Supreme Court declined to take any exception to concurrent findings of Trial Court and Federal Shariat Court, vis-a-vis guilt of accused---For the purpose of determination of age, birth certificate was considered authentic evidence and more reliable as compared to school leaving certificate---Prosecution did not bring on record any evidence in rebuttal challenging correctness of date of birth of accused given in his school certificate and Trial Court on the basis of oral assertion of prosecution that accused was major at the time of occurrence, raised presumption that accused was adult and disbelieved school leaving certificate on the ground that it was not a substantive evidence to determine the age---Trial Court also did not give any credence to the opinion of doctor and further Federal Shariat Court had not properly attended to the matter---Section 7 of Juvenile Justice System Ordinance, 2000 provided that for determination of age, medical report regarding age could also be considered---Supreme Court in the light of school leaving certificate of accused and medical evidence, according to which he was less than 18 years at the time of commission 'of offence, held that at the relevant time accused was a juvenile---Accused was sentenced to death under S.302 (b) P.P.C. as Tazir and as at the time of commission of offence, he was a juvenile, would get the benefit of Presidential Order dated 13-12-2001---Supreme Court maintained the conviction but converted death sentence into imprisonment for life.

(j) Juvenile Justice System Ordinance (XXII of 2000)---

---Ss. 2 & 12---Constitution of Pakistan (1973), Art.45---Presidential Order dated, 13-12-2001--
-Retrospective effect of Juvenile Justice System Ordinance, 2000---Occurrence had taken place before enactment of Juvenile Justice System Ordinance, 2000 and accused was also convicted and sentenced before the enactment---Plea raised by prosecution was that Juvenile Justice System Ordinance, 2000, having no retrospective effect, would not be applicable to the case of accused---Validity---President, in exercise of his powers under Art.45 of the Constitution, vide order dated 13-12-2001, commuted death sentence of condemned prisoners into life imprisonment, in the case decided prior to the enforcement of Juvenile Justice System Ordinance, 2000---Accused was entitled to such benefit extended under Presidential Order, dated 13-12-2001.

Muhammad Munir Peracha, Advocate Supreme Court for Appellant.

Ms. Nahida Mehboob Ellahi, Advocate Supreme Court and M.A. Zaidi, Advocate-on-Record for the Complainant.

Ms. Afshan Ghazanfar, A.A.-G., Punjab for the State.

Date of hearing: 18th October, 2004.