JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

JCr.A No. 96-M/2018
With M.R No. 05-M/2018

Jumaraz son of Abdul Hanan resident of Shang, District Shangla.

Versus

The State

Present:

Mr. Sajjad Anwar, Advocate for the appellant/convict.

Mr. Sohail Sultan, Assistant A.G. for State.

Hafiz Ashfaq Ahmad, Advocate for the respondent/complainant.

Date of hearing: **14.10.2020**

Date of announcement: **20.10.2020**

JUDGMENT

ISHTIAQ IBRAHIM, J.- This appeal as well as the connected Murder Reference No.05-M/2018 are emanating from the judgment dated 11.04.2018 of the learned Special Judge, Anti-Terrorism Court-I, Malakand Division at Swat handed down in case F.I.R No. 361 dated 21.06.2017 u/s 302, 376 P.P.C, 7 ATA registered at P.S Besham, District Shangla, whereby the present appellant Jumaraz was convicted and sentenced as under:

(i) **u/s 376 P.P.C**
Death sentence with compensation of Rs.200,000/- payable to legal heirs of the victim/deceased.

(ii) **u/s 302(b) P.P.C**
Death sentence with compensation of Rs.200,000/- payable to legal heirs of the deceased/victim.

(iii) **u/s 7 ATA**
Death sentence with compensation of Rs.200,000/- payable to legal heirs of the deceased.

2. The occurrence was reported by complainant Tariq Aziz (PW-2) on 21.06.2017 at 16:00 hours in emergency ward of THQ Hospital Besham, according to which, while on routine duty in NADRA office situated at Besham on the same day, he was telephonically informed regarding missing of his minor daughter Madiha. He came back to his house and started thorough search of his daughter with the help of local people and finally found her dead body wrapped in sacks near the house of the present appellant, thus, charged him for committing rape and murder of his minor daughter.

3. The report of complainant was reduced into *Murasila* (Ex.AP/1) by Habib Sayed S.H.O (PW-9) who also prepared injury sheet and inquest report of the deceased and handed over the dead body to Dr. Noon Saha (PW-12) for post mortem. The detail of her report Ex.PW-12/1 is as under:

EXTERNAL APPEARANCE:

- Two bruise marks at neck, one on right side about 1 cm and one on left side of neck about 2 cm.
- Rigor mortis fully developed in upper limb.
- Lips cyanosed.
- She wore yellow color shalwar which was soaked in blood.

- Bruise and scratch marks on her right arm and elbow joint.

According to her uncle Zia-ur-Rehman, they changed her clothes at home which were also soaked with blood.

On Examination:

- Dry blood on her both feet and active bleeding from vagina, hymen was ruptured and there was vaginal tear extending to rectum involving muscles mucosa.

Abdomen:

At Serial No. 03 of inquest report:

- Lips cyanosed.

At Serial No. 11 of inquest report:

- Right kidney was taken and sealed for biochemical examination.

Thorax:

At Serial No. 04 of inquest report:

- Right lung was taken an sealed for biochemical examination.

Cause of Death:

- Asphyxia due to manual strangulation.
- Throttling (manual strangulation).

Time between Death and Post Mortem:

Approximately 7 to 10 hours.

Specimen:

- Internal post mortem was done and specimen taken and sent for histopathology.
- Specimens were taken and sealed from Liver, Lungs, Kidneys, Stomach and high vaginal swab, handed over to Jehan Afsar ASI alongwith Qamees, Shalwar and Dopatta which were soaked with blood of deceased Mst. Madeha.

4. The appellant was arrested by S.H.O (PW-9) on the same day. After registration of formal F.I.R (Ex.PA), investigation of the matter was entrusted to Bakhi Khan S.I (PW-10). During spot inspection he prepared site plan (Ex.PB) and collected blood-stained sand from the place from

where dead body of the minor girl was recovered. The recovery memo in this regard is Ex.PW-8/1. Three empty bags, in which the dead body was covered, were taken into possession vide recovery memo Ex.PW-8/2. A pair of slippers of the deceased/victim, which were concealed on a cot through white color tarpaulin were recovered from the rooftop of the house of the appellant which were taken into possession vide recovery memo Ex.PW-8/3. From the same place two empty bags of Askari cement were also taken into possession through recovery memo Ex.PW-8/4. The I.O also recovered a blood-stained *shalwar* of the appellant from his residential room and secured the same through recovery memo Ex.PW-8/5. Similarly, blood was recovered from the floor of the rooftop of the appellant's house through cotton. The recovery memo in this regard is Ex.PW-8/6. The internal body parts of the deceased after post mortem, handed over to police by lady doctor to police, were taken into possession vide recovery memo Ex.PW-5/1. The parcel in this regard was sent to Khyber Medical College for determination of cause of death of the deceased. Seven days physical custody of the appellant was allowed by concerned Judicial

Magistrate on 22.06.2017. On pointation of the appellant, the I.O took into possession a plastic water tub/cane, wherein the appellant had dipped the head of the deceased, was taken into possession vide recovery memo Ex.PW-3/2. The appellant also made pointation of the place of occurrence which was recorded through pointation memo Ex.PW-3/1 as well as photographs. He was produced before concerned Judicial Magistrate (PW-15) on 25.06.2017 who recorded his confessional statement Ex.PW-15/2. Later on 29.06.2017 section 7 of the Anti-Terrorism Act, 1997 was added in the case as per opinion of DPP. The F.S.L report regarding blood and blood stained articles is Ex.PW-10/2, which is positive for human blood.

5. After investigation, the Investigating Agency submitted challan before the learned Anti-Terrorism Court for trial of the appellant. Formal charge was framed against him to which he did not plead guilty and put himself at the option to face the trial for the offences. The prosecution, in order to prove its case against him, produced and examined as many as fifteen out of twenty-six PWs listed in the calendar of witnesses.

When examined u/s 342, Cr.P.C, the appellant negated the allegations leveled against him by prosecution. He retracted his confession and opted to record his statement on oath, however, he did not produce any witness in his defence. His statement on oath was accordingly recorded on 27.03.2018.

6. On conclusion of trial, the learned trial Court vide judgment dated 11.04.2018 convicted him u/s 302(b), 376 PPC and 7 ATA, the detail of sentences has already been given in the earlier part of this judgment. Hence, this appeal and the connected murder reference.

7. We have paid our anxious consideration to arguments of learned counsels for the parties as well as learned Assistant A.G. for State and gone through the record with their able assistance.

8. First we would take up the point regarding applicability of section 6 of the Anti-Terrorism Act, 1997 (The Act) to the present case which is punishable u/s 7 of the Act, and likewise we would also consider the legal position of trial of the present appellant by the said forum which culminated in conviction of the appellant under the said penal provision of the Act as well as under

sections 302(b) and 376 P.P.C. The main crux of arguments of learned counsel for the appellant on the point is that section 6 of the Act cannot be attracted to facts and circumstances of the present case in view of various judgments of the august Supreme Court of Pakistan as well as this Court, therefore, not only conviction of the appellant u/s 7 of the Act is illegal but the entire proceedings conducted by Anti-Terrorism Court are against the law. The above contention of learned counsel for the appellant was rebutted by learned counsel for the complainant.

9. The issue regarding applicability of section 6 of the Act to particular cases has remained a debated topic before the august Supreme Court as well as High Courts and the view which was persistently taken in this regard is that all the acts mentioned in sub-section (2) of Section 6 of the Act, if committed with design/motive to intimidate the government, public or a segment of the society, or the evidence collected by prosecution suggest that the aforesaid aim is either achieved or otherwise appears as a by-product of the said terrorist activities, are to be dealt with by the special Courts established under the Act. Thus, the test to

determine whether a particular act is terrorism or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such act. In the present case, the allegation against the appellant is that he raped a 5/6 years old girl in an under-construction room on the rooftop of his house and thereafter committed her murder. No doubt, the offence of rape prior to the Anti-Terrorism (Amendment) Ordinance, 2001 was a scheduled offence but after restructuring section 6, the offence of rape is no more a terrorist act as the same does not appear in sub-section (2) of section 6 of the Act, hence, the said offence does not fall within the cognizance of the Anti-Terrorism Courts. As regards the charge of murder against the present appellant, the mode and manner of the occurrence does not suggests his design for creating fear and terror in the public rather his only aim was to satisfy his lust with the minor girl and, per prosecution version, after achieving that goal he killed her in order to conceal his crime. No doubt, a minor girl was killed in a brutal manner, however, it is persistent view of the august Supreme Court that mere gravity or brutal nature of an offence would not provide a valid yardstick for bringing the same

within the definition of terrorism. This view was re-affirmed by the larger Bench of the august Supreme Court of Pakistan in a recent judgment in the case titled *Ghulam Hussain and others Vs. The State and others* reported as **PLD 2020 Supreme Court 61**, and finally it was concluded in the said judgment that:

> **For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta.**

Thus, the offences in the present case do not qualify the meanings of section 6 which is punishable u/s 7 of the Act. This Court, after

scanning the entire evidence and material available on record, has come to the conclusion that Section 7 of the Act is not applicable to the present case in light of the judgment of the larger bench in ***Ghulam Hussain's*** case *supra*.

10. Now the questions before this Court that in light of the *ibid* judgment of the larger Bench, what would be the fate of the case when otherwise the appellant was found guilty of the offences u/s 376 and 302, P.P.C and whether conviction of the appellant under the aforesaid penal sections of the Pakistan Penal Code can be maintained or not. The Anti-Terrorism Court, after taking cognizance of a non-scheduled offence, is vested with powers u/s 23 of the Act to transfer the case to a Court having jurisdiction. For ready reference the said provision is reproduced below:

> **23. Power to transfer cases to regular Courts.** Where after taking cognizance of an offence, an Anti Terrorism Court is of opinion that the offence is not a scheduled offence, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for trial of such offence to any court having jurisdiction under the Code, and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence.

This Court exercises its jurisdiction as an appeal Court u/s 25 of the Act read with section

410, Cr.P.C and it is an admitted legal position that appeal is continuation of the trial. The powers of this Court as appeal Court whether u/s 25 of the Act or under section 410, Cr.P.C, are regulated by section 423, Cr.P.C which confers vast powers on appeal Court regarding reversal, alteration, reduction or changing the nature of the sentence awarded to a convict by trial Court. The said provision is reproduced below for ready reference.

> **423. Powers of Appellate Court in disposing of appeal.--**(1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under Section 411-A, sub-section (2) or Section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering dismiss the appeal, or may –
>
> (a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retired or sent for trial to the Court of Session or the High Court, as the case may be, or find him guilty and pass sentence on him according to law;
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> (b) in an appeal from a conviction, (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be retired by a Court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or **(2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence**, but, subject to the provisions of Section 106, sub-section (3), not so as to enhance the same;
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> (c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper.

(Emphases supplied)

Since, the appellant/convict in the present case has been given fair and proper opportunity of cross-examination of the PWs; he has been examined u/s 342, Cr.P.C and even his statement on oath was also recorded during the course of trial, thus, we do not see any illegality or even an irregularity in the entire proceedings conducted by learned trial Court. Thus, this Court while exercising its powers u/s 25 ATA or 410, Cr.P.C read with section 423, Cr.P.C, has the powers to look into conviction and sentences of the present appellant recorded by trial Court under the general law without remanding the case to the Court of Sessions for deciding the case in exercise of its ordinary criminal jurisdiction on the basis of evidence recorded by Special Court. If the conviction was found by this Court to be well-reasoned and no illegality or material irregularity was available on the face of record which would vitiate the trial, in that eventuality this Court can exercise its jurisdiction to set aside the conviction under one head by maintaining the conviction and

sentence under the other head subject to appraisal of evidence brought on file by prosecution. Wisdom in this regard is drawn from the judgment of the august Supreme Court of Pakistan in the case of *Waris Ali and 5 others Vs. The State* **(2017 SCMR 1572)** wherein the appellants were initially charged u/s 302/324/452/436 P.P.C read with section 148 & 149, P.P.C whereas sections 6 and 7 (a) of the Act were subsequently added to the case. The trial Court in the mentioned case, *inter alia*, awarded death sentences to the appellants u/s 7(a) ATA which were confirmed by the Lahore High Court in appeals. The august Supreme Court of Pakistan, after hearing appeal of the convicts, set aside their conviction u/s section 7(a) of the Act by converting the same to one under section 302(b), P.P.C and reduced the sentences from death to life imprisonment in view of the facts and circumstances of that particular case. The relevant portion of the *ibid* judgment is as under:

> **31. Accordingly, the conviction of the appellants under section 7(a) of the Special Act, is set aside and the same is converted to one under section 302(b), P.P.C. however, keeping in view the peculiar circumstances of the case, this Court is influenced by caution and for securing the ends of justice in the matter of sentence because all was not well**

with the complainant and the Prosecution, the possibility that innocent persons amongst the guilty one were also involved, could not be altogether ruled out, thus, the death sentences awarded to all the appellants are reduced to life imprisonment on the counts mentioned in the impugned judgment but under section 302(b), P.P.C. and the conviction and sentences awarded to them under section 6 read with section 7 of the Special Act are set aside.

11. Now we would look into conviction and sentence of the appellant u/s 376 and 302 (b), P.P.C recorded by learned trial Court in the impugned judgment. It is a case of rape cum murder of a minor girl for which the present appellant was charged by father of the deceased/victim. The fact regarding rape and murder of the deceased surfaced on recovery of her dead body from a place near the house of the present appellant, therefore, in the mentioned circumstances the prosecution cannot be expected to produce eye witness of the occurrence. The evidence against the appellant in the present case consists of his judicial confession as well as circumstantial evidence in shape of medical evidence as well as recoveries of incriminating articles from the spot and rooftop of the appellant's house.

12. It is discernible from the record that the appellant has recorded his confession before the concerned Judicial Magistrate (PW-15) on 25.06.2017 which is as under:

> میں بروز و قوعہ صبح تقریباً 08:00 بجے اُٹھا کیونکہ میرے گھر کے پائپ لائن میں پانی نہیں آرہا تھا۔ میں نے وہ پائپ لائن ٹھیک کیا تو اس دوران طارق عزیز کی بیٹی بعمر 5 سال آئی اور میرے پوچھنے پر بتایا کہ وہ ٹافی لینے دکان جا رہی ہے۔ میں نے اس بچی کو اپنے ساتھ اپنے گھر کی چھت پر لے گیا۔ اچانک میرے ذھن میں شیطانی خیال آیا۔ میں نے چھت کا دروازہ بند کر کے بچی کا بوسہ لیا اور اسے چھت پر زیر تعمیر کمرے کے اندر لے جا کر اُسکی شلوار نیچے کی۔ ساتھ ہی اپنا ناڑا کھولا۔ اور بچی کے اندام نہانی میں اپنا آلہ تناسل رکھ کر رگڑنے لگا۔ اِس دوران شیطان مجھ پر مکمل غالب ہوا اور میں نے اپنا آلہ تناسل بزور اُسکی اندام نہانی میں اندر کیا۔ جس سے وہ بے ہوش ہوگئی اور اس سے خون بہنے لگا۔ میں نے اِس دوران بھی اپنا کام جاری رکھا۔ اِس کے بعد اِسے بے ہوشی کی حالت میں فرش پر چھوڑ کر پانی سے اُس کے خون سے اپنے آپ کو صاف کیا۔ پھر میں نے سوچا کہ اگر اسکو چھوڑا تو یہ میرے لیے مصیبت بن جائیگی۔ اسلیے میں نے اس کے گلے کو بایا اور ساتھ پڑے ہوئے پانی کے ٹپکے میں اس کا سر ڈالا جس سے اس کی موت ہوئی۔ پھر مردہ حالت میں اِس کو سیمنٹ کے بوری میں بند کر دیا مگر اس کی پاوں باہر تھے تو میں نے دوسری اور تیسری بوری میں اسے بند کر دیا۔ بوری کے منہ بذریعہ رسی باندھا۔ اور اپنے گھر کے قریب مکانات کے درمیان ایک جگہ پر چھوڑا۔ راستے میں مسمی ارشاد ملا مگر میں گھر واپس آیا۔ میں بے چین تھا۔ مسجد جا کر نوافل پڑھے۔ بچے کے موت کا اعلان لاوڈ سپیکر پر سنا۔ مقتولہ کے چپل جائے وقوعہ پر رہ گئے تھے جیسے میں نے چھت پر رکھی ہوئی بوسیدہ چارپائی میں چھپائے جو بعد پولیس نے بر آمد کر کے مجھے گرفتار کیا۔ یہی میرا بیان ہے اور اپنے کیے پر سخت نادم ہوں۔

13. Although the confession was recorded with delay because the appellant was arrested on 21.06.2017 and his confession was recorded on

25.06.2017, however, the mentioned delay would not damage the reliability of the confession in view of its confidence inspiring nature and its full corroboration by circumstantial evidence on the record. Confession of an accused and its different aspects in each case is to be looked into in light of its attending facts and circumstances, therefore, it is not a rule of universal application that in each and every case the delay will essentially damage the evidentiary value of confession. Reliance is placed on *"Majeed V/s. The State"* **2010 SCMR 55** wherein it was held that:

> **"10. No doubt there was delay of 12 days in recording the confession but this by itself is not sufficient to discard the same. This Court in the case of *Nabi Bakhsh v. State 1999 SCMR 1972* held that delay in recording the confessional statement by itself is not sufficient to affect its validity. However, no hard and fast rule can certainly be laid down about the period within which the confessional statement of the accused ought to be recorded during investigation. Reference is also invited to *Muhammad Yaqoob v. State 1992 SCMR 1983".***

The Judicial Magistrate (PW-15) has followed the relevant procedure while recording the statement of the confessing appellant and any illegality or even a material irregularity could not be

found in the entire proceeding conducted by him. Prosecution has produced the Judicial Magistrate as PW-15 who stated in his examination-in-chief that:

> *The accused stated before me in Pashto and I recorded his statement word by word in Urdu. After recording his confessional statement, I read over the same to him and he thumb impressed his statement as a token of its correctness.*

He confirmed his above narrations even in his cross-examination by stating that:

> *I made the accused understand about my status and also read over the entire statement to him after recording his statement when he admitting the contents already recorded by me, he made his thumb impression on his statement.*

Perusal of the confessional statement, the questionnaire filled in response to his replies and duly thumb impressed by him and the certificate endorsed by Judicial Magistrate would reveal that the appellant has recorded his statement when he was well within his knowledge regarding significance and consequences of his confession. Thus, we have no doubt or suspicious in our mind regarding voluntariness of the appellant to record his true confession by admitting his guilt with regard to committing rape as well as murder of the minor girl.

14. There is also circumstantial evidence of reliable nature on record against the appellant which proves his proper nexus with the offences of rape and murder of a little girl in a brutal manner. The minor deceased was examined by lady Dr. Noon Saha (PW-12). Her report Ex.PW-12/1 has already been reproduced above, however, for the sake of convenience the important and most relevant portion thereof is once again replicated below:

> *Dry blood on her both feet and active bleeding from vagina, hymen was ruptured and there is vaginal tear extending to rectum involving muscles mucosa.*

Rape of the minor girl prior to her murder is abundantly clear from the above observations of the lady doctor who has also observed bruises marks on neck of the deceased and mentioned the cause of death as asphyxia due to manual strangulation and throttling. She admitted in her cross-examination that:

> *The bruises on the neck were found, one was 1 cm while the other was 2 cm in size. It might have been caused by the index finger and thumb finger at the time of commission of offence by the accused.*

The above observations of the doctor are in line with confession of the appellant wherein he has admitted that the minor became unconscious when he subjected her to rape and thereafter he

killed her by pressing her neck. Thus, medical evidence available on record abundantly corroborates the confession of the appellant.

15. According to site plan Ex.PB, dead body of the girl, covered with sacks, was recovered from Point No.1 near the house of the present appellant. The three blood-stained sacks, in which the dead body was covered, labeled as Al-Fateh Flour and General Mills, Malak Flour Mills and Askari Cement were secured vide recovery memo Ex.PW-8/2 whereas blood-stained sand from the said place was taken into possession vide recovery memo Ex.PW-8/1. This point is at distance of 120, 125 and 170 feet respectively from Points C, D & E shown on the rooftop of the present appellant. During investigation, the I.O recovered a pair of slippers, placed on an old cot and covered with a tarpaulin , from point "C", which belonged to deceased as identified by her father/complainant . The cot and tarpaulin were also taken into possession alongwith slippers vide recovery memo Ex.PW-8/3. Two empty bags of Askari Cement were lifted from point "D" which were taken into possession vide recovery memo Ex.PW-8/4. Point "E" is a portion of the under-construction room on

the rooftop of the appellant's house from where blood was recovered through cotton vide recovery memo Ex.PW-8/6. Point "1B" adjacent to point "E" was latter added with red ink in the site plan on pointation of the appellant where the minor girl was subjected to rape. Bakhti Khan SI, the Investigating Officer, when appeared before the Court during trial as (PW-10), stated in his cross-examination that:

> *First of all, I visited the place from where the dead body was recovered and collected blood from the place of presence of dead body. I also recovered three sacks blood stained. The place from where the dad body was recovered was preserved through police constable..... On 22.06.2017, after the recovery of three sacks, I also took into possession one pair of shoes of deceased, a Chrpai and on Tarpal..... At the time of recoveries of different articles from the house of the accused, a lady constable accompanied me.*

Prosecution has also produced Saqib-ur-Rehman as PW-8 in support of the mentioned recoveries who has verified the same in his examination-in-chief. In cross-examination he stated that:

> *The charpai Ex.P-5 was lying on the roof of the house of the accused. Since new construction was in progress, therefore, I cannot say exactly, how many rooms were there on the roof of the house of the accused. ..... the blood from the roof was obtained through a piece of cotton.*

The F.S.L report (Ex.PW-10/2) regarding the blood and blood-stained articles

mentioned above is positive for human blood. Keeping in view the natural mode and manner of the above mentioned recoveries from the spot coupled with photographs taken during pointation by the appellant as well as the confidence inspiring statements of PWs, any probability of false procurement of the said evidence by police is excluded.

16. Prosecution has established presence of the appellant in the same vicinity through trustworthy and reliable evidence. He stated in his confession that after disposing of the dead body he confronted with Irshad but came back to his house being nervous. Prosecution has produced the said Irshad as PW-13. He verified in his statement that he was coming from duty when in the meanwhile he saw the appellant who was disturbed and was proceeding to his house. Jehangir, who is son of the present appellant, appeared before the Court as PW-7. According to his statement, while busy with other people in digging grave for the deceased, he received information regarding involvement of his father in the offence, hence, came from the graveyard and made sit his father in a room of his house whereafter he was arrested by police. He

further stated that he was satisfied with regard to commission of the crimes by his father being of notorious character. In cross-examination he confirmed that there was no ill-will between them and the accused party rather they were enjoying their lives jointly. He further admitted that:

> *It is correct that I have said in previous statement recorded u/s 164, Cr.P.C that the character of my father is not good rather he was a man of malicious character, however, there was no FIR registered against the accused/my father.*

This witness had no motive to falsely depose against his own father, therefore, his statement, being worth credence, can be relied upon in support of the prosecution case. The appellant has recorded his statement on oath and admitted in his cross-examination that PW Jehangir (PW-7) was residing with him in the same house before his involvement in the present case. Although he denied his nexus with the occurrence but admitted his presence in his house as well arrest by police on the same day. To sum up, presence of the appellant on the day of occurrence in the same village and even near the place of recovery of the dead body is established.

17. After thrashing out the material on record, we have come to the conclusion that the prosecution story stands to reason and is natural, convincing and free from any inherent improbability. All the circumstances mentioned above are inter-linked with each other in the manner making out an unbroken chain connecting the present appellant with rape and murder of the deceased, thus, qualifies the criteria of acceptable circumstantial evidence discussed by the august Supreme Court of Pakistan in the case of *Hashim Qasim and another Vs. The State* **(2017 SCMR 986)** wherein it was laid down that:

> **Placing reliance on circumstantial evidence, in cases involving capital punishment, the superior Courts since long have laid down stringent principles for accepting the same. It has been the consistent view that such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused.**

18. Learned counsel for the appellant objected non-availability of DNA report regarding blood of the appellant to ascertain his nexus with rape of the deceased. No doubt, the DNA report is not available on record though his blood and vaginal swab of the victim were sent for the said purpose,

however, it was not the requirement of law to test his blood for DNA for determination of the fact that the semen found on the body or garments of the victim was of the present appellant. This view was taken by august Supreme Court of Pakistan in another recent judgment handed down in the case of *Farooq Ahmad Vs. The State* **(PLD 2020 S.C 313)** by observing that:

> **The rape having being established, was it then necessary to conduct a DNA test to determine that the semen retrieved from the victim's body and shalwar was of the petitioner. We do not think that such DNA testing was required under the circumstances. Moreover, DNA testing is not a requirement of law. In Shakeel's case (above) it was held (in paragraph 9), that:**
>
> > ***It is well-established by now that "omission of scientific test of semen status and grouping of sperms is neglect on the part of prosecution which cannot materially affect the other evidence." In this regard we are fortified by the dictum as laid down in case titled Haji Ahmad v. State (1975 SCMR 69)...***
>
> **In the above cited case of Haji Ahmad v. State (1975 SCMR 69) the father had raped his step-daughter and his conviction was sustained by this Court in the absence of a DNA test; the Trial Court had relied on the girl's testimony, chemical examiner's report confirming existence of semen on vaginal swabs taken from her and the medico-legal report showing her to have been sexually molested. Similarly, this Court in the case of Irfan Ali Sher v. State (Jail Petition No. 324/2019, decided on 17 April 2020) upheld a conviction under section 376 PPC in the absence of a DNA test. Rejecting the petitioner's argument that 'DNA report**

was not sought' this Court held (in paragraph 3), that:

> ***As regards the semen not being sent for DNA forensic determination with a view to link it with the perpetrator is not a requirement of law.***
>
> **It is also not desirable that we should impose additional conditions to prove a charge of rape, or of attempted rape, and to do so would be a disservice to victims, which may also have the effect of enabling predators and perpetrators. However, there may be cases where an accused's DNA is retrieved for forensic determination to establish his guilt.**

19. Upshot of the above discussion is that prosecution has proved the charge against the present appellant beyond shadow of reasonable doubt; the evidence on record has properly been appreciated by trial Court while recording conviction and sentence of the appellant, thus, the impugned judgment, being well-reasoned, does not calls for any interference. Resultantly, this appeal, being bereft of merits, is accordingly dismissed. The conviction and sentence recorded by trial Court vide impugned judgment dated 11.04.2018 in case F.I.R No. 361 dated 21.06.2017 u/s 302 & 376 P.P.C is maintained, however, his conviction and sentence u/s 7 ATA is set aside, hence, he is acquitted of the charge under the said head. Murder Reference No.05-M/2018 is answered in ***affirmative*** on two

counts to the extent of his conviction and sentence under sections 302 (b) & 376 P.P.C.

Announced.
Dt: 20.10.2020

JUDGE

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