

JUDGMENT REVIEW

by
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PLD 2007 SUPREME COURT 202

NAZEER alias WAZEER --- Appellant

Precise stated facts of the case were that the appellant was convicted under

section 302 (B) PPC, death with fine of Rs. 20,000/- and in default of payment of fine to undergo R.I for one year . This was the major punishment awarded to the appellant alongwith others under section 10 (3) of offence of Zina (enforcement of Hudood) Ordinance, 1979 and under section 201 PPC.

An appeal was filed before Hon'ble Federal Sharait Court which was

dismissed and the appellant approach to the Hon'ble Supreme Court of Pakistan against the Judgement passed by the learned Additional Sessions Judgement Dera Ismail Khan & Hon'ble Federal Sharait Court. The main ground of conviction of the appellant was his confessional statement under section 164 Cr.P.C recorded by Judicial Magistrate. The primary arguments of learned Council for the appellant was that,

“The Judicial confession made on oath was not admissible in evidence and having been obtained through undue influence, inducement, coercion and was not voluntary to have any evidentiary value. It was further argued that provisions of section 164 Cr.P.C and 364 Cr.P.C in variably apply to all sorts of statements. As confessional statements recorded under section 164 Cr.P.C on oath is violation of section 5 of the oath Act 1873, which prohibits the administration of oath or affirmation to an accused person.”

The Hon'ble Supreme Court Of Pakistan considered the aspect of

recording confessional statement on oath as a primary question. The observation of the Hon'ble Supreme Court at page 210 was that,

“The Question for consideration would be whether a confessional statement which was recorded on oath, of caused no prejudice or in justice to the accused is admissible in evidence or not.

After having the arguments from both sides an elaborate and guiding judgement was passed by holding that,

“There is clear distinction of the standard of evidence for proof of offences punishable as Hadd and of an offence punishable as of tazir and the combined effect of above provisions of

law is that the evidence to prove an offence punishable as Hadd, must be in terms of Injunctions of Islam and for an offence punishable under Tazir, proof can be in either form provided in Article 17 of Qanun-e-Shahadat Order 1984. Islam emphasizes that Muslims must speak truth and abstain from telling lie which is a sin. Allah Almighty in His Command Says in Holy Quran “O believers! Stand steadfast with justice as a witness for Allah even if it is against you or against your parents or nearer, even if he is rich or poor, Allah is more nearer than all those both.(4/35)”. The Holy Prophet said “Tell truth even if it goes against you”. The concept of English Law that an 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. Therefore, according to the rule of evidence in Islamic Law a confession made by an accused before the Court is presumed to be based on truth and the principle of English Law that a retracted judicial confession if found confident – 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 the maker, is sufficient evidence for punishment of an offence as Hadd and if a person after making a confession of his guilt before a competent Court, retracts from his confession at any subsequent stage, the punishment of Hadd on the basis of such confession cannot be enforced but it is a valid and legal evidence to sustain conviction of a person for such an offence as tazir. In the light of this rule the subsequent retraction of judicial confession by an accused would neither reduce its value nor affect the truthfulness and admissibility of confession as evidence and consequently, a judicial confession recorded on oath despite being not legal under Oaths Acts, 1873, if contained true statement of facts, may be admissible in evidence subject to the test of it being true and voluntary and can validly be used as an evidence in Hudood cases punishable as Tazir. We, therefore, without going into the question regarding the enactment of section 5 of Oaths Act 1873, on the touchstone of Injunctions of Islam or not, concentrate to the question relating to the admissibility of a confession which was recorded on oath. The rule of evidence of Islamic Law, envisages that the real test to believe or disbelieve a confessional statement is not the method in which the confession is recorded rather it is to be seen that what is stated in the confessional statement is true and the confession was made voluntarily. However, there is difference of opinion of Imam Abu Hanifa with Abu Yousaf and Imam Muhammad on the subject. According to Imam Abu Hanifa giving of oath to an accused as Hadd except in a case of theft, is not valid whereas Imam Abu Yousaf and Imam Muhammad held giving of oath is valid in all matters except in lian. (Al-Jami-ul-Saghir by Imam Muhammad Bin Hassan Al-Sheebani Kitabul Qada P 318). The recording of judicial confession on oath is certainly prohibited under Oaths Act, 1873 and a Magistrate if recorded the statement of an accused in the manner which is prohibited under the law, may have committed an illegality in exercise of jurisdiction but if the confession statement contained true statement of facts, it may not lose the status of legal evidence merely because of adopting of the procedure for recording the confession by the magistrate which is prohibited under the law unless it is shown that the accused was misled and injustice was caused to him by adopting such procedure, therefore, such procedural illegality would assume the character of an irregularity which may not render the confession inadmissible.”

Before passing of this judgement, it was patent practice and understanding

of the judicial officers that a confessional statement accorded on oath cannot be considered as a piece of evidence against the accused and so much so, if that statement is retracted by the accused during trial. It has now been settled by the Hon’ble Supreme Court of Pakistan that

confessional statement recorded on oath can be taken into consideration while passing conviction against the accused. The accused can be sentenced and convicted solely on the basis of retracted confessional statement recorded on oath.

In this particular case the death sentence awarded to the accused was converted into life imprisonment, not on the basis of retracted confessional statement, recorded on oath but being a juvenile offend.