

IN THE FEDERAL SHARIAT COURT  
(Appellate/Revisional Jurisdiction)

**PRESENT**

MR. JUSTICE HAZIQUL KHAIRI, CHIEF JUSTICE  
MR. JUSTICE DR. FIDA MUHAMAMD KHAN  
MR. JUSTICE SALAHUDIN MIRZA

CRIMINAL APPEAL NO.102/I OF 2005 (linked with)  
CRIMINAL APPEAL NO.88/I OF 2003 (Linked with)  
CRIMINAL MURDER REFERENCE NO.10/I OF 2002

1. Muhammad Javed son of Shamroz --- Appellants respectively  
Khan
2. Ahmad Nawaz son of Rabnawaz  
Both residents of Nartopa P.S. Hazro  
District Attock

	Versus	
The State	---	Respondent
For the appellants	---	Sardar Muhammad Ishaq Khan And Mr. Ansar Nawaz Mirza, Advocates

CRIMINAL REVISION NO.24/I OF 2002 (Linked with)  
CRIMINAL REVISION NO.25/I OF 2002

Abdul Wadood son of Ali Akbar r/o Nartopa, Tehsil and District Attock	---	Petitioner in both revisions
	Versus	
1. Ahmad Nawaz and Muhammad Javed 2. The State	---	Respondents
For the Petitioner	---	Malik Rab Nawaz Noon, Advocate
For the State	---	Mr. Muhammad Sharif Janjua, Advocate
FIR, Date and Police Station	---	3, 4.1.2002 P.S. Hazro
Date of the Order of Trial Court	---	5.7.2002
Date of Institution	---	8.4.2005, 2.5.2003 and 27.7.2002 respectively
Date of Hearing	---	4.4.2007
Date of Decision	---	7-6-2007

HAZIQUL KHAIRI, CHIEF JUSTICE.- Appellant Muhammad

Javed through criminal appeal No.102/I of 2005 and appellant Ahmed Nawaz through Criminal Appeal No.88/I of 2003 have impugned the judgments dated 5.7.2002 passed by the learned Additional Session Judge, Attock in session case No. 34 of 2002 whereby they were convicted as under:-

**Appellant Muhammad Javed:** (i) Sentenced under section 377

PPC to undergo 10 years R.I. with a fine of Rs.20,000/-. In default of payment of which he will further undergo one year S.I.

(ii) Sentenced under section 302(b)/34 PPC for committing the Qatl-e-Amd of Ali Khan and sentenced to death penalty. He will pay an amount of Rs. one lac as compensation to the legal heirs of the deceased and in default of payment of which he will further undergo three years S.I.

(iii) Sentenced under section 302(b)/34 PPC for committing the Qatl-e-Amd

of Ubaidur Rehman and sentenced to death penalty. He will pay an amount of Rs. one lac as compensation to the legal heirs of the deceased and in default of payment of which he will further undergo three years S.I.

Appellant Muhammad Javed shall be hanged by his neck till his death which shall be executed subject to confirmation by the Hon'ble High Court.

*12/11*

**Appellant Ahmed Nawaz:** (i) Sentenced under section 308 PPC for committing of the Qatl-e-Amd of Ubaidur Rehman to pay an amount of Rs.30,0000/- (three lac) as Diyat to the legal heirs of the deceased. The Diyat shall be recovered either from his property, if any, or by his father in view of proviso of section 308 PPC. Till the payment of Diyat he will remain in jail. He is also sentenced to undergo five years S.I. as Tazir.

(ii) Sentenced under section 308 PPC for committing of the Qatl-e-Amd of Ali Khan to pay an amount of Rs.30,0000/- (three lac) as Diyat to

the legal heirs of the deceased. The  
Diyat shall be recovered either from  
his property, if any, or by his father in  
view of proviso one of section 308  
PPC. Till the payment of Diyat he  
will remain in jail. He is also  
sentenced to undergo five years S.I. as  
Tazir.

Both the sentences were ordered to run concurrently with benefit  
of section 382-B Cr.P.C.

2. Besides these two appeals, criminal revisions bearing Nos.24/I of  
2002 and 25/I of 2002 were filed by Abdul Wadood, complainant, the  
former for increase in compensation amount against Muhammad Javed  
and the latter for enhancement of sentence and Diyat against Ahmed  
Nawaz. As all the four matters relate to the two judgments of same  
occurrence, therefore, we propose to dispose of them by this single  
judgment.

3. Briefly the facts of the case are that on 3.1.2002, PW. 14 Shaukat  
Hussain Gilani Inspector, received information vide complaint of Abdul  
Wadood (PW.10) that he was in the company of one Yousaf Khan (not

produced) in his Hujra while his children Mst. Mariam Bibi, Ali Khan  
age 7 years and Ubaidur Rehman age 2 ½ years were playing outside  
when at about 3.00 p.m. appellant Ahmad Nawaz age 9 years came to  
them and took both of his sons away by inducing them to give small  
glass stones. Till evening the children did not come back. He searched  
for them and made inquiries but his efforts proved futile and the  
children could not be traced out. Next day i.e. 4.1.2002 he again  
searched for them and when he reached near the Hujra of Gul Daood  
along with others, he met Amjad Khan PW.11 who told him that  
appellant Ahamd Nawaz met him in Mohallah Aliabad and told him  
(PW.11) that he and Javed appellant herein, had thrown Ali Khan into  
the well of Zamurrad Khan and Abdur Rehman (Ubaidur Rehman) into  
the well of Mir Afzal Khan. He brought Ahmad Nawaz to the  
complainant and in the presence of Daood Khan PW.12 and Mumraiz  
Khan (not produced). Ahamd Nawaz repeated the same story before  
them. The dead body of Ali Khan was recovered from the well of  
Zamurrad Khan and the dead body of Ubaidur Rehman was recovered  
from the well of Mir Afzal on the pointation of appellant Ahamd



Nawaz. Police also arrived there and the same day Shauakt Hussin

Gilani PW.14 Additional SHO recorded the statement of the complainant and arrested Ahamd Nawaz. He secured the last worn clothes of both the deceased. Afterwards investigation was transferred to Raja Sajid Mehmood, Inspector/PW.15. On 13.1.2002 accused Javed was arrested. Ahamd Nawaz who was a minor was tried separately under the Juvenile Justice System Ordinance, 2000, although by the same Court which convicted both of them.

4. Both the appellants were charged under sections 302/34/377 PPC read with section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the said Ordinance") to which they pleaded not guilty. As many as 16 witnesses were examined by the prosecution in support of its case against the appellants and on 1.7.2002 and 2.7.2002 ADA gave up Muhammad Yousaf, Mumraiz Khan, Akhtar, Misal Khan, Sher Afzal, Mst. Sajida, Mst. Shomaila, Khuda Dad SI, and Ahmad Khan, ASI as unnecessary witnesses.

5. PW.10 Abdul Wadood complainant reiterated his version contained in FIR and stated that the same day he saw both the appellants Javed and Nawaz going with them while going for Juma Prayer. When the children did not turn up he looked for them in the houses of the appellants but neither the children nor the appellants were there. However, next day viz 4.1.2002 he met PW.11 Amjad Khan who told him that appellant Ahmad Nawaz told him that he and appellant Javed took the children to the well of Zamurad Khan where, after committing sodomy with them the dead body of Ali Khan was thrown into the well of Zamurad Khan and the dead body of Ubaidur Rehman was thrown into the well of Mir Afzal. Afterwards PW.11 Amjad brought appellant Ali Nawaz to him and all of them went to the Hujra where Mumraiz Khan and PW.12 Daood Khan were sitting. In their presence PW.11 asked Ahmad Nawaz about the occurrence and he narrated the same facts as he narrated to PW.11 earlier. Thereafter on the pointation of appellant Ali Nawaz the dead body of Ali Khan was recovered from the well of Zamurad Khan and dead body of Ubaidur Rehman was recovered from the well of Mir Afzal. PW.11 Amjad

1/2/16

Khan, a key witness, deposed that on 4.1.2002 appellant Ahmad Nawaz

had met him and told him that he and appellant Javed had taken Ali

Khan and Ubaidur Rehman to the well of Zamurrad Khan where after

committing sodomy with them, Javed threw away the dead body of Ali

Khan into the well of Zamurrad Khan and the body of Umbaidur

Rehman into the well of Mir Afzal. When he met complainant Abdul

Wadood near the Hujra of Dawood he narrated the story to him.

Subsequently he brought Ali Nawaz appellant to Abdul Wadood and all

the three of them went to the Hujra where Mumraiz Khan and Dawood

were also present. On the pointation of appellant Ahmad Nawaz the

dead bodies of the children were recovered in their presence.

According to PW.12 Dawood Khan appellant Ali Nawaz told him that

he had taken away both the children with him and on the way he met

appellant Javed and both of them committed sodomy with them where

after the dead bodies of the children were thrown into the wells. He

himself searched for the children and inquired from a number of

persons including a shopkeeper, a hotel owner and a video film seller.

PW.14 Inspector Shaukat was the first I.O. He recorded the complaint



of PW.1 Abdul Wadood and also the statements of PWs. at the spot under section 161 Cr.P.C. He is also the witness of recoveries and inquest report etc. PW.15 Raja Sajid Mehmood, Inspector is the second I.O. who arrested Javed Iqbal on 13.1.2002 and got the appellant medically examined. He also produced site plan of the places of occurrence and recovery of the two deceased. PW.4 Dr. Muhammad Shaukat and PW.7 Dr. Muhammad Zafar conducted post mortem examination of deceased. Report of Chemical Examiner established sodomy being committed on deceased Ali Khan.

6. Appellant Muhammad Javed in his statement under section 342 Cr.P.C. stated that he was involved in the case due to ulterior motive and without any evidence. He declined to appear under section 340(2) Cr.P.C. but opted to produce other evidence in his defence. However, he failed to produce any evidence and his separate statement without oath was recorded that he did not want to produce evidence due to non-availability of defence witnesses. Appellant Ahmad Nawaz declined to produce defence evidence, however, his explanation under section 342

Cr.P.C. as to why this case was filed against him and why PWs. have

deposed against him his explanation interestingly was as under:-

“In the area adjoining village Martopa numerous outlaws have their hide ups. Such criminals kidnapped people or young children for ransom. May be these two unfortunate children were kidnapped by the unknown criminals. Their father could not comply with their demand. They may have done away with the children and the family of the deceased were afraid of the criminals. They could not suppress tragedy. Therefore, they falsely involved me in this case. I am too tender to commit such a crime.”

7. It was urged by the learned counsel for the appellants Mr. Ansar Nawaz Mirza that there was delay of 24 hours in lodging the FIR. The victims were 7 years and 2 ½ years old children and they disappeared along with the appellant to the full knowledge of the complainant who allowed 24 hours to pass till by chance he met PW.11 the next day on road who informed him of the fate of his children. No second attempt was made by him for search of his children in the houses of appellants. Delay in the circumstances is most fatal and has not been explained at all by the prosecution.

8. The next contention of the learned counsel was that there was no eye witness either of sodomy or of murder and the entire conviction revolved around the so called confession made by appellant Ahmad Nawaz, a minor of 9 years before PW.11 and repeated before PW.10 the complainant, PW.11 and PW.12 (not produced). It was urged by him that PW:11 is a near relation of complainant (PW.10) whose sister is the wife of the brother of complainant and PW.12 Dawood Khan is the brother-in-law of complainant. Both of them are interested witnesses. The only independent witness was Mumraiz Kan in whose presence appellant Ahamd Nawaz pointed out to the two wells from where the dead bodies of the complainant's children were recovered. Here learned counsel for the appellants specifically referred to the FIR in which there is not a word about either sodomy or murder committed by the appellants which allegations emerged subsequently under a concocted story at the stage of evidence.

9. However, learned counsel for the appellants Sardaar Muhammad Ishaq submitted that the entire case of the prosecution revolves around extra-judicial confession of Ali Nawaz appellant and last seen evidence.

In the present case extra-judicial confession has novel attributes of its own in as much as it is firstly a retracted confession, secondly made by a minor 9 years of age and thirdly the minor implicating himself and also co-accused Muhammad Javed. Every thing said by him cannot be taken as granted but requires thorough and strict examination and scrutiny on the basis of established legal principles of criminal jurisprudence in the back drop of surrounding circumstances of the case. He first referred to the case of *Sajid Mumtaz v. Basharat & others* reported in 2006 SCMR 231 in which it was held:

“This Court and its predecessor Court (Federal Court) have elaborately laid down the law regarding extra-judicial confessions starting from Ahmed v. the Crown PLD 1951 FC 103-107 up to the latest. Extra-judicial confession has always been taken with a pinch of salt. In Ahmed v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial confession, the court must inquire into all material points and surrounding circumstances to “satisfy itself fully that the confession cannot but be true”. As, an extra-judicial confession is not direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

10. In a recent judgment of *Sajid Mumtaz and others Vs. Basharat and others, 2006 SCMR 231* the Supreme Court of Pakistan maintained the earlier view that "Extra-Judicial confession must be received with utmost caution but the Court before relying upon such weak type of evidence, capable of being effortlessly procured, must ask a few questions, like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what above all is the position or authority held by the witnesses."

11. In *Muhammad Ashraf alias Naik Muhammad Vs. The State reported in 2005 P.Cr.L.J. 123* the Court observed that "It seemed highly improbable that accused would go to a stranger living in another village and make confession regarding alleged crime and that too without ascertaining as to whether he was in a position to render him any help in seeking pardon from legal heirs of deceased."



12. Learned counsel also placed reliance on *Muhammad Nadeem Vs.*

*The State (1992 P.Cr.L.J. 1520), Robina Bibi Vs. The State (2001*

*SCMR 1914), Mst. Nasim Akhtar Vs. The State (2000 MLD 530).*

13. It was next urged by Mr. Ansar Nawaz Mirza, learned counsel for

the appellant that the alleged confession was made by a child of 9 years,

therefore, the Courts of Law have shown their utmost caution in this

regard. Reference was made by him to the case *Muhammad Feroz Vs.*

*The State, NLR Criminal 474* in which a Division Bench of High Court

of Sindh had held:-

“The testimony of child witness should only be accepted after the greatest caution and circumspection. The rationale for this is that it is common experience that a child witness is most susceptible to tutoring. Both on account of fear and inducement, he can be made to depose about a thing which he has not seen and once having been tutored, he goes on repeating in a parrot like manner, what he has been tutored to state. Such witnesses are most dangerous witnesses.”

14. Here a passage may be quoted from Dr. Kenny Downing's

(Profession of Laws of England, Cambridge University), book titled

“Outlines of Criminal La, at page 386:-

“Children are most untrustworthy class of witnesses for when of a tender age as our common experience teaches us, they often mistake dreams for reality, repeat glibly of the own knowledge what they have heard from others and greatly influence by fear of punishment, by hope of reward and desire of notoriety.”

In *MANNI Vs. EMPEROR (AIR 1930 OUDH 406)*, the Court commented testimony of child witness as follows:-

“There is no more dangerous witness than young children. Any mistake or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate. The evidence of a child should therefore, be accepted with great caution.”

“In *SULTAN V. THE STATE (PLD 1965 Karachi 615)*, a Division Bench held that conviction cannot be based on sole testimony of child witness. In *SONA MIAH V. THE STATE (PLD 1960 Dacca 396)*, the Division Bench of Dacca High Court ruled that witness is a child who is capable of being

mil

tured and it transpires that she has made a lot of improvements on her original story.”

15. Appellant Ahamd Nawaz in his retracted confession had also implicated appellant Muhammad Javed on which learned trial Judge erroneously relied upon and convicted him and sentenced to death. In the case of Sajid Mumtaz and others Supra the Supreme Court of Pakistan had held that a joint confession cannot be used against either of the accused. In such a case only independent, corroborative and confidence inspiring evidence shall only lead to the conviction of a co-accused.

16. As regards last seen evidence, learned counsel for the appellant placed reliance on *Naqibullah and another Vs The State (PLD 1978 S.C. 21)* in which no motive at all was alleged in F.I.R. against accused for murder and motive as alleged at trial was much too farfetched to be real. It was held:-

“In *Fazal Elahi alias Sajawal v. The Crown (1)* in the final analysis, the Federal Court held that the accused’s presence in the deceased’s company when he was “last seen alive”, as alleged, cannot by itself lead to an inference, beyond reasonable doubt that he was guilty. In that case the Court significantly observed

that while the fact of an accused person being the "only person in the company of the deceased within a very short time of his death" may be almost conclusive, in the absence of explanation from the accused, for holding him responsible for the death, should it have been the result of violence, prolongation of interval generally tends to weaken the inference very greatly. In certain circumstance as much as an hour's extension may suffice to avoid even the duty of furnishing an explanation."

In another case falling under the same category, in State v. Manzoor Ahmed (2) the deceased was last seen alive in the company of the accused when they both entered his room. In that context the Supreme Court observed that in a case resting wholly on circumstantial evidence the Court must remember that the "Processes of inference and deduction are essentially involved – frequently of a delicate and perplexing character--liable to numerous causes of fallacy". Mere suspicion will not be sufficient to justify conviction. Before the guilt of the accused can be inferred merely from inculpatory circumstances those circumstances must be found to be incompatible with the innocence of the accused and "incapable of explanation upon any other reasonable hypothesis than that of his guilt." The circumstances sought to be relied upon must have been established beyond all doubt. But this only means a reasonable doubt, i.e. a doubt such as would assail a reasonable mind and not any and every kind of doubt and much less a doubt conjured up by pre-conceived notions. But once the circumstances have been

12/11

found to be so established they may well furnish a better basis for decision than any other kind of evidence". The matter was also examined at some length in a recent unreported judgment of this Court in Rehmat alias Rehman v. The State (Criminal Appeal No.52 of 1976, decided on 5.4.1977). On the whole the evidence of the deceased having been last seen alive in the company of the accused was regarded as a weak type of circumstantial evidence to base a conviction on it.

In my opinion, in the circumstances of this case, the corroboration supplied by this weak piece of circumstantial evidence, was not sufficient to base the conviction of Wasal accused on his confession. There is no motive at all alleged in the F.I.R. against the accused for the murder. Even in the evidence the motive attributed to him is much too far-fetched to be real."

17. Learned counsel for the complainant Malik Rab Nawaz Noon and State counsel Mr. Muhammad Sharif Janjua heavily placed reliance on the case of Mst. Robina Bibi Vs. The State 2001 SCMR 1914 in which it was held that "where the deceased was lastly seen alive in the company of the accused shortly before the time he was presumed to have met his death near the place of occurrence, inference can reasonably be drawn that the accused is responsible for the death of the



deceased.” Other cases relied upon by them were reported in PLD 1996

SC 305, 2002 Cr.L.J.208, 2002 SCJ 626, 1998 SCMR 2669. As regards

delay in lodging FIR their contention was that much time was spent in search for victims and as such explainable.

18. Having examined the legal position as enunciated by the Superior Courts, what boils down from the facts of the case is (a) the appellants took away complainant's children at noon in his presence by inducing them to give small glass stones (b) the children did not return till evening and the complainant went in search of his children to the houses of the appellants but neither the children were there nor the appellants. (c) FIR was lodged the next day according to which the complainant again looked for his children and met PW.11 on a road, who told him that appellant Ahmad Nawaz told him that he and appellant Muhammad Javed had thrown the complainant's children into two wells but there is no reference to confession made by him for sodomy and murder in FIR (d) PW.11 deposed that he brought appellant Ahmed Nawaz to the complainant and the two of them went to the wells where in the presence of PW.12 Dawood Khan and

12/11

Mumraiz Khan (not produced) he repeated his confession (e) On the pointation of Ahmad Nawaz appellant the dead bodies of both the children were taken out from the wells (f) The police arrived soon and recovered the dead bodies and arrested appellant Ahmad Nawaz on the spot (g) Appellant Muhammad Javed was arrested on 13.01.2002 after 10 days (h) As per medical and chemical reports sodomy was committed on the children and they were thrown away into the two wells (i) appellant Javed was capable of committing sodomy but appellant Nawaz was not being 9 years old.

19. The questions which may emerge out of these facts are (a) why the complainant did not revisit the houses of appellants which were nearby to find out if his children or the appellants were there and allowed the whole night and the forenoon of the next day to pass (b) why the complainant did not report the matter to police of his missing children for about 20 hours when one was a child of 7 years and the other an infant of 2 ½ years (c) What relationship appellant Nawaz had with PW.11 and what persuaded him to confide in him and make confession before him and thereafter before others (d) why police

arrested appellant Muhammad Javed after a delay of 9 days of

confession of appellant Nawaz and from which place (e) Was there any motive of the appellants killing both the children of the complainant after committing sodomy with them (f) was it possible for an illiterate village boy of 9 years old in his statement under section 342 Cr.P.C. above to have propounded a ransom theory for his defence if not tutored (g) whether in the absence of available independent witnesses the evidence of PW.11 and PW.12 close relatives of complainant PW.10 be relied upon.

20. Some of the above-named questions either have no answers to offer or if replied shall be extraneous to the record based upon surmises and conjectures, whims and fantasies. When such strong doubts creep into the prosecution case which rests on extra-judicial confession of dubious nature and last seen evidence each piece of which has been designedly made to have nexus with the others, it will lead to irresistible conclusion that the prosecution has miserably failed to establish its case against the appellants herein.

21. Resultantly we set aside the impugned judgments dated

5.7.2002 passed by the learned Additional Sessions Judge, Attock and

accept both the appeals of above named appellants with direction to

jail authorities to release appellants Muhammad Javed and Ahmad

Nawaz forthwith if they are not required in any other criminal case.

Reference for confirmation of death penalty of Muhammad Javed is

replied in negative.

22. As further consequence both the above criminal revisions are

dismissed.

*12/11/07*

JUSTICE HAZIQUL KHAIRI  
Chief Justice

*Fida Muhammad Khan*

JUSTICE DR. FIDA MUHAMMAD KHAN

*Salahuddin Mirza*

JUSTICE SALAHUDDIN MIRZA

Islamabad, the

7th June 2007

Bashir/\*

*Approved for reporting*

*12/11/07*

*7/6/07*