

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

HON. MR. JUSTICE DR. FIDA MUHAMMAD KHAN
HON. MR. JUSTICE RIZWAN ALI DODANI

CRIMINAL APPEAL NO.65/I OF 2009

Said Rasool son of Kala Khan caste Awan resident of Banda Khair Ali Khan
Tehsil and District Abbottabad

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Appellant

Versus

1. Sajid son of Mohabat caste Tanoli resident of Lohar Bandi.
2. Basharat son of Ali Mardan caste Tanoli resident of Thanda Maira.
3. Arshad son of Lal Khan caste Awan resident of Banda Khair Ali Khan Tehsil and District Abbottabad.
4. The State.

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Respondents

Counsel for the appellant /
Complainant

....

Qari Abdul Rasheed,
Advocate

Counsel for the respondents

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Mr. Masood-ur-Rehman Tanoli,
Advocate

Counsel for State

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Mr. Aziz-ur-Rehman,
Advocate

FIR, Date and
Police Station

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258, dt: 26.06.2004
Mirpur Abbottabad

Date of Judgment of
trial court

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06.03.2009

Date of Institution

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21.05.2009

Date of hearing

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05.07.2012

Date of decision

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05.07.2012

JUDGMENT

DR.FIDA MUHAMMAD KHAN, Judge: This appeal filed by Said Rasool son of Kala Khan is directed against the judgment dated 06.03.2009 passed by learned Additional Sessions Judge-III Abbottabad, whereby he has acquitted the respondents namely Sajid, Basharat and Arshad from charge under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the said Ordinance) in case FIR No.258, lodged on his statement at Police Station Mirpur.

2 Briefly stated facts of the case as disclosed in FIR (Ex.PA) recorded on the statement of appellant/complainant Said Rasool on the night between 25/26-06.2004 are to the effect that his son Muhammad Siddique who was running a shop at Tanchi Chowk Abbottabad and used to return to house at evening time, did not return on the previous night and therefore they remained disturbed throughout. In the morning on that day his grandson Muhammad Idrees who was a 9th class student in a Government High School, left for school at 6.00 a.m. The

appellant/complainant asked him to go to the shop and after making inquiry about the whereabouts of his father inform the complainant. At 6.30.a.m. his grandson Idrees raised hue and cry and informed that his father Muhammad Siddique had been murdered. On this information the appellant/complainant went to the place of occurrence and saw that the dead body of his son Muhammad Siddique, who had a fire arm injury in his head, was lying dead in a pool of blood. The dead body was brought to the medical complex. The appellant/complainant stated that they had no enmity with any one and therefore he lodged the FIR against unknown accused. He added that he will charge the accused after getting satisfied. Thereafter he recorded a supplementary statement on 29.06.2004 wherein he charged the respondent/accused Basharat for committing the offence. It is pertinent to mention that the information whereby he got satisfied and charged the said respondent/accused was supplied by one Tanveer alias China on the next day of the occurrence. The respondent Basharat was accordingly arrested on 05.07.2004 and during the course of investigation the other respondents/accused Arshad and Sajid were arrested on 09.07.2004 and

06.07.2004 respectively. After completion of necessary investigation formalities they were challaned to face trial.

3. On receipt of challan the learned trial court framed charge against all the accused under section 17(4) of the Ordinance. However the respondents/accused did not plead guilty and claimed trial.

4. At the trial the prosecution examined 13 witnesses. A gist of their depositions is as under:-

- * PW.1 Shamrez Khan, SHO is a marginal witness of recovery of pointation memo (Ex.PW.1/1) through which accused Basharat while in custody led the police party to the place of occurrence. He is also witness of recovery memo (Ex.PW.1/2) vide which Basharat accused produced pistol 30 bore (Ex.P1);
- * PW.2 is Dr. Khurram Shehzad, CMO, ATH, Abbottabad. He conducted postmortem of deceased Muhammad Siddique and made the following statement:-

“On 26.06.2004 at 9.00.a.m. I conducted autopsy on the dead boy of Muhammad Siddique son of Said Rasool, Caste Awan r/o Banda Khair Ali Khan, aged about 40/42 years brought by Sartaj Constable No. 1664 and dead body identified by Waheed Gul son of Said

Rasool, and Mohammad Daud son of Mohammad Riaz.

On examination I found the following:-

External Appearance

1. A middle age man lying spine on the table wearing gray colour shalwar qameez, and white under-waist. All of these are blood stained. He is a bald man with moustaches. Rigor mortis has developed.

Injuries

1. Entry wound, a single entry wound of about 2x2 cm on the right part of temporal region just in front of right ear with clotted blood.
2. Exit wound:- An exit wound of about 5x6 cm on the left side of neck just near madibular joint with clotted blood. Left carotoid vessels damaged with left sternoclindo mastoid muscle ruptured due to fire arm injury.

Cranion and Spinal Cord.

- i. Scalp, skull and vertebrae--- Entry and exit wound on the skull and neck already mentioned. Right termportal region of skull fracture.
- ii. Brain, Spincal cord--- Due to fire arm injury vital organs of Bain are damaged.

Opinion

I have conducted PM on the body of Mr. Siddique son of Said Rasool on 26.06.2004 at 9.10.a.m. In my opinion the death of

this person occurred due to the fire arm injury to the skull which resulted in damage to the vital organ of the brain and shock and ultimately death of the individual. Shalwar, Kameez and six page PM report is handed over to police;

- * PW.3 is Mohammad Tariq, ASI Police Station, Cantt. Abbottabad. He is witness of recovery memo (Ex.PW.3/1) through which the Investigating Officer took into possession blood stained clothes of deceased Muhammad Siddique;
- * PW.4 is Ghazi Khan, ASI who on receipt of Murasala (Ex.PA/1), registered formal FIR (Ex.PA);
- * PW.5 is Abdur Rasheed, Havaladar in Pak Army. At the time of arrest of accused Arshad he was present. On his personal search a 30 bore pistol alongwith magazine containing two live cartridges, one diary having different telephone numbers and one National Identity Card, both belonging to the deceased, and some other articles were recovered. He signed the recovery memo (Ex.PW.5/1);
- * PW.6 is Waheed Gul brother of Muhammad Siddique deceased. He corroborated the statement of complainant Said Rasool;
- * PW.7 is Said Rasool, complainant who reiterated the facts as he got recorded in FIR (Ex.PA);
- * PW.8 is Sardar Muhammad Saleem. He is a marginal witness to recovery memo (Ex.PW.8/1) through which the

Investigating Officer took into possession blood stained earth from the place of occurrence;

* PW.9 is Ashfaq. He stated that on the day of occurrence he was travelling in a Suzuki when Muhammad Siddique boarded in the said vehicle and alighted at a place known as Chooran Da Nikka Road. He is witness of wajj-takkar;

* PW.10 is Shoukat Zaman, Inspector/SHO. He partly investigated the case and gave the details of investigation conducted by him;

* PW.11 is Khalid Khan Mohmand, Senior Civil Judge, Swabi. He stated that during the days of occurrence he was posted as Judicial Magistrate, Abbottabad and on 08.07.2004 accused Basharat was produced before him, who voluntarily made confessional statement and he recorded the same;

* PW.12 is Chanzeb, SHO. He conducted investigation in the case. He deposed that on 26.06.2004 he received information about the murder of Muhammad Siddique. He went to the spot i.e. Village Banda Amlook where he recorded statement of the complainant and prepared murasala (Ex.PA/1) and sent the same to the police station for registration of FIR. He prepared site plan (Ex.PB) of the place of occurrence, took into possession blood stained grass and pebbles vide memo (Ex.P8/1). He also took into possession the blood stained clothes of deceased sent by the doctor. He also recorded statements of witnesses under section 161 Cr.P.C. On

29.06.2004 he recorded supplementary statement of complainant Said Rasool wherein he nominated the accused/respondents Basharat, Arshad and Sajid as the actual culprits. On 30.06.2004 he recorded statement of Tanveer alias China under section 161 Cr.P.C. and also got recorded his statement under section 164 Cr.P.C. from the Illaqa Magistrate. After completion of all legal formalities and investigation, he handed over the file to SHO for sending complete challan to court;

- * PW.13 is Pervaiz Khan, IHC Police Station, Mirpur. He produced before the court report of Forensic Science Laboratory pertaining to Case FIR. No. 258/2004 under section 302 PPC, as (Ex.PW.12/1).

After the close of prosecution evidence, the statements of the respondents were also recorded under section 342 Cr.P.C. On conclusion of the trial, they were not found guilty, therefore, they were acquitted from the charge under section 17(4) of the Ordinance. Hence this appeal

5. We have heard learned counsel for the parties and have perused the record with their assistance.

6. Learned counsel for the appellant/complainant submitted that the contents of FIR show that:-

- * no mala-fide is found on the part of appellant/complainant who nominated none in the FIR and charged the respondents only after his complete satisfaction;
- * he nominated one of the respondent after three days of the occurrence;
- * various recoveries effected from the possession of respondent Basharat, support the case of complainant/appellant. Recovery of the pistol which according to the Forensic Science Laboratory report matched with the crime empty, strengthens the case of prosecution.
- * the respondent Basharat made a confessional statement which was recorded by a responsible officer.

Learned counsel for the respondents vehemently contended that:-

- * this is a case of no evidence.
- * the occurrence was unseen and no one was nominated in the FIR initially registered by the appellant/complainant.
- * the circumstantial evidence in the instant case is incomplete and does not inspire confidence.
- * the confessional statement was not recorded in accordance with legal requirements as only ten minutes were given to the respondent/accused.
- * the said confessional statement is retracted.
- * the best witness Tanveer alias China was given up by the prosecution.

Learned counsel for the State supported the judgment of Acquittal passed by the learned Additional Sessions-III, Abbottabad.

7. We have given our anxious consideration to the points raised by learned counsel for the parties and have perused the record with their assistance. It transpires that the occurrence which took place on the night intervening 25/26.06.2004 was admittedly unseen and there is no direct evidence either that of the murder of deceased Muhammad Siddique or about his having been lastly seen alive in the company of any one even. The appellant/complainant had, therefore, initially nominated no one as accused in the FIR. It was on 29.06.2004, after having been informed by Tanveer alias China, that he got satisfied and made a supplementary statement wherein he nominated Basharat accused/respondent as the one who had committed the murder of his son. According to PW.1, the said respondent led to the place of occurrence on 5.7.2004 but that is insignificant as it was by then known to all as the dead body of Muhammad Siddique had already been earlier discovered/recovered therefrom on 26.6.2004. It is also very pertinent to mention here that the aforementioned Tanveer alias China before whom the accused/respondent Basharat had

made extra judicial confession which has satisfied the appellant/complainant, was given up being unnecessary and he could not be examined as PW in the case. Thus the strong link which provided information to the appellant/complainant is missing in the evidence. It is also questionable as to why Basharat accused/respondent who was at that time neither nominated in the FIR nor even suspected for the offence opted to make confession of his guilt before Tanveer alias China without any rhyme or reason because he was not at all under any pressure by the police or the public. Although statement of Tanveer alias China under section 164 Cr.P.C. was recorded on 30.6.2004 by the Judicial Magistrate but he was not cross-examined by the accused. We may also point out that as envisaged by 1-A of the said provision it was not recorded even in the presence of the accused nor he was given an opportunity of cross-examining the said witness who was making a statement against him. The evidentiary value of that statement is further shattered by the fact that PW.11 Khalid Khan Mohmand, Magistrate who had recorded that statement has made no reference in his deposition. There is also no obvious reason on record why Tanveer alias China was given up and declared

unnecessary while in circumstances he was the best available witness to provide support to the case of prosecution. His non-appearance before the trial court has thus caused an irreparable dint in the prosecution case.

8. The other pieces of circumstantial evidence brought by the prosecution against the accused/respondents are also doubtful. Perusal of the record reveals that Basharat accused/respondent was arrested on 05.07.2004 and during his personal search a 30 bore pistol having three live rounds was recovered. It is interesting to note that one crime empty of 30 bore (Ex.P2) was also recovered on the same day from near the place of occurrence. It means that after 10 days of the occurrence the said empty was recovered. It is not known why PW.10, Shoukat Zaman, Inspector/SHO who partially investigated the case and had visited the spot failed to recover the said crime empty on 26.06.2004 when the dead body of Muhammad Siddique had been recovered. The column Nos.23-24 of the inquest report which should have indicated anything recovered from the place of occurrence or from near the dead body are left blank which highlight the fact that the crime empty was not there at that time. Its subsequent recovery on 05.07.2004 when a pistol with live rounds was

recovered from the said accused/respondent is, therefore, doubtful. The said pistol alongwith crime empty was sent to the fire arm expert on 08.07.2004. Although the report of the fire arm expert about the same is positive but its evidentiary value in circumstances is not free from doubt. Moreover, it is highly pertinent to observe that PW.10 Shoukat Zaman, Inspector/SHO who recovered a pistol from Arshad accused/respondent also recovered from his possession a diary allegedly belonging to the deceased. He also recovered CNIC of the deceased as well. It does not appear to any sound reason to believe as to why did the accused/respondent keep the said diary of the deceased as well his CNIC No. 13101-2641336-9 till 09.07.2004 and for what purpose. The occurrence had taken place sometime between the night of 25/26-06.2004 and thereafter one of the accused/respondent Basharat had been arrested on 05.07.2004. In this context there was no reason for Arshad accused/respondent to keep the said diary and CNIC of deceased in his possession for no rhyme or reason. In this connection it is regrettable to note that the Investigating Officers at times exceed their limits and in their futile zealous effort to strengthen the case of prosecution, resultantly shatter in toto.

9. The next piece of evidence is the confessional statement made by accused/respondent Basharat before Khalid Khan Mohmand, Judicial Magistrate who had appeared as PW.11 and confirmed the same. Although a judicial confession can be made basis for conviction if it is actually made before a competent forum and is made voluntarily and truly. It can also be made basis for conviction in Taazir cases even if it is retracted at a later stage provided that the other attending circumstances brought on record corroborate the same in material particulars. However, in the instant case the said confessional statement though recorded by an experienced Magistrate does not fulfill the requirements of law. The said Magistrate gave only 10 minutes to the accused/respondent Basharat to think before making a confession which could entail serious capital punishment. The said accused/respondent had remained in police custody for three days. In these circumstances sufficient time was required to be granted to the accused/respondent before making a confession that was going to endanger even his life. The cross-examination portion made on the statement of PW.11, Khalid Khan Mohmand, Judicial Magistrate does not indicate, that the legal formalities were fully observed by him. Utmost care and caution



should have been exercised before recording that confession which in the present form is not the type of evidence that could be made basis for recording conviction on a capital charge. There is no plausible explanation for the undue delay of three days caused in getting the judicial confession recorded. We may also mention that a retracted judicial confession is considered a tainted piece of evidence. In the instant case the other pieces of tainted evidence referred to above make this confession highly doubtful. In this connection we may also mention that the principles being observed for interference in an appeal against conviction are altogether different from those observed in an appeal against acquittal because with the acquittal the accused earns double presumption of innocence—first, initially, that till found guilty he has to be considered innocent and second that after his acquittal by a trial court further confirms the presumption of innocence. The judgment of acquittal delivered by the trial court cannot be interfered unless it is found perverse and the reasons advanced are artificial and ridiculous. The judgment of acquittal could only be interfered by the Appellate Court in exceptional cases where overwhelming conclusion proof is available which is a definite and utterly incompatible with the



innocence of an accused and grave miscarriage of justice is visible floating on record without any shadow of doubt.

10. In view of above, we have found that the impugned judgment of acquittal of accused/respondents is well reasoned and based on right appraisal of the evidence brought on record and needs no interference by this Court. Therefore, the impugned judgment is maintained and this appeal against acquittal of the accused/respondents namely Sajid son of Mohabat, Basharat son of Ali Mardan and Arshad son of Lal Khan is dismissed.

JUSTICE DR. FIDA MUHAMMAD KHAN

JUSTICE RIZWAN ALI DODANI

Islamabad the 5th July, 2012
*Umar Draz Sial/**

File for reporting