IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

Present:

MR. JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE ZAHOOR AHMED SHAHWANI

CRIMINAL APPEAL NO.56/I of 2011

Banaris Khan son of Muhammad Akram Khan, Caste Pathan,
r/o Khola Kehal, Tehsil & District Abbotabad. **.....Appellant/Complainant**

Versus

1. The State
2. Shehzad alias Chirya son of Muhammad Saeed, Caste Abbasi,
3. Sajid Ali son of Zardad, Caste Pathan,

Both residents of Khola Kehal, Tehsil & District Abbotabad.

.....Respondents/Accused

CRIMINAL APPEAL NO.5/P of 2012

State through Advocate General, Khyber Pakhtunkhwa, Peshawar

..... Appellant

Versus

1. Shehzad alias Chirya son of Muhammad Saeed, Caste Abbasi,
2. Sajid Ali son of Zardad, Caste Pathan,

Both residents of Khola Kehal, Tehsil & District Abbotabad.

..... Respondents/Accused

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Counsel for Appellant/Complainant	....	Mr. Tehmas Khan Jadoon, Advocate
Counsel for State/Appellant	....	Mr. Arshad Ahmed, Assistant Advocate General, KPK
Counsel for Respondents/Accused Shehzad alias Chirya & Sajid Ali	....	Mr. Wajeeh-ur-Rehman Khan Swati, Advocate
Counsel for Respondent/Accused Sajid Ali	....	Mr. Abdul Rehman S. Alvi, Advocate
FIR No. date & Police Station.	....	FIR No.1420, dated 22.11.2008 P.S. Cantt., Abbotabad
Date of judgment of trial Court	....	27.10.2011
Date of receipt of Appeals	....	25.11.2011 & 25.04.2012 respectively
Date of hearing	....	10.06.2015
Date of decision	....	10.06.2015

JUDGMENT:

RIAZ AHMAD KHAN, C.J.— Banaris Khan son of Muhammad Akram Khan, appellant/complainant through Cr. Appeal No.56/I of 2011 has called in question judgment passed by learned Additional Sessions Judge-II, Abbottabad dated 27.10.2011 by virtue of which he acquitted accused/respondents namely Shehzad alias Chirya son of Muhammad Saeed and Sajid Ali son of Zardad. The State has also filed Cr. Appeal No.5/P of 2012 against acquittal of accused/respondents. Both these appeals are being disposed of by this single judgment as they arise out of one and the same judgment and crime report.

2. Brief facts of the case are that appellant/complainant Banaris Khan has got a grocery shop situated in Ward No.15, Khola Kehal, Tehsil and District Abbottabad. His deceased son namely Ejaz used to run the shop alongwith his father. Ejaz used to sleep in the shop. According to the complainant, on 21.11.2008 Ejaz came to the shop at 10:00 p.m. and slept in the shop. At morning time one Akbar son of Hassan Ali informed him that people were standing in front of his shop and Ejaz (son of the complainant) was not responding. According to the complainant, when he reached the shop, the door of the shop was open and inside the shop at back side his son was found dead. He found fire-arm injuries on right & left sides of the chest of the deceased. During this period the police got information and reached the spot. On the spot, report was lodged by the complainant Banaris Khan wherein he did not charge anyone as according to him he had no enmity with anyone. On his report, Marasila Ex.PA/1 was chalked out. On the basis of

this Marasila FIR No.1420 Ex.PA was registered on the same date under Section 302 PPC. The time of occurrence was shown as some time in between 21/22.11.2008, the time of report was 8:45 and the time of registration of case in the shape of FIR was 9:30 on the same date i.e. 22.11.2008. The I.O prepared site plan Ex.PB as well as the injury sheet of the deceased Ex. PW.14/2 and recovered one spent bullet from the pillow of the deceased stained with blood and a piece of that pillow was cut and taken into possession through recovery memo Ex.PW.11/1. Alongwith that one blanket, one quilt, one coat containing cash Rs.18,000/- were taken into possession. The site plan was prepared on 22.11.2008. On 26.01.2009 certain additions were made at the instance of complainant in the site plan and points No. 2, 3, 4 and D were added to the site plan. The I.O. sent the dead body in the custody of one Qasim Constable (PW.22) to District Head Quarter Hospital, Abbotabad.

3. Dr. Usman Shah PW.22 conducted autopsy and found following injuries on the body of the deceased:-

1. Entry wound on left sub scapular region (back) of 1/4 x 1/4 cm in size, 7 cm from left auxiliary pit in between 4 x 5th intercostals space.
2. Exit wound 1/2 x 1/2 cm in size below right auxiliary pit in mid auxiliary line.
3. Firearm injury 1/4 x 1/4 cm in size on right arm in its upper one 3rd (medial aspect) near the axilla on arm pit (entry point) of injury No.1.
4. Firearm injury 1/2 x 1/2 cm in size on right medial posterior/lateral aspect of right arm (exit point).

Probable time between injury and death was 30 minutes whereas the time between death and postmortem was 8 to 12 hours. In the opinion of the doctor, the deceased had died due to firearm injury to the lungs of the chest cavity. The injury (firearm) caused circulatory shock which led to the death.

4. On 23.11.2008 i.e. next day of the occurrence brother of the deceased Asim Khan submitted an application before the I.O. wherein he stated that the accused after killing his brother in his shop had also taken away one mobile phone Nokia-1110 having SIM No. 0346-9572505 and a drawer from the shop. As a result the charge in the FIR was changed from Section 302 PPC to Section 17(4) Harabah of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and Section 411 PPC.

5. The accused were arrested on 24.01.2009. Allegedly on the pointation of both the accused drawer was recovered from a drain (Ganda Naala) on 24.01.2009 regarding which recovery memo Ex.PW.8/1 was prepared. Allegedly the money which was in the drawer in the shape of coins was concealed in a sock and dumped at a vacant place. The same was recovered and after counting all the coins the amount came to Rs.1294/-. On 27.01.2009 both the accused were produced before the Judicial Magistrate Muhammad Asim Khan PW.1 and their confessional statements were recorded on the same date.

6. On completion of investigation, the I.O submitted challan. Charge was framed on 29.05.2009 to which the accused did not plead guilty and claimed trial.

7. After commencement of trial, the prosecution examined 24 witnesses. The accused were then examined under Section 342 Cr.P.C. Initially they submitted that they would produce defence but afterwards accused Shehzad and Sajid only recorded their statements before the Court wherein they submitted that they neither wanted to produce defence evidence nor wished to be examined on oath. However, they submitted copies of newspapers Mark-A and Mark-B, in which the news regarding murder was published and the date of their arrest was shown. According to the said publication, the accused had been arrested on 22.01.2009 whereas the police showed their arrest on 24.01.2009. Both the newspapers were taken on record as Mark-A and Mark-B.

8. After hearing the parties, the learned Additional Sessions Judge-II, Abbotabad acquitted both the accused. Feeling aggrieved, the present appeals by the complainant as well as by the State were filed.

9. Learned Counsel for the appellant/complainant submitted that though it was an unseen occurrence, however, circumstantial evidence was available and that circumstantial evidence connected the accused with the alleged offence. According to the learned Counsel for the appellant/complainant, the deceased had no enmity with the accused and there was no reason to charge them falsely. Admittedly the deceased was asleep in his shop. The roof of the shop was made of tin (teen). There was a small hole in the roof which had earlier not been noticed by the complainant and that was the reason that it was not shown to the I.O, on the first day when the site plan was prepared. However, afterwards it was realized and it was shown to the I.O. and

accordingly the site plan was amended/corrected. The learned Counsel further submitted that the accused had fired from the roof through that hole. The learned Counsel further submitted that infact only one shot was fired and the two injuries were the result of one fire shot. The spent bullet had been recovered which was sent to the expert and the report Ex.PW.21/4 showed that the spent bullet had been fired with the crime pistol.

10. The learned Counsel further submitted that the accused Shehzad in his confessional statement had submitted that he had obtained the crime pistol from his friend Waqas, who had obtained it from Niaz. Waqas had admitted before the Court as PW.12 but since Niaz had died so he could not be produced before the Court. It was further submitted that on the pointation of both the accused the drawer as well as money lying in drawer were recovered. Last but not the least both the accused had made judicial confession which was duly supported by corroboratory evidence so in these circumstances the prosecution had proved its case beyond all shadows of doubts. The learned trial Court as such had erred in acquitting the accused.

11. The learned Assistant Advocate General supported the contentions of the learned Counsel for the appellant/complainant.

12. On the other hand, the learned Counsel for the respondents/accused submitted that it is a fabricated case with no evidence. It was further submitted that the press clippings though were not exhibited in the evidence yet were brought on file and the Court could take into consideration the same. The press clippings clearly showed that the accused had been arrested on 22.01.2009 but were shown to be arrested on 24.01.2009. Even if it is

presumed that they were arrested on 24.01.2009, the confessional statements were recorded on 27.01.2009, which delay had not been explained. Furthermore, there are contradictions between the two confessional statements. Both the accused were produced on the same date and the learned Judicial Magistrate in cross-examination of his statement admitted that the confessional statement of one accused was recorded in presence of the other accused. The learned Counsel submitted that no reliance can be placed on such confessional statements and these statements are of no value. Furthermore, the confessional statement of Sajid Ali was infact exculpatory confession which did not support the statement of the co-accused Shehzad on material points.

13. The learned Counsel also submitted that the case of the prosecution is that accused Shehzad had no pistol of his own so he got the pistol from Waqas who also did not have a pistol, he got the pistol from Niaz who was police official and had been afterwards murdered. On the record neither there was any license of the pistol nor any number of the pistol nor there is any evidence that Niaz had actually given the pistol to Waqas and then Waqas had given the pistol to the accused Shehzad. No empty had been recovered from the spot. Allegedly the crime pistol was sent to Forensic Science Laboratory, Peshawar but the person who took the same to the Laboratory was not produced before the Court. The report does not show as to whether the pistol and the alleged crime bullet were actually sealed or not as no mark is present on the same. The SHO in his statement before the Court submitted that Muharrir had sent the two articles to the Laboratory

whereas the report of the Laboratory shows that those were received from the SHO. According to the SHO the crime pistol was produced before him by Niaz who was then alive but he could not be produced before the Court as during the trial he died.

14. The learned Counsel further submitted that another piece of evidence available with the prosecution was Nokia Mobile. Actually, neither the mobile phone of the deceased was produced before the Court nor the record regarding calls of the mobile produced before the Court was in respect of the mobile belonging to the deceased. The prosecution prepared a made-up story which cannot be believed. The learned Counsel further submitted that the last piece of evidence with the prosecution was the recovery of drawer but in the site plan no table was shown to show that actually there was a drawer in the table. Furthermore it cannot be believed that a small amount of Rs.1294/- would be placed in a sock which would be buried in the lonely place and then would be recovered. Last submission of the learned Counsel was that the medical evidence clearly showed that there were two injuries whereas the learned Counsel for the appellant/complainant wants the Court to presume that there was only one shot fired and in this way the prosecution wants to bring the case in line with the medical evidence. The case as such is a false case and the accused were rightly acquitted.

15. We have heard the learned Counsel for the parties and have also perused the record.

16. The prosecution story is that on 21.11.2008 at 11.00 p.m. accused Shehzad alias Chirya alongwith co-accused namely Sajid Ali went to the

shop of deceased Ejaz. Sajid accused stopped at some distance. Shehzad accused climbed the roof top of the shop, where he found a hole. The bulb inside the shop was alight. At that time Ejaz deceased, then alive, said loudly as to who was there? So Shehzad accused fired a shot from the said hole. Shehzad accused then came down but by that time Sajid accused had already gone home. Shehzad accused went to the house of co-accused Sajid where they remained for some time and afterwards both of them again came to the shop of the deceased to see as to what had happened. They found the deceased dead. Shehzad accused brought out the drawer in which there were coins and a mobile phone. He gave the mobile phone to co-accused Sajid and kept the money himself. This whole story is based upon the confessional statement of Shehzad accused and there is no eye-witness of the said occurrence. The co-accused Sajid also made confession but that cannot be considered as inculpatory confession.

17. The case of the prosecution as such rests upon confessional statements of the accused, recovery of drawer, recovery of mobile phone allegedly belonging to the deceased and recovery of crime pistol alongwith crime bullet.

18. As far as the confessional statement of Shehzad accused is concerned, it cannot be believed for the reasons that the confessional statement was recorded on 27.01.2009 whereas the same confessional statement was published in newspaper namely 'Pine' Abbotabad on 23.01.2009 and newspaper 'Aaj' on 24.01.2009. The statement which was published in the newspapers was to the effect that accused Shehzad and Sajid were arrested

and during the investigation they disclosed that crime weapon i.e. pistol was thrown in a link road canal (Nala), cash and mobile phone of deceased were recovered. In that news the aforementioned story of the prosecution was also given. Both the statements were same in both the newspapers. The same statement was then recorded by the Judicial Magistrate on 27.01.2009. It is strange that how the reporters of the newspapers came to know about this confessional statement even prior to the arrest of the accused as the accused had been arrested on 24.01.2009 whereas the news was published on 23.01.2009. According to the said news, the accused had already been arrested.

19. There is no doubt that news item published in newspaper cannot be considered as evidence until and unless the concerned correspondent appears before the Court and faces cross-examination. Such newspaper report cannot be treated as proof of the facts reported therein. A statement of fact contained in a newspaper is merely hearsay evidence. Nevertheless, if in respect of the same fact the prosecution produces different evidence which is in total contradiction with the news item published in the newspaper then that news item becomes a relevant fact. The Hon'ble Supreme Court in judgment titled 'Wattan Party Vs. Federation of Pakistan' reported in PLD 2006 S.C. 697 held that judicial notice of news item can be taken by the Court.

20. The established principle of law is that no conclusive judgment can be passed on the basis of newspaper item, it cannot be considered as substantive piece of evidence but nevertheless, judicial notice of the news item can be

taken in certain circumstances as given in the judgment of the Hon'ble Supreme Court of Pakistan.

21. In the present case it cannot be believed that the news item was not in the knowledge of the I.O. as both the newspapers were published in Abbotabad. The news item itself creates doubt in respect of the claim of the I.O. as according to the statement of the I.O. the accused were arrested on 24.01.2009 whereas the alleged confessional statement had already been published on 23.01.2009 and then on 24.01.2009. As such it creates doubt in respect of the statement of I.O. that he had actually arrested the accused on 24.01.2009.

22. The confessional statement of accused Shehzad alias Chirya is the ditto copy of the news item published in the newspaper. This accused also retracted from his confession. In his statement before the Court he also submitted that he was subjected to physical torture. The confessional statement is also open to many doubts, so in these circumstances it cannot be accepted as voluntary and no reliance can be placed on that statement.

23. As far as the confessional statement of Sajid Ali accused is concerned, that cannot be considered as inculpatory confession. In his statement he did not say that he had any plan to kill the deceased. According to his statement he had not participated in the act of killing. He had also not participated in the act of taking away the looted money or mobile. His statement is only to the effect that he was present at the time when second accused was committing the offence and second accused had given him the mobile and

that he alongwith other accused had thrown the drawer into the drainage canal (Ganda Nala). The confessional statement of accused Shehzad alias Chirya had already been published in the same words in the newspapers.

24. This is also to be kept in view that I.O in cross-examination of his statement before the Court submitted that he took both the accused from the Police Station on 27.01.2009 at 9:45 hours for recording their confessional statements before the Magistrate. Both the accused were produced before the Court together for recording confessional statements. The confessional statement of one accused was recorded in presence of other accused.

25. The above said statement of I.O. makes the confessional statements inadmissible for the reason that confessional statement is required to be voluntary, without inducement, threat or promise. In judgment titled 'Dhani Bakhsh Vs. The State' reported as PLD 1975 S.C. 187 it was held as under:-

> "The mode and method of recording the confession of one accused in presence of the other casts serious doubt on its voluntariness which is the basic requirement of law as also for its appeal to the judicial conscience. The whole object of legal and judicial insistence on the meticulous observance of all the necessary formalities and precautions laid down with minute particularity is to ensure that the confessional statement should be absolutely free from the slightest tinge or taint of extraneous influence such as threat, promise or inducement and the Courts are placed under an obligation to affirmatively satisfy themselves that it is free and voluntary."

In the instant case, the alleged confession was recorded after three days according to record whereas actual delay is more than three days if the statement published in the newspaper is taken into consideration. This delay has not been explained by the prosecution as to why the confession was recorded after such a long delay.

26. Apparently it seems that in order to prove the case of the prosecution one person was made the principal accused who had confessed the main guilt and the other accused was made a witness. In the above said circumstances we are not inclined to accept the confessional statements of the accused.

27. If the confessional statements are taken aside then there is nothing on record to connect the accused with the alleged offence. The reason is that corroboratory evidence is only to support the substantive evidence and if substantive evidence is not accepted then corroboratory evidence even if it is very strong, is of no use.

28. Nevertheless, the second piece of evidence on which the prosecution has relied is the recovery of crime pistol. The story of the prosecution is that the crime pistol belonged to one Niaz. The accused Shehzad alias Chirya asked his friend Waqas who did not have the pistol so he asked Niaz, the said Niaz gave the pistol to Waqas who then gave the pistol to accused Shehzad. During trial Niaz, who was a police official, was murdered in some other case. Waqas was produced as PW.12. He, in his statement before the Court, submitted that Shehzad accused had asked him to give him a pistol as he did not have the pistol so he called his friend Niaz on telephone and the

said Niaz handed over pistol to Shehzad accused. On 25.11.2008 Shehzad accused handed over the said pistol to Waqas who returned it to Niaz. According to Waqas PW.12, Shehzad accused had asked in presence of Zubair, however, the prosecution abandoned Zubair as un-necessary witness. The said Niaz had produced the pistol to the police on 24.01.2009.

29. The recovery of the said pistol becomes doubtful for the reason that according to Waqas PW.12 he had not handed over the pistol to Shehzad. His statement does not even show that in his presence the pistol was handed over to the accused. It is also not known that Niaz actually knew the accused and handed him over the pistol. The pistol was unlicensed and admittedly a case was registered against Niaz under Section 13 A.O. As such the recovery becomes doubtful.

30. The next piece of evidence is the spent bullet. The spent bullet, according to the prosecution case, was recovered on 22.11.2008. The crime bullet was sent to the Forensic Science Laboratory on 13.01.2009 but it is not known as to where the said bullet and with whom it was lying for such a long time. The alleged pistol was recovered on 24.01.2009. This crime pistol was sent to the Forensic Science Laboratory on 29.01.2009. Both the reports Ex.PW.21/4 and Ex.PW.21/13 of the Forensic Science Laboratory do not show as to who had taken the crime weapon and the bullet to the Laboratory. Both the reports do not show any seal or mark on the seal. As such the recoveries have also become doubtful.

31. Another piece of evidence on which the prosecution has relied is the Nokia Mobile phone of the deceased. According to the prosecution the

deceased was having a mobile phone. Though it was not mentioned in the FIR, however, on the next day of the occurrence brother of the deceased namely Asim Khan PW.5 gave a statement that from the shop where the occurrence had taken place one Nokia Mobile 1110 having SIM No.0346-9572505 and a drawer were also missing. The I.O in his statement before the Court submitted that on 14.01.2009 he obtained data of mobile of deceased Ejaz from S.P. Investigation, Rawalpindi, according to which it was found that IEMEI number of mobile of deceased was 35457201413449 and in mobile of the deceased SIM No.0300-9117496 was being used since 02.12.2008. The strange thing is that neither the S.P. Investigation was produced before the Court nor the mobile data of the alleged mobile of the deceased pertaining to the time prior to the occurrence was produced before the Court to show that IEMEI as shown by I.O was actually of phone belonging to deceased. The IEMEI number of the phone of deceased was not given by the brother of deceased. The case of the prosecution is that Shehzad accused had given his mobile number 0300-9117496 to Sajid accused, who gave it in exchange to Tauqir-ur-Rehman, who had exchanged this mobile with Faisal, who had exchanged it with one Hamad-ur-Rehman and from the said Hamad-ur-Rehman the mobile was recovered. There is absolutely no evidence on record to show that the said mobile was ever used by accused Sajid. There is also no evidence on record to show that the said mobile actually belonged to the deceased. So in these circumstances the recovery of mobile phone also cannot be believed.

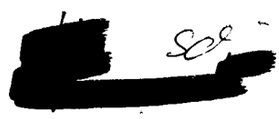
32. The prosecution story is that accused Shehzad alias Chirya after killing the deceased left the place of occurrence and alongwith co-accused came again to the place of occurrence. He opened the door forcibly and entered the shop, brought out the drawer in which there was money in the shape of coins. It cannot be believed that the accused would come again to the shop but even if it was so the bolt of the door should have been in broken condition but neither the site plan shows the same nor the complainant or the I.O said anything to that effect in their statements before the Court.

33. Regarding medical evidence the case of the prosecution is that when the accused Shehzad fired at deceased, the bullet entered the body of the deceased on the left side of his back, inside the body the bullet deflected and travelled towards right side and went out below the right arm pit and again entered the right arm and then went out from the right arm on another point. The whole contention is based on presumption which is not supported by the medical evidence. According to the medical report, there were two entry wounds and two exit wounds. In order to accept the contention of the learned Counsel, we have to presume that the medical evidence is not correct but even otherwise the contention cannot be accepted because even if the bullet had gone out through injury No.2 below the right arm pit then it could not enter the arm through injury No.3 which was upper muscle of the hand. The medical evidence clearly shows that there were two entry wounds of the same size and two exit wounds of the same size. In presence of this evidence, the presumption of the learned Counsel cannot be accepted. It seems that the learned Counsel, in order to prove that only one shot was

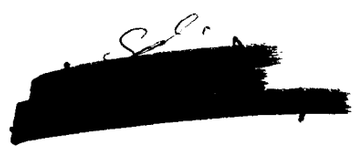
fired, had developed this story but the same was not supported by the medical evidence.

34. In the above said circumstances, we are of the opinion that the prosecution had failed to bring home guilt to the accused and thus the learned trial Court had rightly acquitted the accused. Finding no force in these appeals, both are accordingly dismissed.

Mr. Justice Riaz Ahmad Khan,
Chief Justice



Mr. Justice Dr. Fida Muhammad Khan



Mr. Justice Zahoor Ahmed Shahwani

Announced on 10th June, 2015
At Islamabad
*Imran/**

Approved for reporting.

Mr. Justice Riaz Ahmad Khan,
Chief Justice