

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MEHMOOD MAQBOOL BAJWA
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO. 15-I OF 2017

Farman Ali son of Ameer Nawab,
Resident of Ismaila Tehsil and District Swabi.

..... Appellant

Versus

1. The State
2. Umard Ali son of Rahim Din, Resident of Kandar Garhi
Kapora, Tehsil and District Mardan

... Respondents

For the appellant	...	Mr.Shahid Zaman Yousafzai, Advocate.
For the respondent No.1	...	Mr.Wilayat Khan, Assistant Advocate General KPK
For the respondent No.2	...	In person
No.& date of FIR & PS	...	No.487/2012, dt.21.6.2012 Police Station Akora Khattak, Nowshera
Date of order of trial court	...	16.03.2017
Date of Institution in this Court	...	07.06.2017
Date of hearing	...	11.4.2018
Date of decision	...	11.4.2018

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- At the end of the trial, on arrival at logical reasoning, the learned Sessions Judge Nowshera (hereinafter referred as trial court) found the appellant guilty of the charge in case FIR No.487/2012,(Ex.PW.4/1) registered with Police Station Akora Khattak, convicted and sentenced the appellant Farman Ali in the following terms:

- i) Under section 392 of PPC, to suffer five years R.I with fine of Rs.100,000/- and in default thereof to further undergo S.I for six months.
- ii) Under section 302(b) of PPC, to suffer imprisonment for life as ta'zir and to pay an amount of Rs.300,000/- as compensation to the legal heirs of the deceased and in default to further undergo S.I for six months.

The benefit of section 382-B of Cr.P.C was extended and the sentences of imprisonment were ordered to run concurrently.

3. The compendious facts, squealed in the FIR (Ex.PW.4/1) are that on 21.6.2012, P.W.2 Shakir Hussain, Incharge Police Post Marhati, received information while he was on patrol that a dead body was lying on a thorough-fare at Mughalki Mera, thus he rushed to the spot, where he found body of a young man, murdered with firearm. He maintained that on the spot, he met P.W.8 Umard Ali, father of the deceased, who told him, that while he was present at his home, he

received information that his son deceased Farzind Ali has been murdered by some unknown culprits and on arrival on the crime scene, found dead body of his son and that his motorcycle Honda 125 red colour was found missing, however, cash amounting to Rs.1800/-, his CNIC, wallet and other documents were there and that he had no enmity with anyone and does not know that who had murdered his son. However, added that he will charge the culprits on having information, as such, report/*murasila* (Ex.PA) was sent to Police Station, whereupon FIR No.487/2012(Ex.PW.4/1) was registered.

4. Necessary investigation was carried out but in vain as no culprit could be brought on surface. However, on 10.7.2012, on the statement of P.W.8 Umard Ali recorded under section 164 of Cr.P.C, the appellant along with co-convicts Nizar Ali and Abdul Hameed alias Terah were nominated to be the culprits of the crime alleged herein.

P.W.12 Alamzeb Khan, Inspector, being investigating officer stated to have made the site plan, Ex.PB recovered an empty of .30 bore pistol (Ex.PW.3/2) and blood stained earth/sand,(Ex.PW.5/1) from the crime scene and blood stained clothes of the deceased,(Ex.PW.5/2). After, the aforesaid statement of P.W.8 Umard Ali, appellant and co-convicts were arrested on 12.7.2012. Alleged crime weapon i.e .30 bore pistol was recovered on the pointation of convict/appellant Farman Ali from his 'baithak' beneath a pillow, through recovery memo (Ex.PW.10/1) and prepared site plan of place of

recovery (Ex.PW.10/2), as well as recovered alleged snatched mobile phone; model 6120 through recovery memo (Ex.PW.10/3) from co-convict Abdul Hameed alias Terah and prepared site plan (Ex.PW.10/4) and snatched motorcycle on the pointation of co-convict Nizar Ali from an abundant and deserted house situated at Ismaila through recovery memo (Ex.PW.10/5,) whereupon site plan of place of recovery (Ex.PW.10/6) was prepared.

He also maintained that on 18.7.2012, the appellant along with co-convict were produced before P.W.11, Mian Zahidullah Jan, Judicial Magistrate, before whom, the appellant and voluntarily got recorded their judicial confession, where-after they were sent to judicial lock up.

5. On the conclusion of investigation, the aforementioned the appellant and co-convicts were challaned and sent to face trial before the trial court.

6. The appellant alongwith co-convicts were indicted by framing charge under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "Hudood Ordinance 1979" read with section 34 of PPC and section 411/34 of PPC, to which they pleaded not guilty and claimed trial.

7. The prosecution in order to bring home charge against them produced as many as thirteen prosecution witnesses.

P.W.1 Dr.Pagh Chand, Medical Officer, DHQ Nowshera, conducted the autopsy of the deceased and issued post mortem report

Ex.PM, also making endorsement on the injury sheet and inquest report.

P.W.2 Shakir Hussain S.I stated to be Incharge of the Police Post Marhati, who on receipt of information rushed to the crime scene, met father of the deceased and on his *murasila* Ex.PA, FIR, Ex.PW.4/1 was registered as well as prepared recovery memo of wallet containing Rs.1800/-, CNIC of the deceased, besides making injury sheet Ex.P.W.2/2 and inquest report Ex.PW.2/3.

P.W.3 Constable Muhammad Ayub No.484, is marginal witness to the recovery memo Ex.PW3/1, and also marginal witness to the recovery memo of blood stained earth/sand (P.W.5/1). P.W.4 Fazal Muhammad SI, stated to have recorded the FIR Ex.PW.4/1. P.W.5 Constable Gulfaraz is marginal witness of blood stained earth/sand, Ex.PW.5/1 and blood stained garments Ex.PW.5/2. P.W.6 Constable Khawja Muhammad is the witness, who took the *murasila* to the police station for registration of the case and marginal witness to the recovery memo Ex.PW.2/1. P.W.7 Raz Wali Armourer stated to have opined that the pistol .30 bore is in workable condition.

P.W.8 Umard Ali is the complainant and father of the deceased, who reiterated the facts mentioned in the FIR and also affirmed to have nominated the appellant along with co-convicts in his statement recorded under section 161 of Cr.P.C as well as stated to have identified the stolen motorcycle and mobile set, Ex.P-12 and P-13 respectively,

through identification memo Ex.PW.8/2. P.W.9 Asadullah Khan has identified the dead body of the deceased Farzind Ali.

P.W.10 Murad Ali, ASI is marginal witness of recovery memo Ex.PW.10/1, whereby on the alleged pointation of appellant, pistol was recovered in consequence of disclosure, which was found to be licensed one. He is also marginal witness of Ex.PW.10/5 regarding recovery of alleged stolen motorcycle and Ex.PW.10/6 pertaining to the sketch of the place of recovery.

P.W.11 Mian Zahidullah Jan, Judicial Magistrate, stated to have recorded the judicial confession of the appellant and co-convicts exhibited as PW.11/1 to Ex.PW.11/12. P.W.12 Alamzeb Khan, Inspector is the investigating officer of the case who stated to have carried out the investigation, the details, whereof have been given by the related marginal witnesses mentioned herein before, and produced FSL report of the blood stained earth/sand, blood stained clothes Ex.PK and result of pistol and empty Ex.PK/2. P.W.13 Fazal Subhan being SHO of police station Akora Khattak, submitted complete challan against the accused persons.

8. On closure of the prosecution side, the appellant and co-convicts were examined under section 342 of Cr.P.C, who denied the allegations put-forth against them and professed their innocence. None of them opted to record their statement on oath or produced defence evidence.

After recording statement under section 342 Cr.P.C, the appellant skipped away on 27.5.2016, whereafter, compliance of proceedings as envisaged under section 87/88 of Cr.P.C, he was declared proclaimed offender.

In the meanwhile, on 20.9.2014, a compromise was arrived in between the parents of the deceased Farzand Ali with co-convicts Nizar Ali and Abdul Hameed alias Terah, as such the trial Judge on 9.10.2014, keeping in view the compromise arrived in between the parties and mitigating circumstances, convicted and sentenced Nizar Ali under section 392 PPC to suffer three years RI with benefit of section 382-B Cr.P.C, whereas Abdul Hameed alias Terah, was convicted under section 411 PPC and sentenced to the period already undergone by him. The case was kept in dormant till the arrest of the appellant.

Subsequently on 28.5.2016, the appellant was arrested and was sent to the trial court for proceeding ahead as such, the appellant was tried from the stage, wherefrom he had escaped.

On conclusion of the trial, on 16.3.2017, the appellant was found guilty of the charges, thus was convicted and sentenced for the terms mentioned herein the preceding para of the judgment.

9. The appellant being aggrieved from the judgment dated 16.3.2017, impugned the same before this Court in appeal, seeking setting aside his conviction and sentence with the relief of his acquittal.

10. We have heard Mr. Shahid Zaman Yousafzai, Advocate, learned counsel for the appellant and Mr. Wilayat Khan, Assistant Advocate General KPK for the State and have perused the record with due care and caution.

11. Learned counsel for the appellant Mr. Shahid Zaman Yousafzai inter alia contended that the impugned judgment is contrary to the facts and law which is sheer result of mis-reading of evidence. He urged that the judicial confessions are inadmissible not for the reason that the same has been extorted by means of coercive measure, but the same are contradictory to each other and that the codal formalities have not been adhered to, while recording the same. He maintained that the recovery of pistol is not a corroborative piece of evidence as the FSL report Ex.PK/2 received regarding the crime weapon is negative, which creates doubt in the prosecution case. It was contended that since there is no eye witness of the occurrence and the entire case rests upon the circumstantial evidence, which too has not been proved beyond reasonable doubt as the chain of circumstance does not lead the appellant to the crime, thus sought acquittal of the appellant. To support his argument, he relied upon judgments reported in 2017 SCMR 898, 2016 SCMR 274, 2015 YLR 1279, 2017 SCMR 986.

12. Conversely, learned Assistant Advocate General representing the State, vehemently opposed the arguments, so advanced by the counsel for the appellant and categorically supported

the impugned judgment by maintaining that the prosecution has successfully proven the charge. It was emphasized that the judicial confessions recorded by the appellant and co-convicts have been corroborated by the recovery of stolen articles, thus the trial court has rightly appreciated the evidence on record, as such, prayed for dismissal of the appeal for same being without any merits. Reliance was placed upon the judgments reported in PLD 2006 SC 87, 2005 YLR 908 and PLD 2005 SC 168, 2007 SCMR 782.

13. After scanning and dilating upon the evidence available on record, we have judged that the entire case of the prosecution is based upon the circumstantial evidence, as occurrence is unseen and there is no eye witness of the crime alleged herein.

The evidence so far collected by the prosecution rest upon the following circumstantial pieces of evidence;

- i) Testimony of P.W.8 Umard Ali;
- ii) Medico Legal evidence;
- iii) Recovery of motorcycle and mobile set;
- iv) Recovery of pistol and empty coupled with FSL report and;
- v) Judicial confessions of the convicts.

Undeniably, P.W.8 Umard Ali seems to have arrived on the crime scene, earlier than the police officials, but while lodging the report he has not nominated any one responsible for the crime and said that he

has no enmity with anybody, as such, he does not know that who had committed the crime, so he even did not suspect any one to be behind the crime. He being father of the deceased, on 10.7.2012 got recorded the statement under section 164 of Cr.P.C, and thereby nominated the appellant and co-convicts Nizar Ali and Abdul Hameed alias Tehra to be involved in the alleged crime. The involvement by P.W.8 Umard Ali is neither based on the information of someone, who had seen the occurrence nor on any other plausible circumstantial evidence, which can be read in evidence. His statement is merely based on speculation and undisclosed information, which he failed to produce either before the police or even before the court as such his suspicion can only be considered as an afterthought having no substance at all. It is surprising that before recording statement of P.W.8 Umard Ali the Investigating Officer had no clue of the culprits but after nomination by him, the I.O took such line and the investigation was moved ahead in the direction given by the complainant P.W.8 Umard Ali, which demonstrates that the investigation carried out by P.W.12 Alamzeb Khan is not impartial, thus, such evidence is to be looked into by us, more carefully and consciously than in any other case. Even otherwise, the statement under section 164 Cr.P.C P.W.8 Umard Ali at the most case be treated as supplementary statement recorded after some time, which otherwise, has not been approved to be testimony of worth, so

enunciated by the Apex Court in the case of **Kashif Ali Vs. The Judge, Anti-terrorism, Court No.II, Lahore and others (PLD 2016 SC 951)**.

Unnatural death of the deceased has not been questioned, therefore, the medico-legal evidence need not to be brought under scrutiny for it does not lead to identify or connect the appellant with the crime, particularly in the peculiar circumstances of the instant case.

14. As regards, recovery of alleged stolen motorcycle on the pointation of co-convict by Nizar Ali is concerned, that is not worthy of credence on many counts. Complainant, neither in the police report on the basis, whereof FIR was lodged nor in the statement recorded under section 164 of Cr.P.C has given the registration and chassis numbers and other details of the stolen motorcycle. If, for the sake of discussion, the recovery is believed to be true, even then it would not be safe to rely upon such recovery as discussed for the details of the recovered motorbike have not furnished earlier. We are conscious that P.W.8 Umard Ali has subsequently identified the alleged stolen articles in a so called identification parade of articles but the same is also worthless, because while carrying out such identification neither any other independent witness has been associated nor legal requisites have been followed for carrying out such identification parade. Even otherwise, as the description was not given earlier, therefore, identification of the same thereafter, would be immaterial having no sanctity at all.

15. The recovery of crime weapon (.30 pistol) on the pointation of the appellant is also not worthy of reliance because according to the F.S.L report Ex.PK/2, the empty recovered from the place of occurrence does not match with the recovered pistol, thus by no stretch of imagination, it could be ascertained that the pistol is the same, which had been used in the alleged crime.

Above all, during the arguments, when the learned Assistant Advocate General was confronted and asked as to whether reliance can be placed upon such recovery of crime weapon, to which he graciously conceded that no reliance could be placed on such recovery.

16. Now, coming to the utmost important piece of circumstantial evidence, whereupon the prosecution mainly relies upon, is the judicial confessions allegedly made by the appellant and co-convicts. Before analysis and due scrutiny of the judicial confessions, we would like to refer to the dictum expounded by the Apex Court, while appreciating and discarding a judicial confessions. It has been settled by the Hon'ble Supreme Court of Pakistan that a retracted judicial confessions can be made basis for convicting and awarding sentence, but subject to some independent corroborative evidence and while recording a confessional statement Judicial Magistrate, must reduce the same in his own hand writing, and in case there was a genuine compelling reason for not doing so, then, it must be explained through a Note that it was dictated to a responsible official like

Stenographer or Reader, who shall also be administered oath that he would correctly type or write the version and that if the same is recorded in some other language, then the same should be read over and explained to the accused in the language, he fully understands and a certificate regarding transcribing of such facts be issued and the accused shall be remanded to judicial lock up.

Above all, the judicial confessions must be found to be voluntary as retracted confessions have always been looked upon with suspicion and could not be acted upon unless corroborated by trust worthy and independent evidence, particularly, when the recovery, being supportive evidence is proved, then the judicial confession can be taken into account but not otherwise. Here, reference can be made to the case of **Muhammad Ismail and others Vs. The State (2017 SCMR 898)** and **Azeem Khan and another Vs. Mujahid Khan and others (2016 SCMR 274)**.

In the instant case, the judicial confession reveals that two shots were fired upon the deceased against which, one hit the deceased, following his death but such stance does not corroborate from the circumstantial evidence, such as recovery of the empty, as undeniably the police secured only one empty, which seems not to be in line with the aforesaid judicial confessions.

Moreover, in view of the judicial confession of the co-convict Nizar Ali, it appears that the stolen motorcycle was sold out by him in a

festival (*mela*) at Shamsi Road Mardan in the sum of Rs.28,000/- to a buyer who was from Katlang, but astonishingly, the recovery of aforesaid motorcycle was effected on his pointation from an abandoned and deserted house at Ismailia, which again belies the aforesaid so-called judicial confession. Henceforth it persuaded us to believe that the judicial confession is untrue and not confidence inspiring.

Looking into the judicial confession from another angle, we have found that the judicial confession has been reduced into writing in English and not in the language of the maker or under, which is also not understandable. P.W.11 Mian Zahidullah Jan, Judicial Magistrate, has not mentioned in the Certificate that he understands *pushto* language and that the confession was translated word by word from *pushto* to English. In absence of such certificate at the foot of judicial confession statement would make the same worthless, which cannot be relied or acted upon. Moreover, while recording judicial confessions, the appellant and co-convicts were in need of an interpreter, whereas, being examined, under section 342 Cr.P.C, neither any interpreter, was appointed to translate nor such factum was disclosed in their certificate at the foot of the statement recorded under section 342 Cr.P.C, which further aggravates our concern and lead us to doubt the judicial confessions. On the above stated propositions, we are influenced by the dictum laid down by the Apex Court in the case of **Hashim Qasim and**

another Vs.The State (2017 SCMR 986). For ready reference, the relevant portion of the aforesaid judgment is reproduced herein below:

“Keeping in view the above conflict with the other pieces of evidence, brought on record, the retracted confession of the accused has lost its evidentiary value and legal efficacy thus, it would be absolutely unsafe to rely on it and that too for recording punishment on a capital charge.

Another important aspect, which escaped the notice of the two courts below, is that, the Magistrate in his certificate has mentioned that the accused gave statement in “Hindko Dialect” which the Magistrate translated into Urdu. The Magistrate has nowhere stated in the certificate or at the trial that he was fully acquainted with or could understand “Hindko language” and that the confession was translated word by word from ‘Hindko to Urdu’.”

The Judicial Magistrate also admitted that he had dictated the questionnaire to his KPO (Key Punch Operator) being one of the staff member of his office, which also makes such judicial confession unworthy.

Co-convict Abdul Hameed maintained to have merely purchased the mobile set from co-convict Nizar, but absolved himself for having knowledge about the said mobile set being a stolen or snatched one, thus, his such confessional statement becomes ex-culpatory, which is not only inadmissible but of no help to the prosecution in any manner, henceforth, by no means, it could be relied upon for holding the appellant guilty of the crime as alleged.

17. Adverting to the circumstantial evidence in general, we have considered each and every aspect of the evidence on record in isolation as well as in consonance to each other, but have found that

there is nexus with one and the other and it did not complete the chain as it was broken because, it could not link the accused with the deceased without any shadow of doubt. The judicial confessional statement is neither supportive of the recovery nor any other circumstance, which could hold the appellant to be felon of the crime. As enunciated by the Apex Court, that in a case of circumstantial evidence, there must be trust worthy and confidence inspiring chain of circumstances, which must not be missing and the evidence must lead and connect the dead body of the deceased to the neck of the accused, which in this case, we failed to find out. Thus on the basis of such unreliable evidence, we cannot hold the appellant guilty of the charge, as the prosecution has miserably failed to bring home the charge against him. In this regard we are guided with the principle expounded in the judgment reported in the case of **Muhammad Ismail and others Vs. The State (2017 SCMR 898), Azeem Khan and another Vs. Mujahid Khan and others (2016 SCMR 274) and Naveed Akhtar Vs. The State (2015 YLR 1279).**

18. In so far as the citation referred by the learned Assistant Advocate General KPK is concerned, we have given anxious thought to those as well. There is no exception to the principles settled in those judgments, however, since the facts and circumstances of those cases are all together different and inapplicable to the instant case, therefore, the same have no relevance.

Admittedly, there is no cavil that judicial confession must be relied upon, if the same is rendered voluntarily without any duress as reported in the case of **Ghulam Qadir and others Vs. the State (2007 SCMR 782)** and **Abdul Sattar and another Vs. The State and another(2005 YLR 908)** so, referred by learned Assistant Advocate General, but regarding instant case, we have arrived at the conclusion that the said judicial confessions in question have not been recorded in accordance with law and the principles enunciated by the Apex Court, therefore, no explicit reliance can be placed upon such confessions.

20. In wake of the above discussion, we have reached to the verdict that the impugned judgment has been rendered on the basis of illogical reasons, misreading of evidence, inadmissible and unreliable circumstantial evidence, which has compelled and persuaded us to set aside the impugned judgment, allow the appeal and record acquittal of the appellant.

These are the reasons for our shot order dated 11.4.2018 for acquittal of the appellant.

JUSTICE SHAUKAT ALI RAKHSHANI

JUSTICE MEHMOOD MAQBOOL BAJWA

Islamabad, 11.4.2018

M.Akram/

