

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT:

JUSTICE RIAZ AHMAD KHAN, CHIEF JUSTICE
JUSTICE MRS. ASHRAF JAHAN

JAIL CRIMINAL APPEAL NO.04/I OF 2016 L/W,

1. Suhbat Khan son of Sirbiland Khan, Appellant
resident of Punjpir, presently Bamkhel,
District Swabi.
(Presently confined in Central Jail, Haripur).

Versus

The State Respondent

CRIMINAL APPEAL NO.06/I OF 2016 L/W,

1. Amjid son of Inzar Gul, Appellant
resident of Hero Shah, Dargail,
Tehsil Dargai, District Malakand.
(Presently confined in Central Jail, Haripur).

Versus

The State Respondent

CRIMINAL APPEAL NO.07/I OF 2016

1. Jehanzada son of Khanzada Appellant
resident of Atam Banda Malakand Division,
(Presently confined in Central Jail, Haripur).

Versus

The State Respondent

Counsel for the appellant in ... Mr. Muhammad Sharif Janjua,
J. Cr. A. No.04/I/2016 Advocate

Counsel for the appellant in ... M/s. Muhammad Raziq Khan
Cr. A. No.06/I/2016 and Aziz Muhammad, Advocate

Counsel for the appellant in ... Raja Shahzad Javed, Advocate
Cr. A. No.07/I/2016

Counsel for the State	...	Mr. Arshad Ahmad, Assistant Advocate General KPK.
Complainant	...	Muhammad Niaz in person.
FIR No., Date and Police Station	...	No.482, dated 21.06.2011, Police Station, Zaida, District Swabi.
Date of Judgment of Trial Court	...	29.02.2016
Date of Institution of J. Cr. A. No.04/I/2016 in FSC	...	15.03.2016
Date of Institution of Cr. A. No.06/I/2016 in FSC	...	28.03.2016
Date of Institution of Cr. A. No.07/I/2016 in FSC	...	31.03.2016
Date of hearing	...	27.10.2016 & 28.10.2016
Date of announcement of Judgment	...	17.11.2016

JUDGMENT

ASHRAF JAHAN, J:- By this single judgment, we propose to dispose off Criminal Jail Appeal No.04/I of 2016, Criminal Appeal Nos.06/I and 07/I of 2016, as they all have arisen out of common judgment dated 29.02.2016, passed by the learned Additional Sessions Judge-IV, Swabi, in Crime 482/2011, under sections 302, 364, 34, 411 PPC alongwith section 17 (4) Haraabah Offences Against Property (Enforcement of Hudood) Ordinance 1979, of Police Station Zaida, District Swabi.

2. All the appellants vide impugned judgment were convicted under section 265-H (2) Cr.P.C for murder of deceased Haroon Ahmed and sentenced under section 302 (b) PPC for rigorous life imprisonment and also to pay an amount of Rs.1,00,000/- (one lac) each as compensation to the legal heirs of the deceased within the meaning of section 544-A Cr.P.C. and in case of failure to further undergo simple imprisonment for six months. They were further sentenced under section 392 P.P.C for 7 years rigorous imprisonment with fine of Rs.50,000/- (fifty thousand) each and in default of payment of fine to undergo three months simple imprisonment. Additionally, appellant Jehanzada was convicted under section 201 P.P.C. and sentenced for 2 years rigorous imprisonment and fine of Rs.10,000/- (ten thousand), in default of payment of fine to undergo simple imprisonment for one month. All the sentences were ordered to run consecutively. However, benefit under section 382-B, Cr.P.C. was extended to them.

3. The relevant concise facts as per case of prosecution are that vide daily diary No.19, dated 13.06.2011, the complainant Muhammad Niaz through written application reported to police about his missing nephew Haroon Ahmed son of Muhammad Qamer alongwith his Suzuki Pick-up bearing No.B-9817 MR since 16.05.2011. It was also informed that he was having mobile phone with sim No.03009083477. On receiving such application inquiry under section 156 (3) Cr.P.C. was initiated. On 19.05.2011 a dead body was recovered from the vicinity of Police Station Dargai, which was identified by the complainant through photographs to be of Haroon Ahmed. Hence FIR under sections 302, 364, 34, 411 P.P.C. and 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 was registered on 21.06.2011 at Police Station Zaida against unknown culprits.

4. After the completion of investigation, police submitted challan against four accused Jehanzada, Amjid, Suhbat Khan and Javed. Whereas challan under section 512 Cr.P.C. was submitted against absconding accused Asghar Ali. During the investigation one Bacha Islam was discharged under section 169 Cr.P.C. being innocent and his name was arrayed in challan in the list of witnesses. On 05.01.2012 all the four accused facing trial were charged under section 17 (4) Haraabah Offences Against Property (Enforcement of Hudood) Ordinance, 1979, section 201 and 411 P.P.C, to which they did not plead guilty and claim trial.

5. The prosecution in support of its case in all examined 19 witnesses. For the sake of convenience, gist of their evidence is reproduced as under:-

- The evidence of PW.1 Sadiq Shah is only to the extent of non-execution of warrants against the accused persons.
- Sajid Ahmed PW.2 is marginal witness to the recovery memo Ex.PW-2/1, vide which the Investigation Officer took into possession Rs.25,000/- from Bacha Islam to be the price of Chassis and frame of stolen vehicle.
- PW.3. mushir Masam Khan is the marginal witness to the recovery memo Ex.PW-3/1 vide which the police party recovered two number plates bearing No.B-9817 Mardan and a learning chit belonging to the deceased. He further deposed that the accused led the police party to the place of occurrence and pointed out various places and accordingly the Investigation Officer prepared the pointation memos.
- PW.4 is Dr. Gul Badshah, SMO Civil Hospital Dargai Malakand. As per his evidence, on 19.05.2011 at about 07.40 a.m., he examined the dead body of unknown person brought to the hospital by levey Mirza Fazal Rehman. He conducted the external examination of the dead body and deposed about following injuries:-

“Two wounds spot seen, one over right forehead size is 1 inch, wound was deep, bone was exposed.

The second wound was also on right side back of the scalp near the ear size approximately 4 m.m wound was not deep. Both the legs were attached with neck on a chaddar. Fresh blood not seen. Ligation marks not seen. X-ray scalp not fracture line seen.

Nature of wound: May be due to some blunt thing. Rigormortous sign not seen, ASD done. Nature of death is not known. Dead body was handed over to levey. The

report is Ex.PW.4/1 is in my own handwriting and correctly bears my signature. The said report is given by me on injury sheet”.

- PW.5 complainant Muhammad Niaz supported the case of prosecution to the extent of his application dated 13.06.2011 and the FIR. He further deposed that he identified the deceased through photographs and other articles. There-after dead body was shifted and buried in their village. Later on, he learnt that accused Jehenzada, Amjid, Suhbat and absconding accused Asghar had committed the offence. As per his evidence different parts of the Suzuki pick-up of the deceased were also recovered, which he had identified. He produced the written application of Ex.PW-5/1 on record, regarding disappearance of his nephew.
- PW.6 is Sangeen Khan son of Amrud Khan. He deposed that he accompanied the police party alongwith accused Jehanzada, who led them to the places where the accused had conspired the kidnapping, committed murder of the deceased Haroon and threw the dead body in canal after packing it in a sack. Such mashirnamas were prepared and produced as Ex.PW-6/1 and Ex.PW-6/2. Further he also acted as mashir of recovery of different parts of snatched suzuki as Ex.PW.6/3 to Ex.PW.6/6 on record.
- PW.7 Zahoor Khan, is the marginal witness in respect of production of clothes, chader and other articles of the deceased by the medical staff. He produced recovery memos as Ex.PW.7/1 to Ex.PW.7/3.
- PW.8 Shaheenshah deposed that accused Jehanzada had come to his shop alongwith a Suzuki pickup with body over it and intended to sell the same. As per his version one Sahib Zada purchased the body of vehicle for Rs.14,000/- but subsequently, when Sahib Zada came in

knowledge about the alleged incident, he returned it and placed the same at his shop. On arrival of the police from Swabi the body of the vehicle was handed over to them.

- PW.9 Sahib Zada deposed that he had a tyre selling shop at Batkhela. As per his evidence, PW Shaheenshah informed him that suzuki body is available for sale, which he purchased for Rs.14,000/- but when he came to know that the body which he had purchased was stolen one, so he returned the same.
- PW.10 is Bacha Islam, as per his statement, he purchased chassis of Suzuki pick-up and some other parts for Rs.25,000/- from accused Amjid, subsequently he sold away these articles to scrap dealer.
- PW.11 Gul Rehman deposed that he purchased a China A-200 cell phone for Rs.1600/- from Nizam Hussain, whose shop was situated in Piran Chowk, Malakand. He installed his own Sim numbers 03459513640 and 03429155624 in it. Subsequently, cell phone was taken into possession by levies staff on the pretext that it belonged to the deceased.
- PW.12 Anwar Zeb, owner of hotel at Batkhela deposed that one Jehanzada brought a rare glass of Suzuki Cabin and kept it with him as a trust. Later on police came there and he handed over the same to them. His statement under section 164 Cr.P.C. was also recorded.
- PW.13. Raees Khan deposed that he used to drive flying coach. On 16.05.2011, he was present at Taxi Stand Marghuz, when at about 08.00 a.m. two persons came there, talked with deceased Haroon Ahmed and boarded in his taxi. Subsequently, he came to know that Haroon Ahmed did not return and murdered at Dargai Malakand Agency, from where his dead body was brought. Thereafter, he was summoned by the Magistrate in

judicial lock-up Swabi where he identified accused Suhbat who was one of the persons, who had taken Haroon Ahmed alongwith Suzuki pick-up from Marghuz.

- PW.14 Nazir Khan, DSP Headquarter, Nowshera deposed that at the time of incident he was posted as SHO at Police Station, Zaida. After the arrest of the accused Amjid and completion of investigation to his extent, he submitted supplementary challan against him in this case.
- The evidence of PW.15 Malook Shah Khan is only to the extent that complainant Niaz Muhammad made an application to DPO Swabi, which was marked to him and he entrusted the same to Sub. Inspector Muslim Shah Khan for further proceedings. He produced the extract of daily diary Sr. No.19, dated 13.06.2011 as Ex.PW.15/1.
- PW.16. Fazal Rehman, IHC PP Wazir Abad, Police Station, Dargai deposed that on 19.05.2011 he was at Police Station, Dargai when he received phone from Power House Dargai that a dead body of a male person was floating in canal upper Swat. He reached at the spot where he found dead body of a male person in water, which was lifted from there. The dead body was having a string (noose) around his neck and his legs were tied with a chadar, showing the death of the deceased by strangulation and injuries on his forehead. The dead body was searched but nothing in shape of document for the purpose of identification was found except a sliver ring as well as one wristwatch on the wrist. It was put in official vehicle and taken to Dargai hospital where the concerned Doctor removed the string from the neck and the chadar mentioned above. The Doctor examined the dead body. The photographs of the dead body were taken and produced on record as Ex.PW16/1 and Ex.PW.16/2. Such facts were also recorded in the daily diary of Police

Station Dargai at Serial No.33, dated 19.05.2011 produced on record as Ex.PW.16/3. The dead body was buried being unclaimed. On 15.06.2011, during the course of inquiry the LRs of the deceased Haroon Ahmed identified the dead body through the photographs. Subsequently, LRs of the deceased took the dead body with the permission of the Court and buried it in their own area. The LRs also disclosed that deceased was in use of a mobile phone with the capacity of double sims, having one sim number 0300-9083477. The cell phone tracking system was approached from where it was informed that the said mobile number was being used in phone No.IMEI-35943303105434 and 359433031052442. It was also found that two sims bearing number 0345-9513640 & 0342-9155624 were being used through it. The said numbers were found in use in the area of Peran Malakand by Gul Rehman son of Sahib Gul, which was taken into possession as per memo Ex.PW.16/4. It was disclosed that the said Gul Rehman had purchased phone from one Nizam Hussain, who disclosed that he had purchased the same from accused Jehanzada.

- PW.17, Muhammad Abbas Khan, Judicial Magistrate, Islamabad deposed that on 12.09.2011 at about 11.30 hours Amjid accused was produced before him in custody by Namair Khan, Sub. Inspector for recording his confessional statement. After observing all legal formalities confessional statement of the accused Amjid Ali was recorded under section 164 Cr.P.C. He produced the questionnaire Ex.PW.17/1, statement Ex.PW.17/2 and certificate as Ex.PW.17/3. He further deposed that identification parade of accused Jehanzada and Suhbat was conducted after fulfilling the legal formalities. Identification memo was produced on record as Ex.PW.17/4 consisting of four sheets.

- PW.18 Muslim Shah Khan, Inspector CTD Mardan deposed that he was posted as ASI, Police Station, Zaida, when on 13.06.2011 he was entrusted with the inquiry in this crime under section 156 (3) Cr.P.C, which he started with the permission of concerned magistrate. He produced his application Ex.PW.18/1 and order as Ex.PW.18/2. During this inquiry, the dead body of the deceased was brought from Dargai Malakand, he recorded the statements of complainant Muhammad Niaz and Raees Khan wherein they charged the accused facing trial. Further vide application Ex.PW.18/3 he produced complainant Muhammad Niaz and Raees Khan for recording their statements under section 164 Cr.P.C. Subsequently vide application Ex.PW.18/4 obtained the opinion of D.P.P. and registered the FIR as Ex.PW.18/5.
- Last witness is PW.19 Sub. Inspector Namair Khan, he deposed that initially the case was registered as per daily diary No.19, dated 13.06.2011 and after completion of inquiry, the present FIR was registered and handed over to him for further investigation. He visited the place of incident and prepared site plan. The complainant Muhammad Niaz produced the photocopies of registration book alongwith the bargain receipt of the Suzuki pick-up bearing No.B-9817/MR, which is on record as Ex.PW.19/1. He prepared the list of LRs of the deceased as Ex.PW.19/2, arrested the accused and prepared their arrest cards, available on record. After completing the investigation he handed over the case file to the then SHO Malook Shah for submission of challan against the accused facing trial and also for proceedings under section 512 Cr.P.C. against the absconding co-accused. Further during the investigation accused Bacha Islam was discharged under section 169 Cr.P.C. with the

approval of Court. He produced all the relevant documents on record as Ex.PW.19/1 to Ex.PW.19/31.

- The prosecution given up the remaining PWs and closed its side.

6. The statements of all the accused were recorded under section 342 Cr.P.C wherein they denied the case of prosecution and taken the plea that they had falsely been implicated in this case by the complainant side. The accused Amjid also taken the same stand but additionally stated that at the relevant time, he was in Karachi and serving with Fisheries Harbour Authority. In this respect, he produced the original card as Ex.D-1 and certificate issued by Superintendent of Preventive Service ASO/HQ as Ex.D-2.

7. All the accused persons though denied the allegations levelled against them but neither they examined themselves on oath nor brought any witness in their defence.

8. At the conclusion of the trial, the learned Additional Sessions Judge-IV, District Swabi convicted and sentenced the present appellants, whereas accused Javed was acquitted and absconding accused Asghar was declared proclaimed offender, his perpetual warrant of arrest were ordered to be issued, vide judgment dated 29.02.2016, which is impugned before this Court.

9. We have heard the arguments advanced by the learned counsel for the appellants and learned Assistant Prosecutor General KPK for State.

10. It is contended by the learned counsel for the appellant Amjid that the alleged occurrence was unseen incident. There is only

circumstantial evidence available on record, that too, inconsistent, therefore, no reliance can be placed upon it. He pointed out that as per case of prosecution the deceased was missing since 16.05.2011, whereas such intimation was given to the police on 15.06.2011, after 27 days and no reason has been given by the complainant side for this inordinate delay. Further all the PWs belong to Swabi being relatives of the deceased, therefore, their evidence cannot be accepted. Even PW Raees who is close relative of the deceased got recorded his statement after 35 days of the incident. Not only this but the confessional statement of the accused was also not recorded in accordance with law. Thus, the trial Court recorded the conviction merely on presumptions and assumptions. In support of his contentions, he placed reliance upon the case of Azeem Khan and another Versus Mujahid Khan and others 2016 SCMR 274 and the case of Qaiser Ali Versus The State 2016 SD 560.

11. Learned counsel Mr. Muhammad Sharif Janjua for appellant Suhbat Khan vehemently argued that PW Raees Khan has been examined by the prosecution on the point of last seen evidence. But it is strange to note that at the time of lodging belated report to the police, no such version of the complainant side came on record that on fateful day PW Raees Khan had witnessed some person talking with deceased Haroon Ahmed. The only circumstantial evidence brought on record by the prosecution is not sufficient to prove the charge against the appellant, therefore he may be acquitted.

12. Learned counsel Raja Shahzad Javed for appellant Jehanzada submitted that neither he was nominated in the FIR nor identified by any PW at the time of identification parade. The only evidence against appellant Jehanzada is alleged recovery of some parts of robbed vehicle, for which all the witnesses admitted in their cross-examination that the recovered items were not having any specific marks of identification and commonly available in market. Moreover, accused Javed has already been acquitted by the trial Court on the basis of same evidence, therefore, such evidence is not sufficient to prove the guilt of other appellants.

13. Conversely, Mr. Arshad Ahmad, Assistant Advocate General KPK for the State argued that no doubt there is no eye-witness in this case but there is sufficient circumstantial evidence against the appellants to connect them with the commission of crime. He further submitted that appellant Amjid had got recorded his confessional statement under section 164 Cr.P.C before the magistrate. The deceased had died unnatural death and the accused Suhbat was last seen at Taxi Stand Marghuz with the deceased. Not only this, but different parts of robbed vehicle were recovered from the appellants, therefore, the trial Court had rightly convicted them. But at the same time he reluctantly conceded to the legal position that the pictures of deceased Haroon Ahmed, placed on record reveal that there were no ligature marks or rigormortous over the dead body and the report of the doctor also confirms this position. He also conceded to the

position that record from the mobile tracking system has not been produced by the prosecution.

14. We have considered the arguments advanced by the learned counsel for the parties and have perused the case record.

15. It is an admitted position that occurrence was an unseen incident and as per case of prosecution there is also no direct evidence of the alleged incident except circumstantial evidence. In other words this is a case which solely depends upon circumstantial evidence. The principles of appreciation of evidence applicable in the cases depending entirely on circumstantial evidence have been enumerated in the case of Mohabbat v. The State reported as 1990 P Cr. L J 73, for the sake of reference same are reproduced as under:-

- “(i) Circumstances from which the conclusions are drawn should be fully established.
- (ii) The facts must be consistent with the hypothesis.
- (iii) The circumstances should be of a conclusive nature and tendency.
- (iv) The circumstances should, to a moral certainty, actually exclude every hypothesis, but the one proposed to be proved.”

16. With this background, first of all the case of appellant Amjid is examined. The prosecution evidence against him is, his confessional statement and alleged recovery of two number plates of robbed vehicle. Though, as per case of prosecution he had confessed his guilt before magistrate on 12.09.2011, but subsequently at the stage of trial, he retracted from his confessional statement and took the plea that at the time of incident, he was at Karachi working in Fisheries Harbour Authority. In such situation, in order to establish the case of prosecution against him, corroboratory piece of evidence in support of

his confessional statement is required. In this regard the evidence of doctor is of material value, the doctor in witness box and in his certificate dated 19.05.2011 confirmed the death of Haroon Ahmed but could not disclose the cause of death. When the confessional statement is minutely examined it discloses that death of deceased was caused by fixing his chadar in his neck. If this confessional statement is accepted then it is apparent that it does not find support from the medical evidence, which categorically discloses that neither there were ligature marks nor rigormortous over the dead body. Non-appearance of ligature marks belies the contents of confessional statement connotating the cause of death. The pictures of deceased produced as Ex.PW.16/1 and Ex.PW.16/2 also support the findings and observations of doctor. Thus the narration of facts as put forward in the aforementioned confession, when placed in juxtaposition with other evidence, mainly with medical evidence, do not portray a real or truthful story.

17. It is also important to note that no postmortem of the dead body was conducted. In such situation it cannot be safely concluded that death was caused due to strangulation. Thus, we are of the considered view that when the retracted confession does not find support from the medical evidence, it cannot be made basis of conviction. Reliance in this regard is placed upon the case of, State through the Advocate General N.W.F.P Peshawar Versus Shahjehan, PLD 2003 Supreme Court 70.

18. By this time, it is established legal position and there are plethora of judgments on the point that retracted confessional statements of accused, would do little to advance the case of prosecution, if same did not fulfill the legal threshold in the touchstone of being a genuine, truthful and voluntary one. Reference in this regard can be made to the case of Muhammad Abrar Verus The State and another 2014 YLR 537.

19. Another important aspect of the case is that as per the evidence of PW 16 Fazal Rehman, IHC the dead body was taken out from the Canal in his presence and at that time there was a string (noose) in its neck, which was taken out by the Doctor. He further deposed that the dead body was in a sack. Surprisingly, the evidence of Doctor is totally silent in this regard and there is no mention of any string in the neck of the dead body or sack at all. Again, this piece of evidence also not supported by the evidence of doctor. Thus such type of contradictory evidence cannot justify conviction. Reliance in this regard is placed upon the case of Muhammad Mukhtiar alias Moju Versus The State, 2010 PCr. LJ 1750.

20. The other piece of evidence against appellant Amjid is alleged recovery of two number plates of the robbed vehicle, which are said to be recovered under the heap of some Hay-stock in village Gandheroshah, Malakand. The evidence of PW.03 Masam Khan who is the mashir of above recovery, reveals that he had only deposed that at the pointation of accused recovery was made but he had not named any accused in his evidence on whose pointation such recovery was

effected. In such situation, the evidence in respect of alleged recovery against appellant Amjid becomes doubtful and is of no help to the prosecution.

21. Now, let's examine the evidence brought by the prosecution against the appellant Suhbat Khan. The case of prosecution against him is that he is the person, who on 16.05.2011 was lastly seen by the PW Raees Khan talking with deceased and then boarded in his Suzuki pick-up. It is strange to note that the incident is said to have taken place on 16.05.2011 but written intimation to police about the incident was given by the complainant on 13.06.2011, which was subsequently incorporated in FIR. The perusal of above application reveals that it is totally silent about this last seen evidence. It is noticeable that PW Raees Khan, who subsequently came forward to depose about this last seen evidence is not a stranger, but maternal uncle of the deceased. Therefore question arises as to why this fact was not brought on record at the relevant time. This attitude on the part of complainant party also creates doubts in the case of prosecution.

22. Similarly, so far as the case of appellant Jehanzada is concerned, against him there is alleged recovery of different parts of robbed Suzuki and cell phone of deceased. In this regard the Investigation Officer though deposed that such information was taken from cell phone company but no such record is produced to substantiate this version. Moreover, he was not identified by PW Raees Khan at the time of identification parade. It is also admitted by the prosecution witnesses that different parts of Suzuki pick-up did not

bear any specific mark of identification and commonly available in the market.

23. In the instant case, as per prosecution story incident had taken place on 16.05.2011 but for the first time information to the police was given on 13.06.2011 after lapse of 27 days. No plausible explanation, in respect of this belated information to police is given by the complainant side. Further it is deposed that on receiving spy information, accused have been nominated but no name or source of spy information is disclosed.

24. As, mentioned earlier where the case is based upon circumstantial evidence only, the guiding factor for appreciation of such evidence is that no link in the chain should be missing and all the circumstances must lead to the guilt of accused. Reference in this regard can be made to the case of Ali Khan Versus The State 1999 SCMR 955 and case of MD. Nazir Hussain Sarkar and another 1969 SCMR 388. While in the instant case not a single chain of circumstances through evidence has been proved by the prosecution leading to the guilt of present appellants.

25. It will not be out of place to mention here that on the same set of evidence accused Javed was acquitted by the learned trial Court, whereas one Bacha Islam, initially nominated as accused, was subsequently discharged under section 169 Cr.P.C. and finally his name was arrayed in the list of witnesses.

26. Thus, the crux of above discussion is that as the incident was unwitnessed, therefore, it needed very strong and consistent

circumstantial evidence to prove the guilt against the appellants, which element is lacking in this case. The medical evidence is not supportive, cause of death as per medical examination report is said to be not known. Therefore, in such situation, we are of the considered view that prosecution has failed to prove the charge against the appellants beyond shadow of reasonable doubt.

27. Consequently, the impugned judgment passed by the learned trial Court is set aside and appeals are allowed. The appellants be released forthwith, if not required in any other custody case.

Justice Mrs. Ashraf Jahan

Mr. Justice Riaz Ahmad Khan
Chief Justice

Announced at Islamabad,
on 17.11.2016

Hummayun/-