

**IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)**

PRESENT

MR. JUSTICE ZAHOOR AHMED SHAHWANI
JUSTICE MRS. ASHRAF JAHAN

JAIL CRIMINAL APPEAL NO.20/I OF 2016

1. Khushdil son of Wazeer ... Appellants
2. Sherdil son of Khushdil
both residents of Rajjar, Sheikhabad
Teh & District Charsadda

Versus

The State ... Respondent

Counsel for the appellants ... Mr. Aftab Ahmed Khan, Advocate

Counsel for the State ... Mr. Arshad Ahmed Khan,
Assistant Advocate General,
Khyber Pakhtunkhwa.

FIR No. date and ... No.448, dated 19.08.2009
Police Station P.S. Sardheri

Date of Judgment of the ... 24.01.2012
trial Court

Date of Institution in ... 27.12.2016
Federal Shariat Court

Date of hearing in FSC ... 06.04.2017

Date of Announcement ...

JUDGMENT.

ZAHOOR AHMED SHAHWANI, J. The appellants Khushdil son of Wazeer and Sherdil son of Khushdil, through this jail criminal appeal, have assailed the judgment dated 24.01.2012 passed by the learned Additional Sessions Judge-II Charsadda in case FIR No.448 dated 19.08.2009 registered under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with sections 413 and 414 of Pakistan Penal Code at police station Sardheri, whereby the accused/appellants were convicted under section 396-PPC and sentenced to life imprisonment each with a fine of Rs.1,00,000/- each or in default to further undergo six months S.I. Benefit of section 382-B Cr.P.C. was extended to the appellants.

The co-accused namely Asghar was acquitted of the charge by giving him the benefit of doubt, while co-accused namely wisal was convicted under section 412 PPC and sentenced to seven years R.I. with fine of Rs.50,000/- or in default to further undergo six months S.I. by the learned trial Court in the same impugned judgment but he has not preferred any appeal against his conviction.

Initially, the convict/appellants Khushdil and Sherdil filed their appeals against their conviction before the Hon'ble Peshawar High Court, Peshawar, which were later on transmitted to this Court by Peshawar High Court, Peshawar due to lack of jurisdiction.

2. Brief facts of the prosecution case are that on 19.08.2009 complainant Mukhtiar Khan, ASI police station Sardheri received spy information about a dead body of an unknown person lying in the fields of one Marjan Khan near Nisata Road. The police rushed to the spot and found a

dead body of a man wearing qamees, shalwar, banyan and black chappal murdered by means of fire arms; complainant prepared injury sheet and inquest report, drafted the murasila and sent the dead body for postmortem to Civil Hospital Charsadda and murasila was also sent to the police station for registration of FIR. On such report of the complainant and murasila Ex.PA/1, FIR No.448 (Ex.PA) dated 19.08.2009 under section 302 PPC was registered against unknown accused.

3. Investigation of the case was accordingly conducted and challan was submitted against all the accused before the learned trial court. Case of other co-accused persons Arshad and Javaid was separated and after determination of their age by the medical board constituted for the purpose, challan under Juvenile Justice System Ordinance, 2000 was submitted accordingly.

4. The accused were in custody in another case FIR No.1437 at police station Charsadda and they were also arrested in the case in hand. After investigation appellants were sent to face trial; the learned trial Court framed charge against the accused on 06.04.2010 under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979. The accused did not plead guilty and claimed trial.

5. At the trial, prosecution produced fourteen (14) witnesses. **P.W-1** Dr. Ayaz SMO, who conducted autopsy on the dead body on 19.08.2009 at 11.45 a.m. and opined that the deceased died due to firearm injuries to brain vital centrus. Shalwar, Qamees and Banyan were handed over to police. Probable time between injury and death : within a few minutes, between death and postmortem : about 12 to 20 hours. The P.M. report Ex.P.M consisting of

six sheets alongwith pictorial were admitted to be in his hand writing and bears his signature. The injury sheet and inquest report were also endorsed by him which are Ex.P.M/1 and Ex.P.M/2 respectively. **P.W-2** Fazal Gul constable, who escorted the dead body of the deceased from the spot to the mortuary, he is the marginal witness to the recovery memos (Ex.P.W-2/1). **P.W-3** Fazal Subhan ASI, is the marginal witness of recovery memo, he produced original Identity Card of deceased as Ex.P.W-3/1. **P.W-4** Mukhtiar Khan S.I. is the complainant of the case and narrated the same facts as mentioned in the prosecution story. **P.W-5** Miss Nusrat Yasmeen, Additional Sessions Judge (the then Judicial Magistrate), who had recorded the confessional statement of accused Khushdil and Sherdil. Memorandums of inquiry alongwith certificate are Ex.P.W-5/1 to 5/4 respectively. **P.W-6** Amir Muhammad Khan, ASI is the Investigating Officer of the case. He deposed that on receipt of copy of FIR, he proceeded to the spot, prepared the site plan Ex.PB, took into possession Qamees as P-1, Shalwar brown colour P-2, white banyan P-3 and chappal P-4 and prepared recovery memo Ex.P.W-6/1, took into possession blood stained garments, blood stained earth. Produced recovery memo of photographs of the deceased as Ex.P.W-6/2 and had taken thumb impression of the deceased through finger prints slip as Ex.P.W-6/3, received report of FSL regarding blood stained earth as Ex.P.W-6/4, recorded statements of PWs, made an application for the custody of the accused vide application Ex.P.W-6/5 and Ex.P.W-6/6; during interrogation on the pointation of accused, addition was made in the site plan which is reflected with red pen as Ex.PB, recovered NIC of the deceased and examined the widow of the deceased u/s 161 Cr.P.C. , who identified the clothes, chappal, N.I.C. and photograph of her husband. He produced her in the

court of Judicial Magistrate vide his application Ex.P.W-6/7, where she got recorded her statement u/s 164 Cr.p.C. as Ex.P.W-6/8, produced accused alongwith co-accused before the Court again for confessional statement vide his application Ex.P.W-6/9, made an application Ex.P.W-6/10 in the Court for the arrest of accused Wisal through Zameema Bey and after the formal arrest of the accused he was produced before the Court for police custody through his application Ex.P.W-6/11, recovered carry Dabba on the pointation of accused Wisal and a separate case F.I.R No.1454 dated 13.11.2009 under section 412/413 PPC was registered in police station Charsadda, copy of recovery memo is Ex.P.W-6/12, took into possession the copy of registration book of the vehicle which is Ex.P.W-6/13 produced by Ghulam Muhammad. After expiry of the police custody of Muhammad Wisal he produced him again before the Court for recording his confession vide his application Ex.P.W-6/14. He also made application for obtaining process under sections 204 and 87 Cr.P.C. vides his applications Ex.P.W-6/15-16 respectively. **P.W-7** Tauheed Khan, who produced accused Asghar before the Judicial Magistrate for police custody. **P.W-8** Muhammad Iqbal is the marginal witness to recovery memo Ex.P.W-6/14. In his presence police recovered his tractor generator in scrape form alongwith trolley and carry Dabba bearing Chassis No.807798 from the shop of Kamran Mechanic. **P.W-9** is Mst. Nazia, widow of deceased Abid Hussain, as per her statement, her husband was a taxi driver of carry Dabba No.3955 LHJ blue colour owned by one Ghulam Muhammad alias Babu resident of Karawan Road Mardan, on 16.08.2009 her husband left the house in the above mentioned carry pickup for earning his livelihood, but he did not come back. They started search meanwhile the Charsadda police informed that they have arrested the accused

Khushdil son of Wazir Muhammad, Sher Dil, Javaid and Arshad sons of Khushdil and recovered the N.I.C. of her husband. They also informed her that the wife of accused Khushdil namely Shakila had informed them that the accused are the residents of Ibrahimzai, Sardheri and they have brought her husband on the pretext of picking the patient to the Ibrahimzai where they have snatched the carry Dabba from her husband forcibly and sold out the same to accused Wisal son of Shah Zada and they also killed her husband in the near field. She identified her husband from N.I.C., clothes and pictures. She charged the accused for the murder of her husband. **P.W-10** Ghulam Muhammad, the owner of carry Dabba being driven by deceased as taxi, deposed that he has also made a report to the police station City Mardan which was reduced into writing in the shape of Mad No.42 dated 30.08.2009 which is Ex.P.W-10/1 and the said carry Dabba was returned to him on the order of Peshawar High Court Peshawar vide order dated 26.11.2010, produced attested copy of order as Ex.P.W-10/2, further deposed that the colour of the vehicle was blue but it was changed by the accused into cream colour, the chassis number was also damaged by the accused and the vehicle was identified from its engine number. **P.W-11** Moharrir, produced various N.I.Cs to the I.O. who took into possession the NIC of deceased Abid Hussain which is Ex.P-5. **P.W-12** Fazal Badshah, ASI, the marginal witness to the recovery memos through which the Investigating Officer recovered and took into possession blood stained earth, blood stained straws and blood stained garments of the deceased consisting of qameez P-1, shalwar P-2 and banyan P-3. He is also the marginal witness to the pointation memo (Ex.P.W-6/37) by which the accused led the police party to their house where they had fastened the deceased and snatched vehicle and thereafter they made

pointation of the spot where they killed the deceased. **P.W-13** Hairan Shah DFC, who was entrusted with warrant u/s 204 Cr.P.C and proclamation notice u/s 87 Cr.P.C against accused Asghar. **P.W-14** Ameer Hussain SHO, submitted complete challan Ex.P.K and Ex.PK/1 respectively against the accused.

6. On close of prosecution evidence the statement of convicts/appellants were recorded under section 342 Cr.P.C. wherein they denied the allegations levelled against them by prosecution. All the convicts/appellants neither got recorded statement on oath as envisaged under section 340(2) Cr.P.C. nor produced any witness in their defence. At the close of trial, learned trial court vide impugned judgment convicted and sentenced the convicts/appellants in the manner as mentioned above. Being aggrieved and dissatisfied from the judgment passed by the learned trial court dated 24.01.2012, the appellants filed the instant appeal.

7. Mr. Aftab Ahmed Khan, learned counsel for the appellants contended that it is an un-witnessed incident as none has seen the appellants committed the offence. The case of the prosecution rests upon retracted confessions which cannot be made a base for conviction without any other independent corroboration. He further argued that learned trial court without proper appreciation of evidence convicted and sentenced the appellants and impugned judgment is not tenable in the eye of law. In support of his contentions reliance are placed as under:-

SCMR 2013 pg 383, SCMR 2007 pg 670, SCMR 2010 Pg 1604

SCMR 2004 Pg 209, P.Cr.LJ 2006 Pg 1516, P.Cr.LJ Pg 1989 Pg 1738

8. Conversely, Mr. Arshad Ahmad Khan, Assistant Advocate General, Khyber Pakhtunkhwa defended judgment of the learned trial court and contended that FIR of the occurrence was lodged without any consultation or fabrication and recovery of dead body from the spot corroborates the venue of occurrence; the confessional statement, recovery of vehicle and NIC of deceased on pointation of appellants connect them with the commission of offence and defence could not point out any illegality or irregularity in the impugned judgment. The involvement of accused/appellants in this case is fully established; he sought dismissal of appeal.

9. We have heard learned counsel for the appellants as well as learned Assistant Advocate General, Khyber Pakhtunkhwa and have gone through the record.

10. It is an admitted fact that there is no direct ocular evidence about the guilt of the appellants, but the prosecution has established the case against the appellants by producing concrete circumstantial evidence in the shape of confessional statements made by appellants, recovery of robbed vehicle on the pointation of accused Wisal and recovery of NIC of deceased from the house of appellants.

11. It is evident from the record that appellants Khushdil, Sherdil and Javaid after arrest got recorded their confessional statements on 16.11.2009 before concerned Judicial Magistrate (P.W-5). In their confessional statements accused/appellants have given an account of the incident and have admitted that they had hired the vehicle carry Dabba as taxi and then driver Abid Hussain was murdered by means of firing. All the appellants had narrated the same story

about the incident and the confessional statements made by appellants corroborate each other. The confessional statements have been recorded on 16.11.2009, two days after arrest of appellants. Since the confessional statements have been recorded promptly, therefore, leaves no room for doubt regarding their voluntariness.

12. Moreover, the judicial Magistrate (PW-5) who had recorded the confession has complied with all the formalities required under the law. Despite lengthy cross-examination nothing came on record in the deposition of Judicial Magistrate to be beneficial to defence point of view. Though the appellants have retracted from their confessions even then the same rings true and voluntarily ones. As confessional statement of one appellant corroborates the confessional statement of other. Where the confessional statement of accused is found to be true and voluntary conviction can be recorded on such statement. Reference is made to the state Vs. Waqar Ahmed (1992 SCMR page-950) wherein it has been held as under:-

“There is no basic difference between a confession or a retreated confession, if the element of the truth is not missing. It is always a question of fact which is to be adjudged by the courts on the attending circumstances of a particular case. In this case we have come to the irresistible conclusion that the confessional statements of the accused is true and voluntary and conviction could be recorded on such statements.”

Similarly the Hon'ble Supreme Court in case of Muhammad Amin Vs. The State (PLD 2006 Supreme Court Page-219) held as follows:-

“It is well settled that as against the maker himself is confession judicial or extra judicial, whether retracted or not retracted, can in law validly from the sole basis of his conviction, if the court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement.”

13. Though the confessional statements have been recorded two days after arrest of the applicants, but the delay of two days in recording confessions would become irrelevant to determine its voluntariness, but would not render confessions in-voluntary. Reliance is made in Ghulam Qadir Vs. The State (2007 SCMR page-782)) wherein the Hon'ble Supreme Court held as follows:-

“The confessional statements of the appellants were recorded by the Magistrate on 22.08.1998, seven days after their arrest. Undoubtedly some delay was caused in recording these statements. Delay in recording judicial confession becomes relevant to determine its voluntariness. However, delay without more, does not render the confession in-voluntary.”

Since the confessional statements made by the appellants are true and voluntary, the learned trial court has rightly believed the same and made a base for conviction of the appellants. Moreover, the record further reveals that according to confessions made by appellants that they had sold out the robbed vehicle carry Dabba/taxi to accused Wisal. The police then got recovered the

carry Dabba/taxi of deceased on pointation of said accused Wisal. The confessional statements get corroboration by recovery of carry Dabba on pointation of accused Wisal.

14. It has also come in the evidence of prosecution that NIC of deceased Abid Hussain was also recovered on pointation of Sherdil appellant from his house in another case FIR No.1437 police station Charsadda and later on secured in the case in hand, is a link which further corroborates and strengthens the case of prosecution.

15. The record further reveals that appellants in their confession had stated that Abid Hussain driver was done to death by means of firing. The confession statements further get corroboration by medical evidence. As the medical officer Dr. Ayaz (PW-7) who had conducted autopsy on the dead body of the deceased opined that deceased had died due to firearm injuries to brain vital centrus.

16. Careful perusal of record shows that prosecution has succeeded to establish the case against the appellants by collecting sufficient incriminating circumstantial evidence in the shape of confessional statements, recovery of robbed vehicle and NIC of deceased on pointation of accused. The prosecution has been able to complete the links of the chain connecting the appellants with the commission of offence. The defence could not point out any illegality or irregularity in the impugned judgment passed by learned trial court, which call for interference on the part of this court. The learned trial court has rightly convicted and sentenced the appellants. As such appeal filed by the appellant Sherdil son of Khushdil is hereby dismissed.

17. So far as the appeal to the extent of appellant Khushdil son of Wazir is concerned, since he has expired/died in jail during the pendency of this appeal, therefore, to his extent appeal becomes infructious.

(MR. JUSTICE ZAHOOB AHMED SHAHWANI)

(JUSTICE MRS. ASHRAF JAHAN)

Announced on _____
at Islamabad.
Zain/*

