

Form No: HCJD/C-121  
JUDGMENT SHEET  
IN THE ISLAMABAD HIGH COURT, ISLAMABAD  
(JUDICIAL DEPARTMENT)

**MURDER REFERENCE NO. 02 OF 2015**

The State

Versus

Zafar Ali s/o Nabi Bakhsh

Appellant by : Barrister Mirza Shahzad Akbar.  
Complainant by : Mr. Niaz Barohi, Advocate.  
State by : Malik Awais Haider, State Counsel.  
Date of Hearing : 06-02-2019.

ATHAR MINALLAH, CJ.- Through this consolidated judgment we will answer the instant Murder Reference and decide Jail Appeal No.29 of 2015 titled "*Zafar Ali v. The State*".

2. The learned Additional Sessions Judge, East, Islamabad has forwarded the instant reference for confirmation of conviction and the death sentence handed down vide judgment, dated 07.02.2015, whereby Zafar Ali s/o Nabi Bakhsh (hereinafter referred to as the '**Appellant**') was convicted and sentenced in the following terms:

***"The accused has made a confessional statement and true confession of the commission of offence, so, the proof of the Qatl-e-Amd liable to Qisas is available in this case, therefore, the accused is convicted under Section 302-A of PPC and sentenced to death along with fine of Rs.5lacs, in default whereof to undergo simple imprisonment of 03 months. He is also ordered to pay Rs.5lacs as compensation to the legal heirs of the deceased as required u/s 544-A of Cr.P.C. He be handed by neck till he is dead. The death sentence shall be subject to confirmation by the Honorable Islamabad High Court, Islamabad where a reference shall be sent by this Court. The accused is extended the benefit of section 382-B, Cr.P.C. Case property be kept intact till the period of appeal, revision and reference to be sent to the Honorable Islamabad High Court. Copy of this judgment has been provided to the accused free of cost with a clear direction that he may file an appeal against this judgment within seven days. File be consigned to record room after due completion and compilation."***

3. The facts relevant for deciding the case in hand are that pursuant to a written complaint submitted by Niaz Hussain Barohi, son of Hazoor Bakhsh Barohi r/o House no. 142, Street 1, Phase-II, Bahria Town, Islamabad (hereinafter referred to as the '**Complainant**') FIR No. 231 of 2014, dated 10.08.2014, was registered at Police Station Lohi Bhair, District Islamabad under section 302 of the Pakistan Penal Code (hereinafter referred to as the '**FIR**'). According to the facts

narrated therein the Complainant and his wife had contacted and asked several persons regarding employing a driver. The mother of the Appellant informed the wife of the Complainant that she could help her in arranging a person to be employed as a driver. The Appellant was working as a security guard with M/s ZIMS Security (Pvt.) Limited (hereinafter referred to as the '**Security Company**'). The latter was assigned duties by the Security Company at the residence of the Complainant. The Appellants mother called the Complainants wife and informed her that one Muhammad Nadeem had been arranged and that he was on his way to Islamabad for being employed as a driver. On 10.08.2014, at noon, the latter called the Complainant and informed him that he would be reaching Islamabad in a few hours. The Complainant picked Muhammad Nadeem (hereinafter referred to as the '**Deceased**') and brought him to his house. On his arrival he was sent to the room situated on the second floor of the building for taking rest. After a while i.e at about 5 pm the Complainant heard a loud voice. The Appellant knocked on the door and when the complainant came out, he saw the former with his gun hanging on his shoulder. The Appellant informed the Complainant that the Deceased had shot himself. The Complainant informed the Police and the private security of the residential scheme. The latter arrived at the residence and after taking photographs of the crime scene, disarmed the Appellant. In the meanwhile, the Deceased succumbed to his injuries. The body of the Deceased was brought down with the help of a lifter crane by the police officials and sent to the Pakistan Institute of Medical Sciences (hereinafter referred to as the

**'Hospital')** for conducting an autopsy. Nawab Khan, Assistant Sub Inspector and posted at Police Station Lohi Bhair, conducted the initial investigations at the crime scene. It appears from the record that the Appellant was arrested on 11.08.2014 and pursuant to his personal search various articles/items were taken into possession through recovery memo's prepared by the Investigating Officer and witnessed by Shah Nawaz, Head Constable. On 15.10.2014, the Investigating Officer, in the presence of witnesses, took into possession the record relating to the Appellant from the Security Company, which included a copy of the license of the crime weapon. The physical remand of the Appellant was handed over to the Investigating Officer by the learned Judicial Magistrate on 12.08.2014. The fire arm weapon, alleged to have been used by the Appellant, was recovered on 14.08.2014 and the recovery memo was witnessed by two officials of the Police Station. It appears from the said recovery that the Appellant had led the Investigating Officer to an under construction house to which access was possible because the doors were not yet installed. The recovery memo is silent regarding the presence of any person at the time when the recovery was made. The Appellant was ordered to be sent on judicial remand by the learned Judicial Magistrate, vide order dated 15.08.2014. The learned Additional Sessions Judge framed the charge on 07.02.2015 to which the Appellant pleaded guilty. It appears from the record that on the same day a written application was filed through a learned counsel wherein it was admitted by the Appellant that he had killed the Deceased and that he had handed over the crime weapon to the police officials at the time of his arrest.

It was further stated in the application that the Deceased was killed because of past enmity which provoked him to commit the crime. The learned trial Court, after recording his statement, convicted the Appellant vide judgment, dated 07.02.2015, in the terms reproduced above.

4. Barrister Mirza Shahzad Akbar was appointed by this Court to assist us on behalf of the Appellant at State expense. The Complainant was represented by Mr. Niaz Barohi, Advocate High Court.

5. Barrister Mirza Shahzad Akbar has contended that; the learned trial Court failed to exercise discretion in accordance with law; the record indicates that the murder of the Deceased was shrouded in mystery; the actual date of arrest of the Appellant raises doubts regarding the credibility of the investigations conducted in this case; the application filed through a counsel wherein the Appellant had purportedly admitted his guilt contradicts the recovery of the weapon as has been described in the recovery memo, dated 14.08.2014, by the Investigating Officer; the postmortem was conducted two days after the incident; solely relying on the admission was in violation of the principle of safe administration of justice; the Appellant could not have been sentenced to death on the sole ground of pleading guilty; section 265-E of the Code of Criminal Procedure (hereinafter referred to as the "**Cr.P.C**") vests a discretion in the trial Court which is required to be exercised in accordance with the settled principles and application of mind; the learned trial Court, without observing the

mandatory precautionary measures, proceeded to convict the Appellant by handing down capital punishment; this was not in consonance with the principles of safe administration of justice; the contents of the written complaint filed by the Complainant shows that the Deceased was sent by the mother of the Appellant; for meeting the requirements of the principles of safe administration of justice, the learned trial Court should have recorded at least some evidence so as to be satisfied that the admission made by the Appellant was voluntary.

6. The learned Counsel for the Complainant, on the other hand, has argued that; the discretion exercised by the learned trial Court was in accordance with the law; the Appellant had unambiguously confessed to have killed the Deceased; the Complainant had no reason for falsely narrating the facts in his written complaint; the autopsy report corroborated the admission made by the Appellant.

7. The learned Counsels have been heard and the record perused with their able assistance.

8. The Appellant had pleaded guilty in response to the charge framed by the learned trial Court on 07.02.2015. An application was also filed by the Appellant through a counsel wherein killing the Deceased was admitted and it was further stated that he had surrendered the crime weapon to the police officials at the time of his arrest. The learned trial Court recorded the statement of the Appellant

on the same date when the charge was framed and in response thereto guilt was admitted. The learned Additional Sessions Judge had certified that the confession made by the Appellant was voluntary. On the same date, i.e. 07.02.2015, the learned Additional Sessions Judge convicted the Appellant vide judgment, dated 07.02.2015, and handed down the sentence of capital punishment. The question required to be answered, therefore, is whether the learned trial Court had taken the precautionary measures required for ensuring the safe administration of criminal justice and whether the discretion vested under section 265-E of the Cr.P.C was exercised in accordance with the settled principles of law. Admittedly, no evidence was recorded in this case and the learned trial Court had convicted and sentenced the appellant solely because he had pleaded guilty in response to the framing of the charge on 07.02.2015.

9. Section 265-D of Cr.P.C empowers the trial Court to frame a charge in writing against an accused if it forms an opinion, after perusing the police report and other documents and statements filed by the prosecution, that there is ground for proceeding with the trial. Section 265-E of the Cr.P.C provides that the charge shall be read and explained to the accused and that the latter will be asked whether he is guilty or has any defence to produce. In the event that the accused pleads guilty then the Court records the plea and, "may in its discretion", hand down a conviction on the basis of such a plea. The language of sub section (2) of 265-E is unambiguous and vests a discretion in the trial Court to convict the accused if the latter pleads

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guilty in response to the charge. Nonetheless, a plain reading of sections 265 D and 265 E together, shows that the satisfaction of the learned trial Court that the plea of guilt has been made voluntarily is implicit therein. The legislative intent is obvious from the expressions 'the charge should be read and explained' and 'may in its discretion convict'. The learned Court is, therefore, required to exercise great care and caution in handing down a conviction leading to the sentence of death in cases where an accused pleads guilty to a charge. It is, therefore, crucial for the learned trial Court to observe all the possible precautionary measures and to provide sufficient opportunity to an accused taking the plea of guilty in order to be certain that it is voluntary and free from any influence whatsoever. Life is too precious a gift of the Creator to be taken away lightly and without observing the principles imbedded in safe administration of justice. It would be beneficial to examine the precedent law.

10. In the case titled "*Muhammad Ismail v. The State*" [**2017 SCMR 713**] the august Supreme Court has observed and held in the context of discretion vested under section 265-E of Cr.P.C that it has to be exercised with extraordinary care and caution and that awarding the capital sentence of death on the basis of a plea of guilty ought to be avoided. It has been further observed that to prove the guilt of an accused, evidence of the complainant or the prosecution should be recorded in the interest of safe administration of justice. The apex Court has highlighted the principles relating to confession and the same are reproduced as follows:



**"It should be ensured,**

- (i) that the accused is in full senses and understands the consequences of making a confession;**
- (ii) that, the confession was not a result of any duress, coercion or any promise by the prosecution, to be made an approver;**
- (iii) that, during transit of the accused by the police from and to the Trial Court from the prison, on each "Paishi" no threat or pressure was applied by the escorting police guard or incharge thereof;**
- (iv) what were the actual facts, which induced the accused to confess after facing trial, during which he pleaded innocence all the way;**
- (v) the Court recording the confession has to ensure that the mental capacity of the accused is not diminished due to any illness and if some indication of abnormality is suspected by the Court, it is better to refer the accused to the Standing Medical Board to ascertain the true cause thereof;**
- (vi) While recording the confession, the same safeguards and precautions be adopted, by directing the Public Prosecutor, the complainant's counsel, the Naib Court and all other officials to leave the Court. If need be, the counsel who represents him, may be given an opportunity to be present inside the Court during the whole process, if the accused person, on asking by the Trial Judge, so demands;**
- (vii) the handcuffs of the accused be removed and he be provided a chair on the dais. He may be given some time to think over the making of the confession and in that regard particular questions be put to him, as to why he was making the confession when he has**

***already pleaded innocence and claimed trial at the time, the formal charge was framed;***

***(viii) the Trial Judge shall explain to the accused that, in case of making confession, he has to face a capital sentence in a murder case or any offence punishable with death;***

***(ix) the entire record of all the questions and answers recorded, be properly maintained and thereafter, a proper certificate be appended thereto, showing the satisfaction of the Trial Judge that the accused person was not mentally sick and he was making the confession voluntarily, based on true facts and that, there was no other compelling reason behind that."***

The apex Court has held that in case the trial Court fails to observe the above procedure and requirements, then a statement made by an accused cannot be treated as confession and, at best, it can only be treated as an admission. While referring to Article 30 of the Qanun-e-Shahadat Order, 1984 the august Supreme Court has observed that such an admission can only be treated as a relevant fact and not proof by itself. Moreover, it has been observed that a voluntary and proved confession alone could be treated as proof of guilt against the maker thereof. In a nutshell, the august Supreme Court has drawn a distinction between a confession and an admission. It is important to note that in the facts and circumstances before the august Supreme Court, an admission was made by the accused in his statement, recorded under section 342 of the Cr.P.C, which was recorded towards the end of the trial. It would be apt to refer to the judgment of the august Supreme Court in the case titled "*Imran Ali v. The State*"

**[2018 SCMR 1372]**. In that case the accused had pleaded guilty and had also recorded a detailed confessional statement under section 164 of the Cr.P.C, admitting every aspect of the commission of the offence. However, keeping in view the principles of safe administration of criminal justice, the trial Court had elected to proceed with the recording of the prosecution evidence. The accused in that case had reiterated his admission and confession in the statement recorded under section 342 of the Cr.P.C.

11. In the instant case, the learned trial Court had shown haste in handing down the conviction and sentencing the Appellant to death. The learned trial Court had not observed the due care and caution required to ensure a fair trial and the meeting of requirements of safe administration of justice. We have perused the record and we have observed that the apparent contradictions therein raise questions regarding the plea of guilt having been taken voluntarily. However, we would show restraint in making any observations lest it may prejudice the case of either party before the learned trial Court. We are of the opinion that in the facts and circumstances of the case in hand, the learned trial Court did not exercise its discretion under subsection (2) of section 265-E of the Cr.P.C in accordance with the principles of safe administration of justice.

12. For what has been discussed above, we answer the Murder Reference in the **negative**. Consequently, we allow the Jail Appeal and set aside the impugned judgment, dated 07.02.2015. The matter is remanded to the learned trial Court for *denovo trial*. Since

the Appellant has remained incarcerated for a long time, we expect that his trial will be entrusted to a learned Model Court. We expect that the learned trial Court will proceed and conclude the trial expeditiously. A copy of this judgment is directed to be sent to the Appellant through the concerned Superintendent of Prison.

(MIANGUL HASSAN AURANGZEB)  
JUDGE

(CHIEF JUSTICE)

Announced in the open Court on **13-05-2019.**

JUDGE

(CHIEF JUSTICE)

Approved for reporting.