

IN THE SPREME APPELLATE COURT GILGIT- BALISTAN

Before: - **Mr. Justice Muhammad Nawaz Abbasi, Chief Judge**
Mr. Justice Syed Jaffar Shah, Judge
Mr. Justice Muhammad Yaqoob, Judge

1. Cr. PLA No. 10/2011

Ateeq Hussain s/o lateef Hussain resident of Muhallah Sajadia
Gilgit----- **Petitioner**

Versus

The State ----- **Respondent**

2. Cr. PLA No.11/2011

The State ----- **Petitioner**

Versus

Shamir Alias Rehman S/o Faqir Muhammad R/o Barmas Tehsil &
District Gilgit-----

Respondent

3. Cr. PLA No. 8/2011

Naeem Ahmed S/o Bashir Ahmed R/o Barmas Tehsil and District
Gilgit----- **Petitioner**

Versus

Shamir Hussain Alias Rehan S/o Faqir Muhammad R/o Barmas Tehsil & District
Gilgit ----- **Respondent**

Present: Mr. Joher Ali assisted by Haji Jamal Khan AOR for
Petitioner Ateeq Hussain.
Advocate General for the State.
Malik Haq Nawaz Sr.Advocate assisted by
Muhammad Abbas AOR for the complainant Shamir
Hussain.

Charged under section 302/34/109/114 PPC, 6/7 of ATA 1997 13 Arms Ordinance vide FIR No. 124/09 PS city Gilgit. Petition under article 60 of GB Governance order 2009, for leave to appeal against judgment dated 24.05.2011 passed by Division Bench of learned Chief Court Gilgit whereby the learned Chief Court maintained the death sentence of petitioner/appellant for leave to appeal into appeal to meet the ends of justice.

Date of Hearing on 21-09-2011

JUDGMENT

Muhammad Nawaz Abbasi, CJ: These connected Petitions bearing Cr.PLA No. 10/2011, Cr.PLA No 08/2011 and Cr. PLA No 11/2011 have been directed against the Judgment dated 24-05-2011 passed by the Chief Court in a Criminal Appeal whereby conviction and sentence of Death awarded to Ateeq Hussain appellant by the Special Court established under Anti- Terrorism Act, 1997 at Gilgit in a murder case has been maintained whereas Shabir Hussain his co-convict has been acquitted. The Criminal Petition for leave to Appeal No. 10/2011 has been filed by Ateeq Hussain, convict whereas criminal Petition No.11/2011 and Criminal Petition No 08/2011 have been filed by the state and complainant respectively, against the acquittal of Shabir Hussain.

2. The short facts in the background leading to these petitions are that on a report lodged by Qari Pervez Akhtar on 28-09-2009, a case under Section 302/34, 109,114 PPC read with Section 6/7-A of Anti Terrorism Act, 1997 was registered against the accused at Police Station City, Gilgit, wherein the occurrence has been described as under :-

Iftikhar Ahmad s/o Bashir Ahmed 2nd Master, Government High School, Sharot on the fateful day at about 2000 Hrs while on his way back to his house from school when reached in front of the house of Sana ullah (Brother of First informant) was suddenly fired at and Sana Ullah on hearing fire report coming out of his house saw that Iftikhar Ahmed was lying dead on the road. The deceased had no enmity or strained relation with any person in the area and has been made victim of the terrorism. Ghulam Ali resident of Barmas who was in the company of the deceased at the time of occurrence has witnessed the occurrence.

3. During the investigation of the case, the accused having been found involved in the case were challenged to face the trial before the special court established under Anti-Terrorism Act, 1997 at Gilgit. The prosecution examined 14 witnesses in all and also placed on record the report of fire Arm Expert,

Exp/A, report of Chemical Examiner Exp/B and report of post Mortem Examination ExPW-11/A to prove the charge. The accused in their statement under Section 342 Cr.PC denied the charge and neither appeared in the witness box under Section 340(2) Cr. PC nor produced any witness in their evidence.

4. The learned trial judge on conclusion of the trial having held Ateeq Hussain and Shamir Hussain guilty of the charge awarded them sentence of death under Section 302(b)/34 PPC read with 7 (a) of Anti-Terrorism Act, 1997 and a fine of Rs.3 lac each with direction that the fine on recovery shall be paid as compensation to the legal heirs of deceased under Section 544-A Cr. PC and in default of payment of compensation, each convict would undergo rigorous imprisonment for a term of one year. The accused (Ateeq Hussain and Shamir Hussain) were also convicted under Section 13-D of Arms Ordinance 1965 and each one of them was sentenced to undergo Rigorous Imprisonment for 7 years with benefit of section 382 Cr. PC. The remaining accused were acquitted and murder reference under Section 25 of Anti- Terrorism Act, 1997 read with Section 374 Cr. PC was sent to the Chief Court for confirmation of death sentence of the two convicts.

5. The Chief Court in appeal preferred by the convicts maintained the conviction and sentence awarded to Ateeq Hussain and giving benefit of doubt to Shamir Hussain acquitted him from the charge.

6. M/s Haji jamal Khan and Munir Ahmed Advocate have addressed the Court on behalf of Ateeq Hussain convict, whereas Advocate General has appeared on behalf of the state in all the three connected petition and Malik Haq Nawaz Advocate appeared in these petitions on behalf of complainant.

7. We have heard the learned counsel for the parties at length and also carefully perused the record with their assistance. The factual position of the evidence on record is as under:-

8. The shot was fired at deceased at about 2000 hrs on 25-04-2009 and report of the occurrence was lodged at 2030 hrs at Police Station within half an hour of the occurrence. The prosecution instead of producing Ghulam Ali sole eye witness of the occurrence relied upon the circumstantial evidence. Nowshad Ali (PW-8) star witness of prosecution was initially taken into custody as suspect in the case but subsequently he was cited as witness and his statement under Section 164 Cr.PC was also recorded. Nowshad Ali(PW-8) being not an eye witness of occurrence has no direct knowledge of the involvement of any accused in the case, rather, he got information regarding involvement of Ateeq Hussain and his co- accused in the occurrence by one

Irfan and said Irfan was not produced as witness by the prosecution. Nowshad Ali(PW-08) Further claimed that shortly after the occurrence on Shakeel disclosed the name of accused as culprits before Sadaqat a police Official near the scene of occurrence and subsequently he also narrated the occurrence to him but neither said Shakeel nor Sadaqat Police Constable was produced.

9. The prosecution case in addition to the statement of Nowshad (PW-8) rests on the medical evidence and recovery of weapon of offence at the instance of the accused alongwith empties recovered from the spot. The motive of sectarian hatred has been attributed but no reliable evidence direct or circumstantial has been produced in support thereof.

10. The prosecution has placed much reliance on the evidence of recovery of 30 Bore Pistols at the instance of accused and Crime empties from the spot which as per report of Forensic Science Laboratory, have been found to have been fired from the pistols. Shamir Hussain was arrested on 16-05-2009 and he got recovered 30 Bore pistol from an open place on 29-05-2009 whereas Ateeq hussain was arrested on 03-05-2009 and he led to the recovery of 30 Bore Pistol on 08-05-2009 from shop of one Muzafar volcanizer. The prosecution did not produce any public witness of the recovery of the pistol from Ateeq Hussain and Shamir Hussain so much so Muzafar shopkeeper was also not produced to prove the recovery of pistol at the instance of Ateeq Hussain from his shop. The crime empties of 30 Bore pistol four in number recovered on the day of occurrence from the spot admittedly have been kept at the police station till recovery of the pistol and on 15-10-2009 both were sent together to the Forensic Science Laboratory for expert opinion.

In addition, the prosecution also placed reliance on the confessional statement made by Ateeq Hussain and Shamir Hussain before Superintendent of Police under Section 21-H of Anti- Terrorism Act, 1997.

11. The learned counsel for the petitioner has contended that there is no direct evidence of the involvement of accused in the case whereas the circumstantial evidence produced by the prosecution also would not connect them with commission of offence and in any case the evidence brought on record is shaky which is not truthful and confidence inspiring to be relied upon. The learned counsel forcefully argued that Nowshad (PW-8) has no direct knowledge of the occurrence and the persons who gave him information regarding involvement of the accused in the occurrence were not produced, in confirmation of his evidence based on hearsay knowledge. He forcefully argued that under Qanoon-i-Shahadat Ordinance, 1984, hearsay evidence is not admissible to be made basis of conviction.

12. The learned counsel next argued that the Ghulam Ali the sole eye witness of the occurrence was not produced for the reason best known to the prosecution and similarly, Muhammad shakil and Irfan before whom the accused made disclosure of the occurrence having first hand knowledge narrated the story to Nowshad (PW-8) have not been produced. The learned Counsel contended that the above named persons being the witnesses of extra Judicial confession were most important witnesses of extra Judicial confession were most important witnesses and their evidence was also material in the given facts and that without producing them, the statement of (PW-8) would be of no use to prosecution. The learned counsel next submitted that the recovery of weapon of offence (Pistols) also has no evidentiary value because the crime empties recovered from the spot on the day of occurrence were kept in police custody at the police Station till recovery of pistols from the accused and both were sent together in one parcel to the Forensic Science Laboratory for expert opinion and consequently, no sanctity would be attached to the positive report of fire arm expert. He added that the recovery of pistol at the instance of one accused from an open place and at the instance of other accused from the shop of vulcanizer was not proved through an independent and reliable evidence as no public witness was produced in proof of the recovery of pistols at the instance of accused, therefore, in the given facts the evidence of recovery of pistol would not be reliable.

13. The learned counsel further contended that motive of sectarian hatred also has not been proved beyond doubt and argued that with exclusion of statement of Nowshad (PW-8) and evidence of recovery from consideration, the conviction only on the basis of medical evidence and motive even if is believed would not be possible. In nutshell learned counsel argued that there was no direct evidence and the circumstantial evidence brought on record was not reliable, but unfortunately the trial court as well as the Chief Court in departure to the settled principle of criminal administration of Justice regarding appraisal of evidence withheld the benefit of doubt arising out of the circumstances of the case in favour of accused by stretching the law in favour of prosecution.

14. Malik Haq Nawaz, Learned counsel for the complainant and learned Advocate General vehemently argued that the Nowshad PW-8 was quite independent witness who had no relation with the complainant or enmity with the accused and his statement would seek ample corroboration from the

evidence of recovery read with report of Forensic Science Laboratory according to which the empties recovered from the spot were found matched with the pistols recovered from the accused and in absence of any private enmity of deceased with any person, there would be strong presumption of motive of sectarian hatred behind the occurrence. The learned counsel added that medical evidence would also support the prosecution story regarding the time of death and the nature of fire arm injuries on the person of deceased.

15. The learned counsel and the learned Advocate General have frankly conceded that Chief Court has rightly ignored the confessional statement of accused made before Police Officer under Section 21 (H) of Anti- Terrorism Act, 1997 being not admissible in evidence under the law. They submitted that a retracted Judicial Confession if is found confidence inspiring may alone be sufficient to sustain conviction but in the light of the principle of safe criminal administration of justice a Judicial Confession if is retracted by an accused, the prosecution should being other evidence of independent character to prove the guilt of accused whereas, a concession before a Police officer being not admissible in evidence would not be used against the accused. The reference has made to the Judgment of Supreme Court of Pakistan in Mahram Ali's Case (PLD 1998 SC 1445).

16. This is Basic principle criminal administration of justice that an accused is an innocent child of law unless he is proved guilty and this principle is based upon the concept of Justice in Islam. There is no cavil to the proposition of law that conviction can alone sustain on the basis of even a retracted confession made by an accused person before a judicial Officer if it is found truthful and confidence inspiring and since no sanctity is attached with the confession of guilt before a Police Officer therefore such confession cannot be considered at par to the Judicial confession and is not admissible in evidence to be made basis of conviction. The question of admissibility of confession before a police Officer under Section 21(h) of Anti-Terrorism Act, 1997 was considered by the Supreme Court of Pakistan in Mahram Ali Case (PLD 1998 SC 1445) supra wherein it was held that confessional statement before a police officer was not admissible and observation was made for suitable amendment of Section 21(h) of Anti- Terrorism Act, 1997. This is settled law that a confession made before a judicial officer subject to the credibility of statement is admissible in evidence whereas a confession made before a Police officer or any other person in authority or a private person may have no legal sanctity and can hardly be treated an extra judicial confession in law. The confession of an accused under custody before a Police officer may not be free from undue influence and coercion as Police custody itself is considered coercion and a statement during custody may not be voluntarily. This is settled principle of constitutional law that a person and accused of an offence cannot be compelled to be witness against himself and in that context

the Judicial confession made by an accused voluntarily before a Magistrate which is recorded after fulfillment of legal requirement may be admissible as evidence against him but a confession made before Police officer cannot be equated with the confession before Magistrate because no presumption of its being voluntary can be attracted with such a statement.

17. There is no compulsion for the court to accept the confessional statement of accused recorded by a Judicial officer or a Police Officer but fact remains that a confession made before a Judicial officer has evidentiary value to be accepted as evidence whereas a confession made before a police officer is not considered a legal evidence. The official authority of Police Officer may create an impression of compelling the accused to make confession and Supreme Court of Pakistan in Mehram Ali v. Federation of Pakistan (PLD 1998 SC 1445) having exhaustively dealt with the issue declared the provision of Section 21-H of Anti- Terrorism Act, 1997 ultra vires to the Article 13 and 25 of the Constitution of Pakistan. The Anti-Terrorism Act, 1997 is a federal law which has been made applicable in Gilgit- Baltistan and a provision of federal law declared by the Supreme Court of Pakistan ultra vires to the constitution of Pakistan can no more treated as part of statute and would have no legal effect.

18. The retracted judicial confession if found confidence inspiring may alone be sufficient for conviction but the retracted judicial confession if is not found not found confidence inspiring, court may not give much weight to such confession or make it basis for conviction rather may use it as a corroborative evidence if other direct or circumstantial evidence unimpeachable character. In the light of principle of equality and equal protection of law as envisaged in Article 25 of the Constitution of Pakistan read with Article 17 of the Gilgit- Baltikstan (Empowerment and self Governance) Order, 2009 and subject to the principle of reasonable classification, different laws can validly be enacted for different persons in the society and particularly for heinous crimes but the test of reasonableness of the classification must be based on rational nexus as in a particular set of circumstances a reasonable thing, may be unreasonable in other set of circumstances. Therefore the law applying to a particular crime such as terrorism and sectarian killing or other heinous offences may be constitutionally valid if it has a reasonable and rational nexus for classification but if it is not found on any rational basis it would be violative of the principle of equality and equal protection of law. The Supreme Court of Pakistan in I.A Sherwani's case (1991 SCMR 1441) and Government of Baluchistan through Additional secretary v. Azizullah Memon (PLD 1993 SC 341) has laid down the criteria of reasonableness of classification. The principle of criminal administration of justice is that the Court in cases falling within the definition of terrorism and sectarian killings should be dynamic and must take into consideration surrounding circumstances in the prevailing law and order situation in the country. The acquittal of the accused of such an offence on the

basis of technicalities of law, if otherwise the conscious of the court is satisfied about the guilt of accused is bad in law. The court however must also consider that there is a trend of false implication and it is common practice that even in normal transactions the police usually add the provision of Anti-Terrorism Act, 1997 to make the case more heinous and similarly, the motiveless cases are declared either as result of act of terrorism or sectarian hatred. This is very dangerous trend and the Court without ascertaining the evidentiary value of the evidence brought on record strictly in accordance with law may not be able to do justice and possibility of sending innocent person to gallows may not be ruled out. The special court in terms of Section 32 of the Anti-Terrorism Act, 1997 is a court of Sessions and the provision of Criminal Procedure code 1989 and Qanoon-e-Shahadat Ordinance 1984 mutatis mutandi have been made applicable to the proceedings before a Special Court. Therefore, notwithstanding the fact that Anti-Terrorism Act, 1997 is a special law, the self contained provision of Qanoon-e-Shahadat Ordinance 1984 and Criminal Procedure Code, 1998 would be followed in the cases under Anti- Terrorism Act, 1997 and no provision of Anti- Terrorism Act, 1997 would take overriding effect to the constitution of Pakistan or Gilgit- Baltistan (Empowerment and Self Governance) Order, 2009.

19. In the light of the above discussion there can be no departure to the principle that a confession before a Police Officer is not admissible in evidence under the provision of Qanoon-e-Shahadat Ordinance 1984 and cannot be used as evidence against the accused at the trial at par to the Judicial Confession for the purpose of conviction. The confession before a Police officer may carry the presumption of coercion and undue influence unless it is established on record that an accused voluntarily made a statement before a Police officer quite free from an influence or coercion. The voluntary confession before a Police officer who is not associated with the investigation of case may have the status of extra judicial confession which is very weak type of evidence and cannot be relied upon without independent corroborative evidence of sound and unimpeachable character.

20. In consequence to the above discussion we hold that the confession before a police officer is not admissible as evidence of guilt and provision of section 21-H of the Anti- Terrorism Act, 1997 being violative of Article 17 of Gilgit- Baltistan (Empowerment and self Governance) Order, 2009 readwith Article 13 and 25 of the Constitution of Pakistan unless suitably amended as observed by Supreme Court of Pakistan in Mehram Ali's Case supra cannot be treated valid law. This is important to point out that in terrorism cases, usually direct evidence is not available and culprits may get undue benefit of the situation therefore , in the light of Supreme Court of Pakistan in Mahram Ali's Case, the suitable amendment in Section 21-H of Anti –Terrorism Act, 1997 is necessary and Chief Secretary Government of Gilgit-Baltistan will take up the

matter Ministry of Law, justice and human Rights, Government of Pakistan for the amendment in Section 21-H Anti- Terrorism Act, 1997 on priority.

21 Reverting back to the case in hand we find that prosecution for the reason best known to it instead of producing direct evidence preferred to rely upon the circumstantial evidence. The non-production of Ghulam Ali a Sole eye witness would not only create serious doubt qua guilt of the accused but would also demolish the entire Persecution case. The main reliance has been placed on the evidence of Nowshad (PW-8) but this witness has neither seen the occurrence nor he has direct knowledge of the involvement of the accused rather he was informed by Irfan and Shakeel that the accused have committed the offence and in that the statement of this witness at best is hearsay which is not admissible in evidence to be made basis of conviction, as hearsay evidence in the light of the principle of criminal administration of Justice is not a legal evidence rather this type of evidence may be helpful to trace the link in the chain of circumstantial evidence but in the present case by not producing Irfan and Shakeel who had direct knowledge regarding involvement of accused, the prosecution missed the necessary link of the statement of (PW-8) and also failed to bring on record and reliable direct or circumstantial evidence.

22. The remaining evidence left with the prosecution in the from of recovery of weapon of offence from the accused, the empties from the spot, the evidence of motive and medical also have no credential. The careful scrutiny of the recovery of pistol and the crime empties would show that the police withheld crime empties at police station till recovery of pistols from the accused and sent the same to the Forensic Science Laboratory with the recovered pistols without any explanation. The withholding of crime empties at Police Station till recovery of pistols from accused would create a serious doubt in respect of credibility of this piece of evidence as the possibility of tempering with the empties would not be ruled out and in that on sanctity would be attached with the report of the Forensic Science Laboratory. With the exclusion of statement of (PW-8) and evidence of recovery, the evidence of Medical and motive alone would not prove the guilt of accused. The medical evidence is relevant only to the extend that the deceased sustained fire arm injuries on his person but this evidence neither can identify the assailant nor would be helpful in proof of the fact that recovered pistols were used in the occurrence. The evidence of motive of sectarian hatred was also not proved though any reliable evidence.

23. In the above circumstances the conclusion of guilt on the basis of perception that a motiveless case must be the result of Sectarian hatred and conviction in such a case is a rule and acquittal is an exception would be based on surmises and conjunctures.

24. In the light of the forging reasons, the petition for leave to appeal filed by Ateeq Hussain against his conviction and sentence is converted into an appeal and is allowed. The conviction and sentence of Ateeq Hussain appellant is set aside and short order of even date is made part of this judgment which is read as under:-

For the reasons to be recorded later, the Cr.PLA No. 10/2011 is converted into an appeal and is allowed. The conviction and sentence of Ateeq Huusain appellant is set- aside and he is directed to be released forth with, if not required in any other case. The connected Cr. PLA No. 08/2011 and Cr. PLA No. 11/2011 filed by complainant and the State respectively are dismissed.

25. The connected petitions are dismissed.

26. A copy of this judgment will be sent to the Chief Secretary Gilgit – Baltistan for taking necessary action for amendment of Section 21-H of Anti Terrorism Act, 1997 and copy shall also be directly sent to the secretary law, Ministry of Government of Pakistan for his action in the matter.

Chief Judge

Judge

Judge