

IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN
Cr. P.L.A. No.10/2007

Before: - Mr. Justice Muhammad Nawaz Abbasi, Chief Judge.
Mr. Justice Muhammad Yaqoob, Judge.

State through Advocate General Gilgit-Baltistan. Appellant

VERSUS

**1. Kalab Ali s/o Muhammad Ali
2. Salahuddin s/o Ghulam
3. Muhammad Hussain s/o Rajab Ali,
r/o Nagar District Gilgit.Accused**

CHARGE UNDER SECTION 302/109/34 P.P.C.

PETITION FOR LEAVE TO APPEAL AGAINST THE ORDER/JUDGMENT OF CHIEF COURT GILGIT-BALTISTAN DATED 5-9-2007, WHEREBY THE APPEAL OF RESPONDENTS HAVE BEEN ACCEPTED AND THE APPEAL/REVISION SUBMITTED BY THE PETITIONER FOR ENHANCEMENT OF SENTENCE HAVE DISMISSED WHICH IS RESULT OF MISREADING/NON READING OF EVIDENCE WHICH NEEDS RE-APPRAISAL TO MEET THE ENDS OF JUSTICE.

**Present: - Advocate General Gilgit-Baltistan for appellant.
Mr. Muhammad Issa Sr. Advocate for respondents.**

Date of Hearing: - 21-04-2010

JUDGMENT:-

Mr. Justice Muhammad Yaqoob, J.....The above Criminal appeal with leave of this Court is directed against the impugned judgment/order of learned Division Bench of Chief Court, Gilgit-Baltistan, dated 05-07-2009, whereby the appeal filed by the accused/respondents against their conviction /sentence under section 302 P.P.C. awarded by Sessions Judge Gilgit, in Sessions Case, No.99/97 was allowed and they were acquitted in the case. The leave granting order dated 03-4-2004, in the case is as followed:-

"Advocate General assisted by Muhammad Abbas Private Counsel present for the state. The learned Advocate General submits that the learned Chief Court failed to evaluate the confessional statements of the two accused duly recorded under section 164 Cr.P.C. He further submits that the learned Chief Court failed to take into consideration the recovery of Kalashnikov from the accused, the empties and fourteen live rounds positively opined by the forensic science department. He again submits that the confessional statements supported by recoveries, as incriminating articles, were sufficient to sustain the conviction order by the trial court. Points raised deserve deep consideration. Admit. Notice to the respondents/accused and call for the record. Adjourned to a date in office."

Precisely facts of the case are that on the written report of complainant Rajab Ali s/o Khuda Yar r/o Tukarkot Nagar a criminal case vide FIR No.2/96, was lodged under section 302 P.P.C, to the effect that deceased Shabbir Hussain s/o Rajab Ali (complainant) was carpenter by profession and working at Gilgit. On 20-03-1996, at about 6 P.M. he returned to his residence at Takar Kot Nagar-1. It was about 10.30 P.M. deceased Shabbir Hussain went out of his house to attend a natural call, at that time his wife and mother were also present in his house. Soon after, fire shots were heard by the in-mates. Then the wife of deceased Shabbir Hussain opened the door of the house and she saw in torch light that her husband Shabbir Hussain was fallen on ground in injured condition. In the FIR the complainant has neither charged and nor suspected any person.

The Investigation Officer on the basis of suspicion on different dates arrested some other persons of the locality and later on released them except accused Kalab Ali who was arrested on 19-04-1996, alongwith co-accused Salahuddin. On 22-04-1996 statement of accused Salahuddin was recorded under section 164 Cr.P.C. by 2nd Class Magistrate Nagar-I. Accused Salahuddin has deposed in his statement that the occurrence took place at Tukarkot Nagar with the company of his other co-accused Kalab Ali and Muhammad Hussain. After investigation, challan of the case was submitted before the trial Court for trial against the present respondent/accused. Accused Muhammad Hussain has been acquitted while the other co-accused Kalab Ali and Salahuddin were awarded rigorous imprisonment of 25 years, also liable to payment of an amount of Rs.30000/- to the legal heirs of the deceased as Diyet, in default of payment the accused, shall also undergo for punishment of two years rigorous imprisonment.

Being dissatisfied and aggrieved from the judgment of the Sessions Court Gilgit, preferred Criminal Appeal No.2/2004 and Cr.Rev.No.8/04 before the Chief Court Gilgit-Baltistan. The learned Division Bench of Chief Court Gilgit-Baltistan has set aside the conviction and sentence awarded to the respondents/accused by the trial Court and acquit the respondents/accused from the charge. Hence this leaves to appeal.

We have heard the arguments at length, learned Advocate General submits that admittedly the occurrence took place on 20-03-1996 at night and the FIR was registered on 21-03-1996 against unknown persons, at about 7 a.m. in police station Nagar-I.

However, the complainant had suspected the present respondents/accused alongwith some other persons of the locality who were arrested in this criminal case. Challan of the Case was submitted before the trial court for trial against the respondent/accused.

On the conclusion of trial learned lower Court rightly convicted the respondents/accused. He further contended that the Magistrate 2nd Class/Naib Tehsildar Nagar-I was recorded confessional statement in which he has narrated the true story of the commission of an offence in detail and has also expressed his view to the effect, that the murder was committed due to registration of criminal case against them. Accused were intending to kill complainant or his elder son (Sheikh Muhammad Ali) but on the day of occurrence deceased Shabbir Hussain came in their front considering the same as (Sheikh Muhammad Ali) committed murder of Shabbir Hussain. In the light of confessional statement the trial Court convicted the respondent/accused absolutely on right way. He further vehemently argued that the weapon of offence has been recovered on the pointation of accused Kalab Ali led by himself in presence of marginal witness. Empty shells and fire bullets alongwith other material have also been recovered from the spot of occurrence. All the present respondents/accused prima facie without any shadow of doubt links with the commission of murder. He further submits that capital punishment may be awarded by accepting this leave to appeal to meet the ends of justice.

Counsel for the respondent/accused strongly opposed the arguments advanced by the learned counsel for the petitioner and

submits that no person was charged and suspected in the FIR as culprits. The police arrested various persons on various dates as suspects, the occurrence is also un-witnessed and that there is no evidence against the respondents. He further submits that the PW's have made improvement in their statements on material points. The recoveries of the incriminating articles are fake and evidence is full of contradictions. He contended that the "so called" confessional statement of the accused Salahuddin does not posses any evidentiary value as the same was recorded in violation of settled principles of laws and directions of Superior Courts. The retracted confessional statement of the accused is in full contradiction to the prosecution evidence on material points, rather then corroborating it, hence it has no legal value to base the conviction. The motive is vague and even not proved, all these questions are of fatal consequences for the prosecution and makes its case absolutely doubtful and un-reliable for recording conviction and giving a capital punishment on such retracted confession.

The learned Trail Court has neither accepted the present case as doubtful one, nor extended the benefit of doubt to the accused but surprisingly has extended the same to the prosecution, as such the learned Division Bench of the Chief Court Gilgit-Baltistan has legally accepted the appeal and set aside the conviction order/judgment passed by the learned trial Court. This leave to appeal has no force as such liable to be dismissed.

We have anxiously considered the arguments advanced by the learned counsel for the parties and have carefully examined the record which shows that the occurrence is un-witnessed, there is no

ocular evidence against the respondents. PW's have made improvements in their statements on material points; there is no other evidence on record against the respondents/accused except the confessional statement of the co-accused Salahuddin. It is also an admitted fact that confessional statement of respondent/accused Salahuddin has been recorded by a 2nd Class Magistrate, which on the face of it suffers from inherent violation. The Magistrate is supposed to observe the formalities but has not followed while recording the confessional statement. The courts must look for strict compliance of sub section (3) of section 164 Cr.P.C. before proceeding to determine the voluntary character of the confessional statement. It has been noticed that the Magistrate who are charged with a duty of recording confession did not take the process of recording confession seriously, even Magistrate could not follow the procedure which is given below:-

"As soon as accused is produced for confession, his handcuffs should be removed and all the police officers should be turned out from the court room. Thereafter the accused should be informed, that he is before a Magistrate and he made any statement or not. He would not be given back to the police who produced him before court but would be remanded to judicial lockup. He should then be given sufficient time to ponder over the matter thereafter he should be warned that he is not bound to make any statement but if he do so it could be used as evidence against him, then following questions should be put to him"

- a) For how long have you been with police?
- b) Has any pressure been brought to bear upon you to make confession?
- c) Have you been threatened to make confession?
- d) Has any inducement been given to you?
- e) Why are you making this confession?
- f) Have you been maltreated by police?

After recording the accused's answers to the above questions, if the Magistrate is satisfied he is making confession voluntary, and then he should proceed to record his confession in verbatim.

So much so that "voluntary" character of confessional statement as required under section 164 Cr.P.C. is not available in this case. We are further fully convinced as a result of the above discussion that the conviction of respondents/accused is not sustainable, as the statements can not be termed as "Voluntary" and "True" confession required under section 164 Cr.P.C. The object behind legal and judicial insistence which is empathetic and firm in meticulous observance of all the essential prescribed formalities and pre-courses before recording the confession is to provide to the confessing accused and environment of absolute freedom from all inside and out side hostile factors which cause or endues fearful consequences in his mind, in case he refuses to make it, unless all the signs of such fear as shadded from his mind the only inference to be drawn would be that it was not made voluntary, therefore, such confession would be irrelevant and inadmissible in evidence and can not be made the sole basis for conviction for a capital charge.

The combine affect of section 164 and 364 Cr.P.C. read with article 41 and 43 of Qanoon-e-Shahadat Order 1984, are that before relying on confession of an accused two essential legal requirements must be fully and objectively satisfied Firstly, that the confession is made voluntary and is true, and secondly, that the same must be proved at the trial, in the absence of these legal requirements such confession can not be considered as a legal piece of evidence.

The second aspect of the confessional statement is that “whether the second class Magistrate is empowered to record a confessional statement of an accused” the answer is in negative. The relevant law does not permit to record a confessional statement by a 2nd class Magistrate under section 164 Cr.P.C. even if he was empowered to record confessional statement u/s 164 Cr.P.C. was not competent to record the above statement after separation of Judicial Magistracy from executive Magistracy. Therefore statement under section 164 Cr.P.C. is only valid when it is drawn in legal form. Admittedly, this procedure has not been adopted by the Magistrate while recording the confession in this case, as such no reliance can be placed on it.

The next piece of evidence is the recovery of Kalashnikov alongwith other incriminating articles have been affected from the possession of accused/respondent on his pointation .Therefore, it can not be termed as planted and fictitious recovery. In this regard once again we have carefully scrutinized the relevant record and found that the investigation officer has shown inefficiency on various stagers i.e. as per PW-6, the Kalashnikov was handed over to the accused Muhammad Hussain on the behest of accused Salahuddin

but Investigation Officer has affected recovery from the possession of accused Kalab Ali. Further more the Investigation Officer has dispatched empty shells and five bullets which were taken into possession at the time of spot inspection and recovery of Kalashnikov has been affected after a period of one month. All the recoveries have been dispatched together for opinion of Arms Expert. Although law requires immediate dispatches soon after the recovery in separate parcels, but the same provisions of law have been violated by the Investigation Officer, witness namely Mirza Hussain and Ramzan Ali were cited as marginal witness to the recovery Memo.ExhPW-3/B. One marginal witness Ramzan Ali has not been examined while statement of Mirza Hussain marginal witness is contradictory on material points to the recovery memo, as well as to the statement of Investigation Officer, in absence of other evidence the mere recoveries would not be sufficient to furnish a foundation for a conviction in a capital charge.

In the light of the discussion made herein above, we form our view that the prosecution has miserably failed to prove the guilt of the respondents/accused beyond any reasonable doubts , further we accordingly upheld the impugned order/judgment dated 05-09-2007,passed by the learned Division Bench of Chief Court Gilgit-Baltistan.

Appeal dismissed

Announced
21-04-2010.

Chief Judge

Judge

