

**JUDGMENT SHEET**

**PESHAWAR HIGH COURT,  
MINGORA BENCH (DAR-UL-QAZA), SWAT  
(Judicial Department)**

**J.Cr.A. No.52-M/2020**

**JUDGMENT**

Date of hearing:- 23.09.2020

**Appellant:- (Abdul Ahad alias Idress) by Barrister  
Asad-ur-Rehman.**

**Respondent:- (The State) by Mr. Inayat Ullah Khatir,  
State counsel.**

**WIQAR AHMAD J:-** This judgment is directed to dispose of jail criminal appeal filed by appellant namely Abdul Ahad alias Idress against judgment of his conviction and sentence dated 19.12.2019 of the Court of learned judge Anti-Terrorism Court-II Malakand Division, Camp Court Buner in case FIR No. 233 dated 21.08.2011 registered under sections 324, 353, 427, 148, 149 PPC read with section 5 of Explosive Substances Act, 13 A.O. as well as section 7 ATA at Police Station Chinglai District Buner, whereby he was sentenced as follows;

- ***U/S 148/149 PPC to one year rigorous imprisonment.***
- ***U/S 324 read with 149 PPC to 10 years rigorous imprisonment along with fine of Rs. 20,000/-, or in default thereof, the accused shall further undergo one month simple imprisonment.***
- ***U/S 337 A (i), 337 F (i), (ii), (v) read with section 149 PPC to one year rigorous imprisonment along with payment of Daman of Rs. 10,000/- payable to each victim.***
- ***U/S 353 read with 149 PPC to one year rigorous imprisonment.***

- *U/S 427 read with section 149 PPC to one year rigorous imprisonment.*
- *U/S 7 (I) (b) ATA to 10 years rigorous imprisonment along with fine of Rs. 20,000/-, or in default thereof accused shall further suffer one month simple imprisonment.*
- *All the sentences were ordered to run concurrently.*
- *The appellant was also extended benefit of section 382-B Cr.P.C.*

2. As per contents of FIR, complainant namely Malak Zada Khan SHO along with other members of police party were on their way to village Totalai through vehicle No. 9683/PRA. They had been on official duty escorting the then Minister Sardar Hussain Babak. When complainant-party reached the place of occurrence i.e. Kalogay at 23:20 hours, some unknown accused who had already been present there, started firing on police as well as the then Minister's vehicles. Due to indiscriminate firing of accused vehicle carrying the former Minister got out of control and fell down in a deep ravine, as a result of which, Sardar Hussain Babak and his companions namely Noor Wali Khan, Aurangzeb, Fazal Karim and Muhammad Tayyab (driver) received injuries on different parts of their bodies, while rest of the complainant-party including police officials escaped un-hurt. 'Murasila' was drafted which culminated into ibid FIR registered against unknown accused at police station concerned.

3. Later on, seven (7) accused including the present appellant were nominated for commission of the offence during the course of investigation. Out of said seven (7) accused, five (5) accused were earlier arrested, interrogated and were sent for trial. They were acquitted by learned Judge Anti-Terrorism Court vide his judgment dated 12.12.2012. Whereas the present appellant and another accused were proceeded under section 512 Cr.P.C and declared proclaimed offenders. Upon arrest of present appellant supplementary *challan* was submitted to his extent on 04.05.2017. He was convicted by learned Judge Anti-Terrorism Court Buner vide judgment dated 17.01.2018, on conclusion of his trial. Appellant challenged judgment of his conviction before this Court by filing Jail Criminal Appeal No. 73-M of 2018, which was allowed vide judgment dated 12.03.2019 and the case was remanded to learned trial Court for *de novo* trial with further directions to provide legal assistance to accused for his defence.

4. After remand, learned trial Court framed charge against the appellant on 10.04.2019, to which he pleaded "*not guilty*" and claimed trial. Prosecution produced as many as seventeen (17) witnesses, whose statements were recorded and placed on file. On

conclusion of proceedings in the case, accused was examined under section 342 Cr.P.C. The learned trial Court convicted and sentenced the appellant vide impugned judgment dated 19.12.2019, as stated earlier.

Appellant has filed instant appeal through Superintendent Central Prison Mardan with an application for appointment of a counsel for him. At the time of disposal of said application (Cr.M No. 29-M/2020) Barrister Asad-ur-Rahman volunteered that he would conduct case of the appellant *pro bono*, and was accordingly appointed as counsel for appellant.

5. We have heard arguments of learned counsel for appellant, learned State counsel and perused the record.

6. Perusal of record reveals that other co-accused namely Bahram Zay, Yousaf Shah, Syed Zaman Shah, Muhammad Saeed and Zar Wali have been acquitted on almost similar set of facts and evidence of the prosecution. While differentiating case of the present appellant for the purpose of his conviction and sentences, learned trial Court has mentioned two factors in Para 15 of the impugned judgment which are;

*(a) That the appellant has recorded confessional statement before the competent Court wherein he has confessed to commission of the offence on 19.04.2017, which was also found to have been corroborated by*

*pointation of the place of stay documented vide pointation memo Ex. PW-4/6 and pointation of the place of occurrence documented vide pointation memo Ex. PW-4/5.*

*(b); that the accused had remained absconder for sufficient long period of time.*

So far as confessional statement of the appellant, is concerned, it is important to be noted that the appellant was formally arrested in the instant case by the Investigating Officer on 30.03.2017. He had earlier been arrested at Karachi and after his arrest in the case in hand he was shifted to District Buner for the purpose of investigation in the present case. His confessional statement has been recorded on 19.04.2017 i.e. after 20 days of his arrest in the case in hand. In reply to question No. 8 of the questionnaire, he has stated that he had remained in custody of the police at Karachi for 15 days while his additional custody of 20 days had been obtained by the Buner police. Appellant had remained in police custody for a total of 35 days but even if we count his custody with Investigating Officer of the present case, it was also not less than 20 days. The Magistrate who had recorded confession of appellant had also stated in his cross-examination while deposing as PW-9 that it was correct that the appellant had remained in police custody for almost 35 days.

Hon'ble Supreme Court of Pakistan in its judgment in the case of "Asif Mahmood v/s The State" reported as "2005 SCMR 515" has held that Court must satisfy itself about truthfulness and voluntary nature of a retracted confession, before relying on it. Relevant part of observation of the august Court is to the following effect;

***"Confessional statement for being relied upon should not only be true, voluntary and believable but should be without fear, favour or any inducement."***

This Court in its earlier judgment in the case of "Muhammad Israr and another v/s The State" reported as 2002 P Cr. LJ 1072 had not treated the confessional statement recorded after four days of custody of accused as voluntary in nature. Similarly, in the case of "Naseeb Zada v/s The State and another" reported as "2019 YLR 2157" a confessional statement recorded after 5 days of the occurrence was termed as one recorded at a belated stage and was not found voluntary in nature. In support of same ratio, further reliance may also be placed on judgments reported as 1983 P Cr. LJ 882, 1983 P Cr. LJ 892, 1996 P Cr. LJ 394, 2018 YLR 1629 and 2019 P Cr. LJ 1014.

Confession of the appellant in the case in hand cannot be held to have been voluntarily recorded, for the simple reason that the appellant had remained in police custody for extra-ordinarily long time and the element of coercion, threat and torture for procuring his confession, may not be ruled out.

7. When the confessional statement of appellant was not found to be worthy of reliance then the corroboratory pieces of evidence like pointation of the spot where the appellant had stayed or pointation of the place of occurrence cannot be deemed sufficient for conviction of the accused. Such places had already been known to the Investigation Officer as pointed out earlier by acquitted accused and there has been no new discovery or recovery on pointation of the accused/appellant, making it admissible under Article 40 of Qanun-e-Shahadat Order, 1984. In this respect, reliance is placed on judgment of Hon'ble Supreme Court of Pakistan in the case of "Hayatullah v/s The State" reported as 2018 SCMR 2092, wherein it has been held;

*"It is astonishing that the trial court while recording the statements of the witnesses (police officials) regarding the confession before the police, recorded each and every word of the appellant before the police and also exhibited the memo of disclosure. The said statement before the police and the said memo of disclosure were absolutely inadmissible hit by Article 39 of the Qanun-e-Shahadat Order, 1984. In order to give a cover of Article 40 of Qanun-e-Shahadat Order, 1984, the investigating officer recovered a pistol on the same day and all*

*the witnesses claimed that thereafter the appellant pointed out the place of occurrence and the place from where the dead-body was earlier recovered. We are conscious of the fact that after making such disclosure before the police no new fact was discovered because it is already in the knowledge of the police on 11.02.2006 that the deceased had received a bullet injury and from the place of occurrence an empty of 30 bore pistol was also recovered. So the recovery of pistol after the said disclosure was not a new fact or not a fact which was not in the knowledge of police. Likewise, the place of occurrence and the place where dead-body was thrown while dragging it from the said place, was already in the knowledge of the police and such pointing out of the place after said disclosure is worthless, irrelevant and inadmissible as the said place was already in the knowledge of the police and a site plan of the same place had already been prepared on 11.02.2006."*

8. So far as absconsion of appellant, is concerned, it is well settled by now that absconsion may be considered as a corroboratory circumstance in support of other evidence of prosecution but when the prosecution fails to establish its case on the basis of reliable evidence, conviction may not be based on mere absconsion of an accused. Hon'ble Supreme Court in the case of "Rasool Muhammad v/s Asal Muhammad and 3 others" reported as 1995 SCMR 1373 had held, in this respect;

*"In their statements under section 342, Cr.P.C., while explaining their alleged abscondence, they stated that prior to the occurrence they had gone to Punjab for earning their livelihood. On their return to the village they learnt about the charge against them and they voluntarily appeared before the police. Rehman Gul Constable P.W.3 who was deputed to execute the warrants of arrest of Rashid Gul and Khan Muhammad has stated that the people of area usually go to Punjab for earning their livelihood. Furthermore, disappearance of a person named as, a murderer /culprit after the occurrence, is but natural, whether named rightly or wrongly. Abscondence per se is not a proof of the guilt of an accused person."*



In support of same ratio further reliance may also be placed on judgment of Hon'ble Apex Court reported as 1986 SCMR 823.

9. In light of what has been discussed above, it is clear that prosecution could not prove its case against the appellant beyond reasonable doubt. He is therefore acquitted of commission of the offence by extending him benefit of doubt. The instant appeal is accordingly allowed and the accused/appellant was ordered to be released from jail, if not required in any other case. These are reasons for our short order of even, which read as follows;

*"For reasons to be recorded later, we allow this appeal, set-aside the judgment of conviction dated 19.12.2019 passed by learned Judge Anti-Terrorism Court-II Malakand Division Swat Camp Court at Buner, in case FIR No. 233 dated 21.08.2011 registered under sections 324, 353, 427, 148, 149 PPC read with section 5 of Explosive Substances Act, 13 A.O. and section 7 ATA at Police Station Chinglai District Buner and resultantly acquit the appellant namely Abdul Ahad alias Idress son of Said Hayat of the charges levelled against him. He be released forthwith if not required in any other case.*

Announced.

Dt: 23.09.2020

JUDGE

JUDGE

17/10/2020  
W/R

NAWAB

DB: Hon'ble Mr. Justice Ishaq Ibrahim  
Hon'ble Mr. Justice Wiqar Ahmad