

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**

Judicial Department

**Cr.A No. 445-P/2017
Adil Khan Vs Chinar Gul**

Date of hearing: 08.10.2019.

Appellant by: M/s Hussain Ali, Advocate
and Barrister Amir Khan
Chamkani.

State by: Mr. Mujahid Ali Khan, AAG.

Complainant by: Syed Abdul Fayaz, Advocate.

JUDGMENT

AHMAD ALI, J. Through this common judgment we would propose to decide the connected Cr.R No.118-P/2017 & Cr.A No.541-P/2017 being outcome of one and the same judgment dated 22.07.2017 of the learned Additional Sessions Judge-XIII, Peshawar, whereby the appellant Adil Khan s/o Roman, was convicted and sentenced to life imprisonment with fine of Rs.100,000/ with payment of compensation amount of Rs.300,000/- to the LRs of deceased u/s 544-A Cr.P.C or in default thereof to suffer 6 months SI, whereas co-accused Iftikhar Ali s/o Murad Khan was acquitted of the charges, in case FIR No.1159 dated 03.12.2013 registered against them under sections 302/34 PPC at Police Station, Badhber (Peshawar).

2. Brief facts of the case are that complainant/Chinar Gul reported the matter to local police to the effect that on 03.12.2013, when he was proceeding to his house, he found the dead body of his son Farid Ullah lying in a Suzuki vehicle, who was put to death by some unknown person through firearm. Initially, nobody was charged. Later on, on 26.02.2014, complainant recorded his statement under section 164 Cr.P.C before learned JMIC, Peshawar, wherein he charged the present appellant and acquitted accused (respondent in Cr.A No.541-P/2017) for the murder of his deceased son Farid Ullah. Accordingly, both the accused were arrested and put to trial.

2. On completion of investigation, challan was submitted in Court where the accused-appellant was charge-sheeted to which he pleaded not guilty and claimed trial. The prosecution in order to prove its case, produced and examined as many as thirteen witnesses whereafter statement of the accused was recorded, wherein, he professed his innocence. The learned Trial Court, after conclusion of trial, found the appellant guilty of the charge and, while recording his conviction, sentenced him as mentioned above. Feeling aggrieved, the appellant has filed the instant appeal before this Court.

3. Arguments heard and record gone through.
4. No doubt, it was an unseen occurrence and initially, nobody was charged by the complainant for the murder of his deceased son Farid Ullah. The State came into action when mobile of the said deceased was traced and recovered from one Nazim Mahmood resident of Kohat. The complainant also recorded his statement u/s 164 Cr.P.C before the JMIC on 26.02.2014 and charged the present accused-appellant along with acquitted co-accused. There is nothing on record or in the statement of complainant in respect of source of information for charging the accused in the instant case. The accused-appellant and acquitted co-accused were shown to have been arrested on 24.02.2014, but, surprisingly, there is no card of arrest available on record in this regard so as to suggest their features and identification marks etc.
5. The prosecution, for establishing the case against accused-appellant and acquitted co-accused, though produced the said Nazim Mahmood to whom the cell phone was sold by the acquitted co-accused (Iftikhar Ali), before the Judicial Magistrate, but he was not examined as PW during trial for reasons best known to them. Had it been he would substantiate the stance of prosecution with regard to involvement of the accused appellant in the commission of offence in

shape of the recovered mobile of deceased. In the circumstances adverse inference u/s 129(g) of the Qanun-e-Shahadat Order 1984 could be safely drawn. Be that as it may, the mobile phone when produced before the Court was not in sealed condition what to say about its parcel number. So, it cannot be said with confidence that actually the said mobile phone was the ownership of deceased. The initial dents, as hinted above, create serious doubts in the prosecution case qua involvement of the accused-appellant in the commission of offence. Reliance could be safely placed **NLR 2015 SCJ 121**.

7. From perusal of record, it further transpires that the occurrence took place on 03.12.2013 which was admittedly an unseen occurrence and there was no direct evidence either that of the murder of deceased Farid Ullah or about he having been lastly seen alive in the company of accused. The complainant had, therefore, initially nominated no one as accused in the FIR and it was on 26.02.2014 when he recorded his statement u/s 164 Cr.P.C and charged the accused in the present case without mentioning source of his satisfaction. Accused were then arrested and they have recorded their confessional statements before the Magistrate. But, surprisingly, no cards of arrest of both the accused

are available on judicial file to show that actually when the accused were arrested in the instant case. The prosecution also recorded the statement of one PW Nazim Mahmood u/s 164 Cr.P.C from whose custody the alleged mobile phone of deceased was recovered who in his said statement, recorded on 05.03.2014, deposed as under:-

“I work in Plaster of Paris Factory at Kohat. Iftikhar Ali also used to work with me in the said factory. About one month ago, the said Iftikhar Ali sold mobile set Samsung of white colour to me for Rs.4000// Later on I came to know that the said mobile set was the property of a deceased person and the same was taken from him after his murder. There is no malafide on my part. The mobile set in question was produced by me to the police, who took the same into possession.”

Which shows that he has only mentioned the name of accused Iftikhar Ali (acquitted co accused). His statement was not cross examined by the present as well as acquitted co-accused as they have already recorded their confessional statements on 01.03.2014 which is otherwise, exculpatory in its nature and it will be more appropriate to discuss the statement recorded under section 164 Cr.P.C;

Confession.....Confessions may be divided into two classes, i.e. judicial and extra-judicial. Judicial confessions are those which are made before

Magistrate or Court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or Court. Extra-judicial confessions are generally those made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? And (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in a criminal proceedings, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

8. Moreover, the Magistrate had nowhere stated in the certificate or at the trial that he was fully

acquainted with or could understand the native language of accused and that the confession was translated word-by-word from the native language to Urdu/English language. Another important aspect was that the accused subsequently retracted his confession. Keeping in view the conflict with the other pieces of evidence, brought on record, the retracted confession of the accused has lost its evidentiary value and legal efficacy thus, it is absolutely unsafe to rely on it and that too for recording punishment on a capital charge. Even otherwise, Judicial confession allegedly made by accused-appellant before a Magistrate under section 164, Cr.P.C. had been retracted before the Trial Court and in the absence of any independent corroboration such retracted judicial confession could not suffice all by itself for recording or upholding the accused appellant's conviction. More so, Retracted confession should have been corroborated by some other independent evidence and the same seldom sufficed by itself to record a conviction on the basis of the same. Mobile phone recovered during investigation did not stand connected with alleged offence and there was no other piece of evidence produced by prosecution to provide any corroboration to retracted confessions attributed to

accused appellant, thus, prosecution has miserably failed to establish its case against the accused-appellant. Even, otherwise, in view of the law laid down in case reported in **2017 SCMR 713**, if an accused confesses his guilt, but pleads not guilty during trial, then prosecution is bound to prove the same beyond any shadow of doubt. We are also forfeited from the case law laid down in the dictums reported in **AIR 2003 SC 3601, (2003)8 SCC 180, 2017 SCMR 986, 2017 SCMR 898 & 2012 SCMR 580, 2016 SCMR 274.**

9. The moot point in the instant case is the confessional statement of accused appellant and that of acquitted co-accused. Now, it is important to see the confessional statement of accused that whether it was recorded according to principles laid down by the superior courts or not. Confession recorded with a delay of 4 days after arrest with no plausible explanation and such undue delay cannot be made basis for recording conviction of accused on capital charge. Longer the custody of accused weaker the evidentiary value of confession. Reference can be made to case titled **“Said Rasool Vs Sajid and three others”** reported in **NLR 2014 SD 223.**

10. For relying on confessional statement of any accused it is to be appreciated that a specific

procedure has been followed u/s 164 Cr.P.C. i.e. as soon as the accused is produced for his confessional statement, his handcuffs should be removed and the police officers should be turned out from the court room, thereafter accused should be informed that he is before a Magistrate and whether he makes any statement or not. He would not be given back to the police, which had produced him before the Court but would be remanded to judicial lock-up. He should 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 did so, it could be used against him as evidence. It will be also appreciated that once accused, in a murder case, was entrusted to custody of Magistrate, the Magistrate was required to clear his court room from all the police officials/officers in uniform or in plain clothes and accused should be provided a chair and dice also disclosing him that he is in safe and secure hands of Magistrate and that he would not be entertained in fear of police. Magistrate was also required to infuse courage and confidence in the accused and providing assurance that in case he did not make a confession, he would not be handed over back to police. Simply filing of printed proforma and dictating such an important matter to typist was not a faithful

obligation under the law. In the instant case the Magistrate has simply filled the proforma and has shown highly irresponsible attitude while dealing with such a sensitive matter and has violated the clear instructions of the High Court, contained in the High Court Rules & Orders.

11. There is another glaring point in the instant case that while recording the confessional statements of accused, no identity was affirmed by the learned Judicial Magistrate. The questionnaire and certificate did not contain anything regarding identity of appellant like CNIC #, identification marks, physical appearance. Likewise, no identification parade was conducted in presence of witnesses that the accused-appellant making confessional statement is actually the one who has been enrobed in the instant case or anyone else. In this regard, wisdom can be derived from the case law laid down in the dictum reported in **2017 PLR 554**.

12. It is a bedrock principle of law that, once a Statute or rule directs that a particular act must be performed and shall be construed in a particular way then, acting contrary to that is impliedly prohibited. That means, doing of something contrary to the requirements of law and rules, is impliedly prohibited.

Therefore, the so called confession of accused appellant cannot be termed as a true and voluntary confession, and it cannot, whatsoever, be made the sole basis for conviction of the accused appellant on a capital charge specially when there is no corroborative evidence, mere recovery of alleged mobile of deceased from a third person that too who was not produced for test of cross examination and the said mobile was even not sealed into parcel and there is also no proof that the mobile is actually the ownership of deceased.

13. The above discussion has led this Court to believe that the learned trial court has erred in appreciating the case evidence in its true perspective. It has been held, time and again by the superior courts, that a slightest doubt occurs in the prosecution case is sufficient to grant acquittal to an accused. The conclusions drawn by the learned trial Court are not borne out of the case evidence, therefore, the impugned judgment is not sustainable.

14. For what has been discussed above, this appeal is allowed, the impugned judgment is set aside and the appellant is acquitted of the charge levelled against him. He be set at liberty forthwith, if not required to be detained in any other case.

15. As the judgment of the learned Trial Court is set aside, therefore, the connected Criminal Revision No.118-P/2017 has become infructuous and is dismissed accordingly. Resultantly, the connected Criminal Appeal against acquittal bearing No.541-P/2017, being meritless also stands dismissed.

16. Above are the reasons of short order of even date.

J U D G E

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Announced
08.10.2019

Amjad PS

DB

Hon'ble Mr. Justice Rooh-ul-Amin Khan & Hon'ble Mr. Justice Ahmad Ali