

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Cr. Appeal No.47-P of 2023

Imdad Ullah son of Sameen Jan,
 r/o Machin Khel District Lakki Marwat.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	<u>Mr. Zahir Shah Marwat, Advocate</u>
For State :-	<u>Mr. Jalal un Din Akbar-e-Azam</u>
	<u>Khan Gara, AAG.</u>
For respondent No.2.	<u>Mr. Muhammad Tariq Kakar,</u>
	<u>Advocate</u>
Date of hearing:	<u>31.05.2023</u>

JUDGMENT

ISHTIAQ IBRAHIM, J.- Accused Imdad Ullah and Muhammad Tahir, charged in case FIR No.393 dated 17.09.2017, registered under sections 302, 365 and 203 PPC, at Police Station Thall, District Hangu, were tried by learned Sessions Judge Hangu and on conclusion of trial, both having been found guilty of abducting Muhammad Yasir, a minor boy of 7/8 years, and thereafter committing his murder in the hill known as *Khaidmak Pahar*, have been convicted and sentenced vide judgment dated 09.02.2019, as below:-

Under Section 364-A read with
section 109 PPC: To undergo imprisonment for life each and to pay a fine of rupees one lac each, as compensation to legal heirs of the

deceased in terms of section 544-A Cr.P.C and in default thereof to further undergo rigorous imprisonment for six months each.

Under Section 302 (b) PPC:-To undergo imprisonment for life each and to pay rupees one lac each, as compensation to legal heirs of the deceased in terms of Section 544-A Cr.P.C. and in default thereof to further undergo six months rigorous imprisonment each.

2. Against their conviction and sentences, convicts Imdad Ullah and Muhammad Tahir, have filed **Cr.A. No.47-P of 2023 and Cr.A. No.27-P of 2019**, whereas, Alam Khan petitioner/complainant, has filed **Cr.R. No.33-P of 2019**, seeking enhancement of sentences of the convicts/respondents from life imprisonment to normal penalty of death as provided for the offence.

3. As both the appeals and the criminal revision petition are emanating from one and the same judgment dated 09.02.2019, of the learned Trial Court, rendered in one and the same FIR, therefore, we propose to decide the same through this single judgment.

4. The prosecution's case in brief is that on 17.09.2017 Alam Jan complainant (PW.14) submitted

an application/complaint Exh.PW.9/1 to SHO Police Station Thall District Hangu to the effect that on 30.08.2017 at about 12.00 noon, his minor son, namely, Muhammad Yasir aged about 7/8 years, had gone missing from “*Bannu Chowk Israfeel Market Thall*”. He came to know from footages of CCTV Cameras installed on Israfeel Market and United Bank Thall that his son has been abducted by Moulana Imdad Ullah (appellant), a prayer leader (*Pesh Imam*) of village Boland Khel and when he contacted and asked him about his son, appellant Imdad Ullah told him that he will hand him over the minor at 0300 hours; that later on, when he tried to contact appellant Imdad Ullah, his both cell phone Nos.0313-1333600 and 03029896060 were switched off; that he is satisfied that his minor son has been abducted by Moulana Imdad Ullah. On the complaint/application of the complainant FIR Exh.PA was registered in Police Station Thall by Mohib Ullah SI (PW.9) and on the same day he arrested appellant Imdad Ullah at Chapperi road along with appellant Muhammad Tahir. On cursory interrogation of appellant Imdad Ullah at the spot of his arrest, he disclosed that he has killed minor Muhammad Yasir by putting big stones on his body in *Khadimak Pahar*. Mohib Ullah SI, issued his arrest card Exh.PW.9/2 and Exh.PW.9/3 of the

appellant and thereafter on the pointation/discovery of appellant Imdad Ullah, recovered the dead body of the minor deceased in presence of Badshah Zar (PW.3) and Doctor Muhammad Ayaz, vide pointation memo Exhs.PC/2. On the spot, he telephonically informed Abdur Rehman SI (PW.10), the Investigating Officer of the case, to reach the spot, who accordingly proceeded to *Khadimak pahar* where the appellants were handed over to him. Abdur Rehman SI (PW.10), prepared injury sheet Exh.PW.9/4 and inquest report Exh.PW.9/5 of the deceased as well as prepared sketch of the place of recovery of dead body of the deceased Exh.PB/1, recorded statements of the PWs under section 161 Cr.P.C. During spot inspection, he recovered and took into possession stones stained with blood and fats vide recovery memo Exh.PW.6/1. He also took into possession USB containing footages of CCTV Cameras, produced by complainant through recovery memo in presence of PWs Jamshid and Sahib Gul and the last worn clothes of the deceased stained with flash and fats vide recovery memo Exh.PW.6/2, obtained physical remand of the appellants and interrogated them. During interrogation appellant Muhammad Tahir disclosed that his motorcycle was used by appellant Imdadullah for taking the minor deceased to *Khadimak* hill which is parked in “*Dar ul*

Uloom” Thall. He recovered the said motorcycle Exh.P.1 along with its registration Exh.P.2 and took the same through recovery memo Exh.PW.10/2 in presence of witnesses. He also took into possession CDR of mobile numbers of the appellants consisting of 41 sheets Exh.PW.10/3, sent a bottle containing pieces of flash and hairs of the deceased for DNA through constable Mir Jang to the Laboratory and received report of KMC in this regard which is Exh.PW.10/5. He obtained photographs from USB and took the same into possession through recovery memo Exh.PW.10/7, produced appellant Imdad ullah before the learned Judicial Magistrate where he recorded his confessional statement, whereas statement of appellant Muhammad Tahir was recorded under section 164 Cr.P.C. He inserted section 203 PPC against appellant Muhammad Tahir, obtained blood of parents of the deceased for the purpose of DNA and sent the same along with parcels No.3 and 4, containing material of dead body of the deceased, to Punjab Forensic Science Agency report of DNA is Exh.PW.10/15-A, recorded statements of the PWs under section 161 Cr.P.C. and on completion of investigation handed over case file to the SHO, who submitted challan against the appellants before the learned trial Court.

5. On receipt of challan by the learned trial Court, the appellants were formally charge sheeted to which they pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as fifteen witnesses. After closure of the prosecution's evidence, statements of the appellants were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed their innocence. They, however, declined to be examined on oath under section 340(2) Cr.P.C. or to produce evidence in defence. Appellant Imdad Ullah also retracted his judicial confession. On conclusion of trial, the learned trial court, after hearing both the sides convicted and sentenced the appellants as mentioned above.

6. We have heard the exhaustive arguments of learned counsel for the parties advanced at the bar and with their able assistance perused the record and evidence available on file.

7. Before advertng to merits of the case, we deem it appropriate to first decide Cr.Misc.18-P of 2023, filed by appellant Imdad Ullah along with appeal for condonation of delay in filing appeal. The impugned judgment has been passed on 09.02.2019, against which appellant Imdad Ullah has filed appeal on 12.06.2023 i.e. after a period of more than four years. It appears from order sheet dated 09.02.2019, of

the learned trial court that after pronouncement of the judgment, the appellant was handed over copy thereof on the same day. To this effect signature of appellant Imdad Ullah was also been obtained on the margin of order sheet of the said date. In the application, the appellant has alleged that he being behind the bars was unable to engage a counsel while none from his family members is pursuing his case and that he is also ignorant of law, therefore, he could not file appeal within the stipulated period of limitation.

8. It is an admitted position that Superintendent Jail has not forwarded any appeal on behalf of appellant Imdad Ullah despite the fact that appellant being confined in jail was under his supervision. It was obligation of the Superintendent concerned Jail to facilitate the appellant in filing appeal within the prescribed period of limitation as required under Rule 90 of the Pakistan Prisons Rules, 1894. For ready reference rule (ibid) is reproduced below:-

“Rule 90. Facilities to prisoners for filing Appeals:-The Superintendent **shall** inform every convicted prisoner, on first admission to prison, of the period within which an appeal from the order under which he has been committed to prison may be filed, if the prisoner desires to appeal, every facility shall be given to him for the purpose. A

request for appeal, made with the period allowed, shall be attended to forthwith.”

An iota of material is not available on file to show that appellant Imdad Ullah was informed by the Superintendent Jail and his desire to file or not to file appeal against his conviction and sentence has been obtained. The appellant being prayer leader must not be acquainted with the legal technicalities and its consequences. The question of condonation of delay in filing appeal by a convict beyond the period of limitation came up before the Hon’ble Supreme Court in case titled, **“Muhammad Bakhsh alias Muhammadi vs the State” (1985 SCMR 72)**, wherein delay of 680 days was condoned due to sentence of life imprisonment and the appeal was decided on merit. Similarly, in case titled, **“Muhammad Nawaz vs the State” (PLD 2002 Supreme Court 287)**, the Hon’ble Supreme Court has condoned the delay of 145 days in filing petition for leave to appeal by the convict. The worthy Lahore High Court, Lahore, while dealing with the controversy of filing appeal by the convict person beyond the period of limitation in case titled, **“Lehrasab Hussain vs the State” (2011 MLD 1564)** has held that:-

“Admittedly, the appellant had been in the jail for a period of more than nine years before filing of the appeal. The appeal filed by his co-convict abated due to his demise. The Superintendent Jail should have obtained and forwarded the appeal of the appellant along with his co-convict as he was under an obligation to facilitate him in filing the appeal within limitation as required under Rule 90 of the Pakistan Prisons Rules, 1894. The appellant’s contention that he remained under bona fide mistake that it was forwarded and his relatives had also preferred appeal constitutes a valid ground for condonation of delay in the appeal against conviction. The technicalities should not hamper the court of justice and the powers regarding condonation under Section 5 of the Limitation Act, 1908, should be liberally exercised to ensure administration of justice in its true spirit. In this respect reliance is placed on the case law reported as Mian Muhammad Nawaz Sharif Vs the State (PLD 2009 SC 814).

In case titled, **“Ali Askar vs the State” (2018 MLD 1608)**, this court while condoning delay in filing appeal by the convict, the appeal was heard and decided on merit.

9. Taking guidance and placing reliance on the judgments (supra), we, while taking into consideration the long sentence of life imprisonment awarded to the appellant Imdad Ullah, allow his application for condonation of delay, resultantly, his appeal is being decided on merit along with appeal of appellant Muhammad Tahir.

10. It appears from record that none has furnished ocular account of the incident. The entire case of the prosecution's hinges upon the confessional statement of the appellant Imdad Ullah and circumstantial evidence collected during investigation in support thereof. As per version of complainant on 30.08.2017 at noon time, his son Muhammad Yasir went missing and on 17.09.2017, he after watching footages of CCTV Cameras installed at the spot came to know that he has been abducted by appellant Imdad Ullah, hence, he submitted a written application/complaint to SHO Police Station Thall charging therein directly appellant Imdad Ullah for abduction of Muhammad Yasir. Undeniably, there is delay of about 17 days in reporting the matter; however, this shows *bana fide* of the complainant that he was not interested in charging innocent people. Similarly, keeping in view the customs and traditions of the area to which the complainant belongs where people in the cases

of abduction apprehending death of the abductee, prefer silence till finding any clue qua whereabouts of the abductee. Had there been any enmity or ill will of the complainant with appellant Imdad Ullah, he could easily charge him on the very first day of the incident. Record depicts that soon after report of the complainant, appellant Imdad Ullah along with co-appellant Muhammad Tahir was arrested at Chapperi road and on the same day, on the discovery/pointation of appellant Imdad Ullah, the dead body of the minor deceased was recovered in decomposed form from *Khadimak Pahar*. Appellant Imdad Ullah also recorded confessional statement before the learned Judicial Magistrate on 21.09.2017, wherein he while narrating the entire episode of abduction of the minor deceased from Thall Bazaar to Khadimak Pahar, confessed committing his murder in the said Pahar. Though, during trial, he has retracted his judicial confession, but it is settled law that conviction of an accused can be recorded on the basis of retracted judicial confession, if the same is proved voluntary, true and corroborated by other strong circumstances of the case. Mere denial of an accused from his confession in statement under section 342 Cr.P.C. would not make his confessional statement inadmissible. In

case titled, **“Manjeet Singh vs the State” (PLD 2006 Supreme Court 30)**, it has been held by the Hon’ble Supreme Court that retracted confessional statement either judicial or extra judicial, if found truthful and confidence inspiring as well as qualified the test of voluntariness can be used for conviction, without looking for any other sort of corroboration. The Hon’ble Apex court in the judgment (supra) has further observed that no rule of criminal administration of justice existed to the effect that the court having found the retracted confession voluntary and true must look for the corroboration and that in absence of corroborative evidence, conviction cannot be maintained. Retraction of a judicial or extra judicial confession itself is not an infirmity to be considered sufficient to withhold the conviction, because evidentiary value of a confession is not to be diminished by the mere fact that it was retracted by the maker at the trial. Even an independent corroboration thereof from other sources direct or circumstantial, cannot be insisted in every case as a mandatory rule, rather the rule of corroboration is applied by way of abundant caution and is a case depending entirely on the confessional statement of a person or only on the circumstantial evidence, and this rule is applied more cautiously.

11. To determine as to whether the confessional statement of the appellant Imdad Ullah is voluntary, true and corroborated by other strong circumstances of the case? We would like to reproduce his statement below by translating the same from Urdu to English and thereafter to dilate upon the evidence collected and produced by the prosecution in corroboration thereof:-

“Stated that, I am Pesh Imam in a Mosque of village, Boland Khel. On 30.08.2017 at 1200 noon, I picked Muhammad Yasir deceased from shop of his father Alam Jan, situated in Israfeel Market Thall Bazaar and took him to the shop of one Naveed, situated in Mir Khabi Thull. There my co-villager Muhammad Tahir was present in a room, situated adjacent to the shop of Naveed. I along with Muhammad Yasir deceased stayed in the said room with Muhammad Tahir. I demanded from him his motorbike bearing registration No.F.1348-Hangu, but he told me that the motorbike has been taken by shopkeeper Naveed to Thull Bazaar. After sometime, shopkeeper Naveed returned, parked the motorbike and handed over its key to Muhamamd Tahir. Shopkeer Naved after some conversation with us left the room. I then took key of motorbike from Muhammad Tahir and told him that I am going to commit murder of Muhammad Yasir deceased, as his father Alam Jan and uncle Muhammad Umar have blamed me for

keeping illicit relation with boys, as a result, I am being removed from the position of Pesh Imam. Before, I had tried to kill Muhammad Umar and Alam Jan, uncle and father of Muhammad Yasir deceased, but remained unsuccessful. After that I along with Muhammad Yasir left the shop and reached *Khadimak Pahar* on motorbike. I parked the motorcycle in the bottom of hill and took Muhammad Yasir up to the hill where I sit him in a ditch and placed big stones on his body from legs upto his head. I then return on the motorbike to the room of Muhammad Tahir. After taking meal with him and Naveed, at assar time I re-visited the crime spot and noticed that minor Muhammad Yasir has died. This is my statement”.

12. It is manifest from record that on arrest of the appellant Imdad Ullah on 17.09.2017, Mohib Ullah SI (PW.9), on his pointation has recovered the dead body of deceased from *Khadimak phar*, lying under the stones vide pointation memo Exh.PC/2, in presence of PWs Badshah Zar and Muhammad Ayaz. Badshah Zar while appearing as PW.3 has deposed that he accompanied Mohib Ullah SI accompanied to *Khadimak Ghar* where on the pointation of appellant Imdad Ullah the dead body of Muhammad Yasir deceased lying under the stones, was recovered. To this effect pointation memo Exh.PC/2 was prepared by the SHO which

correct bears my signature. Similar is testimony of Abdul Rehman SI, the investigating Officer (PW.10) of the case, who has deposed that he was telephonically informed by SHO on which he reached *Khadimak Hill* and in his presence the dead body of the deceased was recovered on the pointation of the appellant Imdad Ullah. He prepared injury sheet and inquest report of the deceased and shifted his dead body to the hospital for post mortem examination. Youaf Khan ASI (PW.1) is another witness of the pointation memo who has testified in line with the above named PWs by stating that the dead body of the deceased was recovered on the pointation of the appellant Imdad Ullah in his presence.

13. Naveed Ahmad while appearing as PW.4 deposed that on 30.08.2017 at about noon time, he was present in his shop when appellant Mohammad Tahir came there. He took key of motorbike from him and proceeded to Thall bazaar; that on his return after 15/20 minutes he saw appellant Imdad Ullah along with Mohammad Yasir in a room adjacent to his shop with appellant Mohammad Tahir; that appellant Imdad Ullah took key of motorcycle from Muhammad Tahir and took Muhammad Yasir deceased along with him on the motorbike; that after

1 ½ hour, appellant Imdad Ullah returned alone on the motorcycle; thereafter we all took meal and departed from each other.

14. Record divulges that the motorcycle bearing registration No.1248 used in the commission of offence has also been taken into possession and duly exhibited during trial. Momin Khan (PW.7) has identified the dead body of the deceased boy.

15. Azam Shah, owner of Israfeel Market has been examined as PW.13. He has deposed that he is owner of Israfeel Market situated in Bannu Chowk Thall bazaar; that he had installed CCTV Cameras in the market at different places for security measures; that he has handed over record of CCTV footage of 30.08.2017 to Alam Jan complainant in which the accused Imdad Ullah and deceased can be seen together. Amazingly, this witness has not been cross-examined by the defence meaning thereby that his testimony remained unchallenged. All the footages of the CCTV cameras have been taken into possession by the I.O. and exhibited during trial.

16. The above discussed oral and circumstantial evidence fully corroborate the confessional statement of appellant Imdad Ullah. Similarly, the testimony of Dr. Imran Khan (PW.2), who has

conducted autopsy on the dead body of the deceased also support the confessional statement of the appellant. He while appearing in the witness box has stated that the dead body of the deceased was fully decomposed and there was deep fracture on his frontal skull. He opined the probable time between death and postmortem as 15-20 days, meaning thereby that the occurrence has taken place in between 30.08.2027 and 17.09.2017. The prosecution witnesses have been subjected to lengthy and taxing cross examination but defence failed to create any dent in their testimony.

17. Syed Mansoor Shah Bukhari, Judicial Magistrate Hangu, who has recorded confessional statement of the appellant while appearing as PW.11 deposed that on 21.09.2017 at 01.00 PM, Abdul Rehman SI, produced appellant Imdad Ullah before him for recording his confessional statement. After observing all legal formalities and providing sufficient time to him for pondering over on his statement, he recorded his statement Exh.PW.11/2. The memorandum of inquiry is Exh.W.11/1 and certificate is Exh.PW.11/3. This witness has also been subjected to lengthy cross-examination by the defence but nothing of the sort that the confessional statement of the appellant was involuntary and result

of torture, coercion or inducement could be extracted from his mouth.

18. For what has been discussed above, we are firm in our view to hold that confessional statement of the appellant Imdad Ullah is voluntary, true and free from any force and inducement and is corroborated by strong oral, circumstantial and medical evidence. The learned trial Court while appreciating the prosecution evidence and the confessional statement of the appellant Imdad Ullah has arrived at a right conclusion by holding him guilty of the offence to which no exception can be taken.

19. So far as the findings of the learned trial court with regard to guilt of appellant Muhammad Tahir are concerned, the same are not based on proper appreciation of evidence. Except a single circumstance that his motorcycle was used by appellant Imdad Ullah for taking the deceased to the spot, no other evidence, much less concrete has been brought on record to prove his nexus with appellant Imdad Ullah in the commission of offence. The prosecution has failed to prove his mens rea and actus reus in the commission of offence to his role, hence, findings of the learned trial court to the

extent of his conviction are not sustainable in the eye of law.

20. Now the moot question is what should the quantum of sentence to be awarded to the appellant Imdad Ullah, so as to meet the ends of justice. We have observed certain inconsistencies of minor dimension in the prosecution evidence which though are not so fatal to warrant acquittal of the accused, however, the same can be taken as mitigating circumstance in the matter of sentence in light of ratio of judgment in case titled, “**Falak Sher vs the State**” (NLR 2000 Criminal 188 Supreme Court),

wherein it has been held that:-

“In the overall circumstances of the case, where motive has become suspect and where the prosecution version suffers from inconsistencies other than of a fatal character, it appears proper not to resort to the death penalty, touching the guilt of the accused. For such reasons the appeal is partly allowed converting the capital punishment awarded by the High court, into life imprisonment coupled with fine and identical provisions, as to distribution of compensation under section 544-A Cr.P.C. returned by the trial court together with the benefit of section 382-B Cr.P.C. of the same code”.

Reliance in this regard can also be placed on **1980 SCMR 859 and 1993 SCMR 1660**. In the case of Israr Ali vs. The State reported in 2007 SCMR 525, it has been ruled by the Hon’bble bench that

question of sentence demands utmost care on part of the Court dealing with life and liberties of people and that accused person(s) is/are also entitled to extenuating benefit of doubt on the question of sentence. Again, in the case of Muhammad Riaz and another vs the State and another reported in 2007 SCMR 1413, it was observed by the Hon'able Supreme Court that no doubt, normal penalty for an act of commission of Qatl-i-Amd provided under law is death, but since life imprisonment also being a legal sentence for such offence must be kept in mind wherever the facts and circumstances warrant mitigation of sentence, because no hard and fast rule can be applied in each and every case.

21. Accordingly, appeal filed by appellant Imdad Ullah being meritless is hereby dismissed, resultantly, his conviction and sentences recorded by the learned trial court vide judgment dated 09.02.2019 are maintained.

22. Connected Cr.A. No.207-P of 2019, filed by appellant Muhammad Tahir is allowed, consequently, his conviction and sentences recorded by the learned trial court vide judgment dated 09.02.2019 are hereby set aside and he is acquitted from the charge leveled against him in this case. He

be set at liberty forthwith, if not confined in any other case.

23. On acquittal of appellant Muhammad Tahir and maintaining the conviction and sentences of the convict Imdad Ullah, connected Cr.R. No.33-P of 2019, stands dismissed.

Announced:

31.05.2023

M.Siraj Afridi CS

JUDGE

JUDGE

DB of Hon'ble Mr. Justice Ishtiaq Ibrahim; and
Hon'ble Mr. Justice Sahibzada Asadullah.