

Judgment Sheet

PESHAWAR HIGH COURT, MINGORA
BENCH/
DAR UL QAZA, SWAT

JUDICIAL DEPARTMENT
CONSOLIDATED
J U D G M E N T

Cr.A. No. 114-M/2015

Date of hearing 03.10.2017.

Appellant: (Rehman Gul) by Syed Muhammad Durrani, Advocate.
Respondents: (the State & 1 another) by Mr. Rafiq Ahmad, Asstt: Advocate General and Muhammad Qayum Khan, Advocate.

MOHAMMAD IBRAHIM KHAN, J-

The earlier is Criminal Appeal bearing No. 114-M of 2015 of the accused/Appellant Rehman Gul followed by the Jail Criminal Appeal bearing No. 110-M/2015 conjointly preferred by both these convicts/Appellants Rehman Gul and Asghar Khan alias Ghamay, who have been convicted and sentenced by the judgment as

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contained in Sessions Case No. 46/7 of the year 2013 announced on 20.05.2015 for the following sentences:-

Accused/Appellant Rehman Gul:-

- *U/S 302 (b) PPC to normal death penalty of death as Ta'zir for causing death of Fayaz. He shall be hanged by neck till he is dead (i.e. M.O. in presence of Judicial Magistrate on duty in Jail confirms the convict dead).*
- *The accused/Appellant Rehman Gul shall also liable to pay compensation of Rs. 20,00,000/- (2 million) u/s 544-A Cr.P.C. to the LRs of deceased minor Fayaz. The said compensation shall be recoverable from the accused/Appellant as arrears of land revenue. Owing to want of property, he shall further undergo 6 months SI.*

Accused/Appellant Asghar Khan:-

- *U/S 302 (b) PPC to normal death penalty of death as Ta'zir for causing death of Fayaz. He shall be hanged by neck till he is dead (i.e. M.O. in presence of Judicial Magistrate on duty in Jail confirms the convict dead).*
- *The accused/Appellant Rehman Gul shall also liable to pay compensation of Rs. 20,00,000/- (2 million) u/s 544-A Cr.P.C. to the LRs of deceased minor Fayaz. The said compensation shall be recoverable from the accused/Appellant as arrears of land revenue. Owing to want of property, he shall further undergo 6 months SI.*

These appeals, are therefore, disposed of by way of this singled-out judgment.

2. It refers to a doomful incident that occurred at an unknown time on 06.8.2013 at a place river Swat near Odigram, which is at a distance 4/5 KMs towards West of the Police Station Rahim Abad District Swat. The maker of this report is Sher Afzal who is uncle of the

minor lad by the name of Fayaz aged about 7/8 years whose autopsy was conducted and after being assured that death of the deceased was not natural as the accused/Appellant Rehman Gul is said to have killed him and thrown his body in river Swat. No motive was set as by the time it was not known as the occurrence being unseen.

3. By setting the charge, the learned trial Court has given three (3) heads, under the first head the accused Rehman Gul is said to have pushed one Fayaz son of Akbar Ali resident of Odigram into river Swat and killed him at the instance of co-accused/Appellant Asghar Ali alias Ghamay on 06.08.2013 at an unknown time, thereby committed the offence under sections 302,109 PPC. Under the second head on 05.08.2013 at 'Sham wela' (شام ويلہ) co-accused/Appellant Asghar Ali alias Ghamay has paid Rs. 20,000/- to co-accused/Appellant Rehman Gul to kill minor lad Fayaz and the latter acted upon by throwing him in the water in river Swat, thus, the co-accused/Appellant

Asghar Khan alias Ghamay has committed the offence of abetment and instigation for causing murder of the minor Fayaz, the offence committed within the meaning of section 302 r/w 109 PPC. The third head speaks off that when at the time Rehman Gul the co-accused/Appellant was pushing the minor Fayaz in the river Swat to kill him the instigator Asghar Khan abettor of the offence was himself present at the time of occurrence and thereby committed the offence of *Qatl-i-amd* punishable under section 302 read with section 114 PPC.

4. When these accused/Appellants did not plead their guilt, prosecution examined mother of the deceased by the name of Mst. Masia Bibi as PW-1, Nadar Khan as PW-2, Sher Afzal lodger of the First Information Report and uncle of the minor lad Fayaz as PW-3, minor sister of the deceased Fayaz Sumera star witness of the prosecution as PW-4, the alleged shopkeeper Usman Ali as PW-5, Akbar Khan as PW-6, Usman Ali as PW-7,

Hanif Khan SHO as PW-8, Nameer Gul IHC No. 417 as PW-9, Naeemullah Constable No. 881 as PW-10, Sultan Mehmood SI as PW-11, Fazal Rahim as PW-12, Abdul Bari Shahzad as PW-13, Dr. Nasrullah Khan as PW-14, the Judicial Magistrate concerned Syed Shaukatullah Shah as PW-15 and under the joint statement of learned counsel for the complainant and learned A.P.P evidence of the prosecution was concluded

5. After closure of the prosecution evidence, the accused/Appellants were examined under section 342 of the Code of Criminal Procedure, describing themselves as scapegoats, they denied the charges, posed innocence and stated to have falsely been implicated in the case. They, however wished to produce no defence, nor to examine themselves on oath as required under section 340(2), Cr.P.C.

6. After delivery of the detailed reasons in the impugned judgment, appropriate sentences thought for have been recorded, which are now impugned through these connected criminal appeals.

7. Having heard arguments at length of learned counsel for the accused/Appellants, learned counsel for the complainant and learned A.A.G. for the State, record delved deep into with their able assistance.

8. The disclosure of facts leading involvement of the accused/Appellant Rehman Gul is on account of clue of last seen evidence given by Sumera daughter of late Akbar Ali aged about 8 years. This minor girl has been examined as PW-4 who is the real sister of the deceased Fayaz, under the Court observation was held competent to reply the

questions, thus, on her examination, she has narrated that on the fateful day her brother Fayaz alongwith her, both of them were standing in front of their house, in the meanwhile, accused/Appellant Rehman Gul came there and asked her brother to take him to his uncle Sher Afzal who was working in Agriculture field. When the minor Fayaz did not return till late at night, extensive search was carried out by family members including mother, uncle and other relatives, then the minor Sumera disclosed that accused/Appellant Rehman Gul had taken her brother on the pretext as referred to. Later, her brother was murdered by throwing him in the river. She has been cross-examined at length, who has admitted that accused/Appellant Rehman Gul was never known to her

previously and likely accused/Appellant Asghar Khan was also not known to her as she has never seen them before. It was further disclosed by another person by the name of Usman Ali examined as PW-5 that he while sitting in his shop on 06.08.2013 situated in his village Odigram, Rehman Gul accused/Appellant accompanied by the deceased Fayaz came to his shop where Rehman Gul paid him Rs. 10 for purchase of peanuts, later both of them left his shop.

Accused/Appellant Rehman Gul is known to him as his sister's house is situated near his house and he often acclimated visit to his  sister's house. Under the information given through lodger of the First Information Report and being named therein the accused/Appellant Rehman Gul was arrested

on 10.08.2013 at 11:45 hours while standing in General Bus Stand. His custody was obtained and while confessing his guilt before the Judicial Magistrate PW-15 Syed Shaukatullah Shah, he disclosed that he had thrown the minor lad Fayaz in Swat river, while co-accused/Appellant Asghar Khan alias Ghamay accompanied him for the act of commission of *Qatl-i-amd* being committed at the instance of Asghar Khan. The accused/Appellant Rehman Gul was working with him on daily wages @ Rs. 250/- per day and he used to stay with him for the night as the co-accused/Appellant Asghar Khan told him that he has relations  developed with mother of the minor lad Fayaz, thereby in order to get her hands this young lad ought to have been killed for which an offer was made of Rs. 20,000/- and on receiving this

amount it was co-accused/Appellant Asghar Khan who brought the minor and then he pushed him into ravine, after doing so he decamped from the place situated nearby Swat river and after 4 days of the occurrence the co-accused/Appellant Asghar Khan disclosed that the name of child is Fayaz who is fatherless. Thus, the police in view of this confessional statement arrested the co-accused/Appellant Asghar Khan 11.08.2013.

9. Where statement of minor sister of the deceased by the name of Sumera PW-4 coupled with the statement of PW-5 Usman Ali for the purpose of last seen evidence would absolutely negate the confessional statement given by the accused/Appellant Rehman Gul before the Judicial Magistrate as he had never been to the shop of PW-5 Usman Ali for

purchase of peanuts of Rs. 10 and he never took minor lad Fayaz under the pretext to meet him with his uncle Sher Afzal who was working in the agriculture field. The other way around the confessional statement annihilate the last seen evidence as betoken by the sister of deceased and the shopkeeper examined as PW-4 and PW-5 one after another. This confessional statement has been believed by the learned trial Court and on its basis the evidence has been carried out and the extreme penalty of death to both the accused/Appellants has been awarded; therefore, the role of each accused/Appellant is *— (Signature) —* to be appreciated, if any, in the light of evidence so adduced by the prosecution. The last seen evidence is nevertheless enough to sustain conviction on murder charges where

the witnesses have some connection with the deceased their independent corroboration is required to rely upon it. The last seen evidence is always considered weak type of circumstantial evidence and it cannot be made basis for conviction of murder charge, there is need of strong corroboration and other pieces of evidence. In context of the present case except the minor sister of the deceased and shopkeeper Usman Ali PW-5 statements would utterly fly in the face of the version of prosecution in view of the confessional statement if taken in *juxta* position. Reliance is

placed on *PLJ 2015 Cr.C. (Lahore) 207*

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"Mazhar Hussain vs the State", wherein the relevant citation speaks off:-

"Last seen evidence is a week type of evidence unless corroborated with some other piece of evidence which is

conspicuously missing in instant case. Last seen evidence can be procured at any time during investigation if direct evidence is not available to prosecution.

Similar view has also been affirmed in case law cited as 2013 YLR 1364 (Lahore)

“Zafar Iqbal vs the State”. The relevant citation enunciates:-

“ Prosecution case was based on circumstantial evidence. Last seen evidence which was a week type of circumstantial evidence could not be made basis for conviction on murder charge when the was related to the deceased and his testimony was not corroborated by any other evidence.

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Last seen evidence is not enough to sustain conviction on murder charge when the witness has some connection with the deceased and independent corroboration is required to rely upon it.

10. The learned Trial Court has mainly given credence to the confessional statement of the accused/Appellant Rehman Gul in order to hold truthfulness and its veracity, the prosecution examined the Judicial Magistrate Syed Shaukatullah Shah, PW-15, who recorded confessional statement on 12.08.2013 at 01:00 P.M. Accused/appellant Rehman Gul was produced before him by the Investigation Officer and it was believed that the accused/Appellant Rehman Gul offered himself to disclose the real facts leading to the commission of *Qatl-i-amd* of the minor lad Fayaz, therefore, after questionnaire setting up  as many as 11 questions were asked and replied, statement was reduced under section 164 Cr.P.C. read with 364 Cr.P.C. This witness who is a Judicial Officer has

categorically admitted in his cross-examination:-

یہ درست ہے کہ میں نے ملزم کے بدن کے وہ حصہ جات جن پر تشدید کیا جاسکتا ہے بذاتِ خود نہیں دیکھے تھے۔

یہ درست ہے کہ میں نے ملزم کو اس نسبت نہیں بتایا تھا کہ میں اس کے خلاف بطور گواہ پیش ہونگا۔ یہ درست ہے کہ میں نے ملزم اس نسبت نہیں بتایا تھا کہ اقبال جرم کے بنیاد پر اسے سزا بھی ہو سکتی ہے۔ یہ درست ہے کہ میں نے ملزم کو یہ تنبیہ بھی نہیں کی تھی کہ ملزم بطور بھی لیا جائے گا۔

Approver
یہ درست ہے کہ میں نے ملزم کو سوچنے کیلئے 24 گھنٹے کا وقت نہیں دیا تھا۔ یہ درست ہے کہ ملزم کو سوچ بچار کیلئے حوالات جو ڈیشل نہیں بھجوایا گیا تھا۔ یہ درست ہے کہ میں نے ملزم کو اقبال جرم سے پہلے وکیل یا رشتہ دار سے مشورہ کرنے کا موقع نہیں دیا تھا۔

Where confessional statement has nexus to be believed and on its basis conviction is to be followed, such confessional statement ought to have been corroborated with other evidence. Where judicial confession before the Magistrate is at the stage of recording of the statement of the said accused making confession recorded under section 342

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Cr.P.C or even prior to is retracted particularly when such retracted confession is leading to conviction it renders it altogether inadmissible in evidence and is liable to be set aside.

Wisdom in this behalf is supported by the judgment of the Hon'ble Supreme Court of Pakistan cited as 2017 SCMR 898

"Muhammad Ismail and others vs the State".

The relevant citation (b) reads:-

*Reappraisal of evidence.
Judicial confession before
Magistrate, retraction of--
Effect. Judicial confession
allegedly made by accused-
persons/appellants before a
Magistrate under S. 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 persons' conviction.
Convictions and death sentences
awarded to accused persons
were set aside in circumstances
and they were acquitted of the*

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charge of murder. Appeal was allowed accordingly.

In the case in hand, in view of the admissions as referred by the learned Judicial Magistrate the course of its admissibility which is ought to be declared as volunteer, but this possibility is ruled out in view of the dictum laid down in PLD 1971 Lahore 850 “Ghulam Muhammad vs the State”, wherein the relevant citation opines:-

"All that the Magistrate told the accused was that he should sit down and think over the matter and then make a statement according to his own free will. This warning was not sufficient to bring to the mind of the confessor the serious results that had to follow the confession. The warning is to be administered in the language used in subsection (3) of section 164, Cr.P.C and where it is administered in a casual way the Courts have refused to rely on such a confession. The Magistrate even did not explain

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to the accused before time was allowed for consideration that he was not bound to make a confession and if he made one, it will be used against him. The warning administered by the Magistrate in this case does not confirm to the one prescribed by the Statute and this failure is enough to vitiate the confession apart from other circumstances which make it unacceptable."

Where the Magistrate was duty bound to have asked the questionnaire and to have let known the accused that the confession being made would use against him and that the said Magistrate is to appear against him as prosecution witness to confirm all the possibilities for making it to believe the statement recorded before him as to convince the Court liable it for conviction of the accused. Warning has not been administered while recording this confession of the accused/Appellant Rehman Gul, thereby, it

was requirement under the prescribed Statute and its failure is sufficient to vitiate confession. Apart from built-up, narration by the Investigation Officer put in the mouth of the accused/Appellant Rehman Gul to mere state words for his implication thereby the confession is hardly believable to be volunteered statement before the said learned Judicial Magistrate.

11. There is always a motive which is set in the First Information Report where the crime of murder takes place there are reasons to believe that such heinous crime is always committed where motive remained proved. In this case, the co-accused Asghar Khan alias Ghamay wished to marry mother of the deceased and as this minor lad was all the time attached with his mother, while

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Mst. Masia Bibi mother of the deceased was working as Sweeper in private school, the accused/Appellant Asghar Khan did not get a chance to convey his feelings for offering her hands despite of the fact that Masia Bibi, mother of the deceased had grown up children and that too when she stepped in the witness-box as PW-1, she has categorically denied that ever has met with the accused/Appellant Asghar Khan, she states:

ملزم اصغر خان نے نہ کبھی مجھے دیکھا ہے، نہ میرے ساتھ کبھی ملاقات کی ہے اور نہ ہی میرے ساتھ فون پر بات کی ہے اور نہ ہی میرے لیے کبھی رشتہ بھیجا ہے۔ اصغر خان ملزم کی اپنی بیوی اور بچے موجود ہیں۔ ملزم اصغر خان کبھی کسی بھی غیر اخلاقی سرگرمیوں میں ملوث نہ رہا ہے۔

Another prosecution witness PW-3

الصراحت
Sher Afzal has also stated alike:

میرے بھائی کے کسی کے ساتھ تعلقات وغیرہ نہیں ہیں۔ اصغر خان ملزم نے کبھی بھی ہمارے گھر میری بھابی کا رشتہ مانگنے کی غرض سے کوئی نہیں بھیجا ہے اور نہ ہی اس کا کوئی اظہار کیا ہے۔ میں نے کبھی بھی اصغر خان کو اپنی بھابی

مساحت مسیا بی بی کے ساتھ بات چیت کرتے ہوئے یا
ملاقات کرتے ہوئے نہیں دیکھا ہے۔

Thus, in the given circumstances when the motive is not set as to why the accused/Appellant Asghar Khan will pay an amount of Rs. 20,000/- when he has never wished to marry Mst. Masia Bibi mother of the deceased and paid an amount of Rs. 20,000/- to the co-accused/Appellant Rehman Gul and this fact has also been admitted by the PW-3 Sher Afzal in the following manner:-

میرے روپر واصغ خان نے رحمان گل کو مبلغ 20,000
روپے نہیں دیے ہیں۔

Thereby, by the statement of PW-1 Mst. Masia Bibi compelled with the statement of PW-3 Sher Afzal the purpose set as motive to kill the minor by the co-accused/Appellant Asghar Khan through accused/Appellant Rehman Gul remained unproved.

12. The medical evidence furnished by PW-14 Dr. Nasrullah Khan is also not in line with the version of prosecution, as the medical report is completely silent with regard to cause of death and even this fact has been plainly admitted by the Medical Officer concerned when cross-examined by the defence that in his report the cause of death has not been given. The medical evidence put-forward by the Medical Officer and the statement of mother of the deceased Mst. Masia Bibi PW-1, if are placed in *juxta* position, she clearly admitted in her cross-examination that during the days of occurrence it was hot season and *so, so* the kids often go to the river for taking bath coupled with the fact that when the cause of death is shrouded with mystery in view of medico-legal report, the deceased child might

have been drowned while swimming in the river.

13. Last but not the least it could be the preliminary objection but neither been taken by the learned Trial Court nevertheless the learned defence counsel, nor even the learned counsel for the complainant and learned A.A.G. appearing on behalf of the State have ever pointed out that previously the charge has not been framed under section 34 of the Pakistan Penal Code as obviously when the accused/Appellants were tried for the offences under sections 302 read with 109 and 114 PPC, the accused/Appellants under the asservations shared their common intention.

Thus, the charge being framed without such allegations would also bring a serious blow to the prosecution as it could amount to not

sharing common intention by both the accused/Appellants in committing *Qatl-i-amd* of the deceased Fayaz by throwing him in the river Swat.

14. In such like scenario, it is hard to believe the prosecution version as it seems to have been developed by the police inviting troubles for both the accused/Appellants Rehman Gul and Asghar Khan alias Ghamay. This lead to serious implication of creating doubt. It has been enshrined in Islamic Jurisprudence some 1400 years ago that it would be better to acquit 100 culprits than to convict one innocent soul. Even otherwise, conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case must be resolved in favour of the accused. Reliance in

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this regard is placed on the case law cited as

"Muhammad Khan and another vs. The State,

1999 SCMR 1220". It has now been settled that

for giving benefit of doubt to an accused, there

need not be number of circumstances to prove

the innocence of accused; even single

circumstance creating reasonable doubt is

sufficient for the acquittal of an accused.

Reliance in this regard is placed on the case

law cited as **Muhammad Khan and another**

vs. The State, 1999 SCMR 1220.

15. In view of the above discussion and

scrutiny of evidence from all angles, we are of

the firm view that the prosecution has failed to

prove the guilt of the accused/Appellants

(N.B.) through cogent and unimpeachable evidence.

The basic principle of Sharia/Law is that

conviction must be based on evidence beyond

any shadow of doubt because the damage

resulting from erroneous sentence is

irreversible, ergo, while extending the benefit of doubt to the accused/Appellants, we accept both these connected appeals by setting aside the conviction and sentences recorded through the impugned judgment dated 20.05.2015 by the learned Trial Court and acquit them of the charges levelled against them. They be set free forthwith, if not required in any other case.

16. Similarly, Murder References No. 4-M & 4-A of 2015 are answered in negative.

17. These are the detailed reasons for our short orders of even date.

Announced.
Dt. 03.10.2017

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