

*Judgment Sheet*

IN THE PESHAWAR HIGH COURT,  
ABBOTTABAD BENCH.

*JUDICIAL DEPARTMENT*

**J.Cr.Appeal.No.134-A/2011.**

**JUDGMENT**

*Date of Hearing* 10.10.2018

*Appellant (Akhtar Zaib)*

*Mr. Owais Abbasi,  
Advocate.*

*by*

*Respondent (State) by*


*Mr. Yasir Zahoore Abbasi,  
AAG.*

**SYED MUHAMMAD ATTIQUE SHAH, J:-**

Appellant-convict Akhtar Zaib alias Kala Muna S/o Faqir Muhammad has filed instant appeal against the conviction and sentence passed against him by the learned Additional Sessions Judge-II, Mansehra, Camp Court at Oghi, vide judgment dated 12.07.2011 in case FIR No. 34 dated 21.01.2009 under Section 302/34 PPC of Police Station Oghi, District Mansehra, whereby the appellant-convict was convicted under Section 302-B PPC and sentenced to life imprisonment with fine of Rs. 200,000/- and in default

to undergo six months SI. Benefit of Section 382-B Cr.P.C has been extended to him.

2. Muhammad Iqbal Khan ASHO was on *Gusht*, when he received information that an unknown dead body is lying in the forest of village *Chakal Payen*. On such information, he rushed to the spot, found a dead body smeared in blood, having a wound on head. He conducted search of the dead body but could not recover any identity of the deceased. He prepared injury sheet and inquest report of the deceased and sent the dead body for postmortem examination. He started inquiry under Section 174 Cr.P.C. during course of which the photographs of the deceased were published in newspaper. During inquiry, Muhammad Arif (PW-2) came and stated that the dead body was of Muhammad Ameen S/o Muhammad Taj deceased who was his paternal cousin and 15/16 days prior, he left the house along with Kala alias Muna and did not return. On the basis of publication as well as rumours, they inquired and also identified the photographs of the deceased who has been murdered by Kala alias Muna. On the basis of



said statement of PW-2, FIR was registered against appellant-convict.

3. Initially appellant-convict was absconding, however, he was arrested in the instant case on 01.11.2009 who was produced by Ali Akbar SI (PW-7) before the court on 02.11.2009 and he obtained two days police custody of the appellant-convict. PW-7 prepared site plan Ex PC on the pointation of accused and on 04.11.2009, produced him vide application Ex PW-7/7 for recording his confessional statement. Appellant-convict confessed his guilt and disclosed the names of his co-accused Munawar and Taj Feroz who were also arrayed as accused in the instant case.

4. Dead body of deceased was examined by Dr. Niaz Muhammad (PW-9). According to his report Ex PW-9/1, he found the following injuries on the body of deceased:-

*"1. A big longitudinal wound extending from parietal region of head to the occipital region. The wound was gapping in appearance and the skull bones were broken into pieces. Brain matter was present in small amount and was noted outside*

*the wound. Size of wound was 6 inches x 3 inches cavity deep.*

*2. Right thigh was swollen and underlying femur bone was fractured with crackling sound noted.*

*3. Bruises of brown colour were noted on the chest, legs and thighs and whole body."*

5. During course of investigation Khalid Khan SI (PW-14) recovered axe from the house of accused through recovery memo Ex PW-11/1 having some suspicious blood on it, which was sent to FSL and report of FSL Ex PW-14/6 revealed that the axe contained human blood. After completion of investigation, prosecution submitted complete challan for trial of the accused.

6. After supplying copies to the accused in compliance of Section 265-C Cr.P.C. the learned trial Court framed charge against the accused to which they pleaded not guilty and claimed trial. The prosecution was thus asked to produce its evidence. In order to prove its case against the accused, prosecution produced and examined 14 PWs and closed its evidence. The learned trial Court recorded statements of the accused under Section 342 Cr.P.C. After hearing arguments of learned counsel for the parties, the

learned trial Court convicted the appellant-convict under Section 302-B PPC and sentenced him to undergo life imprisonment. He was further ordered to pay fine of Rs. 200,000/- and in default to further undergo SI for six months. Benefit of Section 382-B Cr.P.C. was extended to him. However, co-accused Munawar and Taj Feroz were acquitted of the charge.

7. Arguments heard and record perused.

8. The prosecution case rests on circumstantial evidence as there is no eyewitness of the occurrence. In order to reach to the neck of culprit from the murder of the deceased through said chain of circumstances, the prosecution is equipped with:-

- i. *Recovery of blood from the spot.*
- ii. *Recovery of axe from the house of appellant-convict.*
- iii. *Report of FSL.*
- iv. *Confessional statement of the appellant-convict.*
- v. *Motive.*
- vi. *Oral as well as medical evidence.*

9. We would first take the confessional statement of the accused and its evidentiary value. The only piece of evidence which prevailed before the

learned trial Court to convict the appellant was his confessional statement before Judicial Magistrate and the recovery of crime axe from his house. It is settled law that confession must not only be voluntary but it must also be true. In order to ascertain the truthfulness of confession, it must be visualized and examined in juxtaposition with the other evidence of the prosecution. For such comparison we would like to reproduce the confessional statement of the accused:-

بیان کیا کہ مقتول محمد امین عرف پردیسی میرا دوست تھا اور اسی طرح منور ولد نامعلوم سکنہ بانی بجنہ اور تاج فیروز ولد نامعلوم سکنہ کھڑی بھی ہمارے ساتھ اٹھتے بیٹھتے تھے۔ محمد امین عرف پردیسی نے اپنی اراضی فروخت کی تھی جس کی رقم اس کے پاس تھی۔ اس نے ہم تینوں کو کہا کہ کوئی کاروبار اس رقم سے کرتے ہیں۔ جس پر ہم کالا ڈھاکہ چرس لینے کیلئے گئے۔ تاج فیروز ہم تینوں یعنی محمد امین مجھے اور منور کو چھم بنگراں بٹھا کر چلا گیا اور کہا کہ میں چرس لاتا ہوں۔ آدھ گھنٹہ کے بعد وہ چرس کی پٹی لے کر آیا اور ہمیں کہا کہ باقی مال نہیں لایا صرف یہی پٹی ملی ہے۔ جس پر ہم چاروں نکلے پانی کی طرف واپس ہو گئے۔ راستہ پر تاج فیروز ہمیں چرس پلاتا رہا۔ رات 11 بجے چکل کیساتھ ویران جگہ پر پہنچے۔ میں سب سے آگے تھا۔ مجھ سے پیچھے محمد امین عرف پردیسی تھا۔ تیسرے نمبر پر منور تھا۔ اور سب سے پیچھے تاج فیروز تھا۔ منور کے پاس ہاتھ میں کلہاڑی تھی جس سے اس نے محمد امین عرف پردیسی کے سر پر کلہاڑی سے سیدھی وار کی جس سے محمد امین عرف پردیسی زخمی ہو کر گر گیا۔ پھر تاج فیروز نے منور سے کلہاڑی لے کر محمد امین عرف پردیسی جو کے گرا ہوا تھا کے سر پر کلہاڑی سے وار کیا۔ تاج فیروز نے کلہاڑی مجھے دی کہ محمد امین پر وار کر دو ورنہ میں تمہیں مار دوں گا۔ میں نے تاج فیروز سے کلہاڑی لی اور محمد امین عرف پردیسی کے منہ پر سیدھی کلہاڑی سے وار کی۔ تاج فیروز نے محمد امین کے جیب سے دو لاکھ روپے نکالے۔ پھر ہم تینوں نے مقتول کو دندی سے نیچے پھینک دیا۔ پھر ہم نیچے مقتول کے پاس آئے اور اس کے اوپر کمبل ڈالا۔ پھر ہم تینوں کھڑی واپس ہو گئے۔ تاج فیروز کے گھر آئے جس نے مجھے -/80,000 روپے دیئے اور کہا کہ کلہاڑی لے کر چلے جاؤ اور اس ایریا میں نظر نہیں آنا۔ پھر میں پشاور چلا گیا۔ (میرا یہی بیان ہے)۔

10. The appellant-convict in his confessional statement has not disclosed any clear motive which prompted them to commit the murder of the deceased, rather he stated that after selling his property, the deceased had asked them to do a business with the sale proceeds. When the deceased was ready to do a joint business from the sale proceeds of his property, what was the reason for killing him? is a question which finds no answer on record. Moreover, the postmortem report of the deceased reveals that he had only one injury on his head, while the appellant-convict in his confessional statement stated that three injuries with the blows of axe were inflicted to the deceased, first by Munawar, second by Taj Feroz and third by the appellant-convict. The appellant convict also states in his confessional statement that Rs. 200,000/- were taken out from the pocket of deceased by Taj Feroz, out of which Rs. 80,000/- were paid to him, however, during course of investigation, said amount could not be recovered from any of the accused. He also states in his confessional statement that after the occurrence, they went to the house of Taj Feroz who asked him to

take along the axe and thereafter, the appellant-convict left for Peshawar. He never stated that prior to leaving for Peshawar, he had visited his house and left the axe there. The entire facts disclosed by the appellant-convict in his confessional statement are contradictory to the evidence available on record.

The case can be looked from another angle. As per record, the appellant-convict was arrested in the instant case on 01.09.2011 in injured condition, he was produced before the court with prayer of police custody and two days police custody was granted. He was also got examined through medical officer and his medical report is available on file as Ex PW-9/D-1. However, PW-12, while appearing in the witness box stated that he was unaware as to whether the accused had any apparent injury on his body or not. In Ex PW-12/1, i.e. the questionnaire put to accused prior to recording his confessional statement shows answer to question "*Do you have any apparent injury?*" as "*No*". Moreover, as per Ex PW-12/2, the accused was produced before the learned Judicial Magistrate (PW-12) at 01:30 PM for recording his confessional statement. After putting the



questions mentioned in the questionnaire, the accused was given time of 30 minutes to think over his confession, however, interestingly the confession statement of the accused was concluded at 01:45 PM. All this shows that accused was not given proper time nor any satisfactory measures were adopted prior to recording the confession of the accused and the same was recorded in cursory manner. Therefore, the confessional story of the accused does not appear to be true and voluntary. Indeed it completely belies the prosecution story. Regarding the voluntariness of the said confession, suffice it to mention that the same was recorded on fourth day of his arrest. In "*Muhammad Parvez and others Vs The State (2007 SCMR 630)*", the apex Court has held that confessional statement recorded with a delay of four days, could not be made basis for conviction of the accused.

11. There is no cavil to the proposition that conviction can be awarded to the accused on the basis of sole confession, however, for that the confession must be voluntary, true, without any inducement, fear and coercion. In "*Manjeet Singh Vs. The State (PLD 2006 SC 30)*", the august Supreme Court held that:-

*"There is no rule of criminal administration of justice that the Court having found the retracted confession voluntary and true, must also look for the corroboration and in absence of corroborative evidence conviction cannot be maintained. The retraction of a judicial or extra-judicial confession itself is not an infirmity to be considered sufficient to withhold the conviction because the evidentiary value of a confession is not diminished by mere fact that it was retracted by the maker at the trial and thus the independent corroboration from other source direct or circumstantial, cannot be insisted in every case as a mandatory rule rather the rule of corroboration is applied as abundant caution and in a case depending entirely on the confessional statement of a person or only of the circumstantial evidence, this rule is applied more cautiously."*

12. In the circumstance and the manner and mode, the confession of the appellant-convict was recorded which was subsequently retracted, as a rule of caution, it must be supported by some connecting/corroborative evidence. *"State Vs Waqar (1992 SCMR 950), Nazir Hussain Vs The Crown*

*(1969 SCMR 442) , Habib Ullah Vs The State (1971 SCMR 341) and Staet Vs. Minhun (PLD 1964 SC 813)”.*

**13.** The prosecution claims corroboration from recovery of crime weapons i.e. axe. As alleged by the prosecution, the crime weapon allegedly recovered contained human blood as per Serologist report Ex PW-14/6, however, despite the fact that the blood stained garments and blood recovered from the spot were also sent for examination, there is nothing regarding matching or grouping of the blood on the crime weapon with the blood on the clothes of the deceased as well as blood recovered from the spot. Therefore, this missing chain would obviously benefit the accused.

**14.** Moreover, the recovery of alleged crime weapon i.e. axe was shown from the house the accused. Admittedly appellant-convict was not present at the time of alleged recovery. The IO who allegedly recovered the axe, had raided the house of the accused in absence of any lady constable. No one from the family of the accused had come forward to disclose that the axe belonged to the appellant-convict, nor the


investigating officer could bring on record any documentary evidence showing that the house wherefrom the alleged axe was recovered, was of appellant-convict. The marginal witness to memo Ex PW-11/1, Nasir Zaman during cross examination stated that he resides in Karachi and had come to the village due to the occurrence. He also disclosed that the accused along with his family members were residing in the said house and such like axe is usually available in each house of the village. Thus the prosecution failed to establish that the recovered axe was actually the crime weapon in the instant case.

15. Admittedly the parents of the deceased had died prior to his murder, while he was neither married nor having any brother and sister. PW-2, Arif is the cousin of the deceased and was also his legal heir. The occurrence allegedly took place on 06.01.2009. According to PW-8, the relatives of the deceased had visited police station on 16.01.2009 and had identified the deceased to be Muhammad Ameen through his photographs and clothes etc. however, the statement of Muhammad Arif under Section 164 Cr.P.C was recorded on 20.01.2009 on the basis of

which FIR was registered on 21.01.2009. There is nothing on record to suggest as to why from 16.01.2009 till 21.01.2009, Muhammad Arif was not produced before the court for recording his statement under Section 164 Cr.P.C. Keeping in view the said delay in recording statement under Section 164 Cr.P.C. the probability of prior consultation and deliberations cannot be ruled out. Moreover, PW-1 Qamar Zaman and PW-2 Muhammad Arif, both are the cousins of the deceased. PW-1 deposed during cross examination that the other property of the deceased is in possession of one Aurangzeb while PW-2 deposed that the deceased had disposed of his entire property. PW-2 further deposed during cross examination that they were informed by one Arshad a Suzuki driver that deceased and accused had travelled together in his Suzuki prior to occurrence. Neither the statement of said Arshad was brought on record during investigation, nor this stance get support from the material available on record. Similarly, the deceased had joint property with PW-1 and PW-2, while the accused had no joint property with the deceased. The deceased was willing to do joint business with accused

from the sale proceeds of his property, as such the motive advanced by the prosecution is not appealing to a prudent mind, as there is nothing on record that the accused wanted to grab the money of deceased or deceased was not willing to pay something to the accused out of sale proceeds of his property.

16. In the circumstances when the alleged confessional statement of the appellant-convict not only belies the mode and manner of the occurrence as narrated by the prosecution, but the said confession is not corroborated by any other material evidence, then we are afraid that such confessional statement has been wrongly considered for passing conviction against the accused. The testimony of oral PWs as well as the witnesses of recovery and pointation etc. are contradictory to each other. The report of FSL does not suggest that the blood found on the allegedly recovered axe was of the same group of blood recovered from the place of deceased. The statement of Arshad Suzuki driver, who had allegedly last seen the deceased in the company of accused, was not recorded. So the prosecution could not built up a chain



of circumstantial evidence, leading to the conviction of accused.

**17.** In view of the above, we hold that the prosecution has failed to prove its charge against the appellant-convict as well, beyond any shadow of doubt, therefore, while accepting this appeal, we set aside the impugned conviction and sentence passed against the appellant/convict and acquit him in this case. He be set free forthwith, if not required in any other case/crime.

**18.** These are the reasons for our short order of the even date.

**Announced.**  
**Dt. 10.10.2018**

  
**JUDGE**

  
**JUDGE**