

B/R

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(*Judicial Department*)

Cr.A.No.09-D/2023 with
Cr.Misc.No.05-D/2023

Saqib

Versus

The State and another

JUDGMENT

For appellant: Mr. Saif-ur-Rahman Khan, Advocate.

For State: Mr. Aamir Farid Saddozai, Asstt:
A.G.

For complainant: Muhammad Bilal Khan Kundi,
Advocate.

Date of hearing: 11.9.2023.

Dr. Khurshid Iqbal, J.-

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1. The instant appeal has been preferred by the appellant Saqib son of Malik Ihsanullah against the judgment of the Additional Sessions Judge-II/MCTC, D.I.Khan, passed on 27.02.2023, in case FIR No.64, dated 06.4.2019, under Section 302 PPC of Police Station Yarik, D.I.Khan, whereby he was convicted under Section 302(b) PPC and sentenced to imprisonment for life as Ta'zir. He was also held liable to pay Rs.20,00,000/- (rupees twenty hundred thousand) as compensation to the legal heirs of the deceased within the meaning of Section 544-A Cr.PC, which shall be recoverable from his property as arrears of land revenue or in default thereof to undergo six months S.I. The benefit of Section 382-B Cr.PC was extended to him.

2. Facts of the case shortly are that on 06.4.2019 at 09:10 a.m., the complainant Habibullah (PW-11) with the help of his relatives brought his injured son Hizbulah (victim / deceased) in semi unconscious condition to the Emergency Room of Civil Hospital, D.I.Khan. He reported that at morning time, his son went to the shop of one Iqbal for purchasing groceries. At about 07:30 a.m., his son-in-law Zubair (PW-7) rushed to his house and informed him that the victim was fired at. He, along with PW Zubair, rushed to the spot and saw the victim besmeared with blood. His injured son informed him that the appellant Saqib fired at him with his pistol. The complainant stated that the appellant claimed what he called to be in love with the victim. For this reason, he added, the appellant would tease the victim. Further highlighting the motive, the complainant informed that a year ago, a complaint was made against the appellant. However, the matter was patched up. The report of the complainant was reduced in the shape of a Murasila (Ex.PW-4/1) which culminated into registration of the FIR (Ex.PA). Initially, the FIR was registered under section 324 PPC. Later on the injured succumbed to his injuries, therefore, section 302 PPC was inserted.

3. After the arrest of the appellant followed by completion of investigation, challan was submitted against him. Formal charge was framed to which he pleaded not guilty and claimed trial. The prosecution examined fourteen (14) witnesses. At the conclusion of the prosecution evidence, the appellant was examined under Section 342 Cr.PC. He professed innocence and false implication in the case. However, he neither wished to be examined on oath, nor did he want to produce evidence in defence. At the end of the trial, the learned

trial Court convicted and sentenced the appellant/accused as mentioned above vide the impugned judgment.

4. We have heard the arguments of the learned counsel for the parties as well as learned Asstt: A.G. representing the State and perused the record.

5. According to the initial report of the incident (Murasila) the complainant Habibullah (PW-11/father of the victim) was informed by Zubair (PW-7) that the victim was fired at. The appellant was thus not nominated in the Murasila as culprit. The ocular account was furnished by PW-7, 11 and one Shah Nawaz (brother of the complainant/PW-10). A close reading of the evidence furnished by these PWs transpires that PW-11 was informed by PW-7 at his home that the victim was fired at. PW-11 had sent the victim out for buying some commodities from the nearby shop of one Muhammad Iqbal. PW-11 stated in his deposition before the Court that PW-7 informed him that the appellant fired at the victim. PW-7, when entered the witness box, did not name the appellant having fired at the victim, nor was such information disclosed by the PW-11 in the Murasila, as noted above. The deposition of PW-7 reveals that at the relevant time he was present in Shadi Khan Market in the shop of a Tailor Master when he heard firing. As he came out of the shop, he saw a crowd of people near the shop of Iqbal. He found the victim in injured condition lying across the road. He did not say in his examination-in-chief that either he asked the victim himself or heard from someone amongst the people present there that the appellant fired at him. Rather, he stated that on seeing the victim in injured condition, he immediately rushed to the house of the PW-11, where he informed him about the incident. His testimony further shows that he, along with PW-11, rushed back to the place of the incident and it was

at that time that he asked the injured victim about the culprit, at which the latter replied that the appellant fired at him. PW-10, in his examination-in-chief, said that the deceased was coming from the shop of Iqbal towards the road side, when he came at a distance of about 10/15 paces, in the meanwhile, from the other side, the appellant armed with a pistol, came there and fired at him, as a result of which, he was hit and the appellant ran away from the place of the incident. He further stated that after seeing the occurrence, he rushed towards the injured victim where other people including Zubair (PW-7) also attracted. His testimony further shows that PW-7 brought PW-11 to the place of the incident.

6. It is established from the above that: firstly, PW-11 and PW-7 were not the eye witnesses of the incident. Secondly, while PW-7 was immediately attracted to the spot where PW-10 was also present, PW-7 did not ask right at that time, nor did PW-10 inform him of having seen the appellant while firing at the victim. Thirdly, while PW-10 mentioned the presence of PW-7, the latter remained absolutely silent about the presence of the former. Fourthly, PWs-7 and 11 have contradicted each other in such a way that PW-11 did not specifically mention in the Murasila that PW-7 informed him that the appellant was the culprit. PW-11 made improvement in examination-in-chief of his deposition that PW-7 informed him in his house that the appellant has fired at the deceased. PW-7, on the other hand, stated that he asked the injured victim about the culprit when he was back to the place of the incident, along with PW-11 (father of the deceased). All the three witnesses (PWs-7, 10 and 11) failed to positively support each other.

7. As stated above, if PW-10 had seen the appellant having fired at the deceased, why he didn't

inform at least PW-7, let alone other people present there. The purpose of the presence of the PW-7 near around the spot in Shadi Khan Market may appear to be somewhat justified because, as per his version, he was on 28 days long leave during those days. However, the purpose of presence of PW-10 is not clear in his statement. So, it is shrouded in mystery for what purpose he was present there. He is the real uncle of the deceased (brother of the complainant). During cross-examination, he was confronted with his statement recorded under section 161 Cr.PC. He recalled that in his 161 statement, he stated before the I.O that father of the deceased (PW-11) came back, along with Zubair (PW-7) and other relatives to the spot. When asked about the presence of PW-7, he replied that PW-7 had reached to the spot before his arrival there. As observed above, PW-7 was present at the spot right at the time of the occurrence but the latter, as noted above, does not mention that PW-10 was also present and more so, PW-10 was the eyewitness of the occurrence. In light of the above discussion, material dents are visible in the evidence of the prosecution. Firstly, the name of the eye witness was not mentioned in the Murasila despite the fact that the complainant came to know about the so called eye witness—Shah Nawaz (PW-10). In *Rehmat Ullah (2020)*¹ the name of the eye witness was not disclosed in the first information report, which the Court considered fatal to the prosecution. Secondly, the eyewitness did not state the purpose of his presence on the scene of the incident. Admittedly, he is the real uncle of the victim. There is no doubt of his being a highly interested witness. In the circumstances, possibility of the appellant being falsely implicated cannot be ruled out. Guidance is derived from *Dalmir (1970)*,² wherein three eye witnesses were found to be interested and their evidence not buttressed by

¹ *Rehmat Ullah and another v. The State*, (2020 YLR 103 Sindh).

² *Dalmir and another v. The State*, (1970 SCMR 840).

circumstantial evidence. Thirdly, many people got attracted to the crime scene but neither anyone amongst them came forward, nor did the I.O bother to examine anyone as a witness. In a recent case of 2021³, a number of people had attracted to the spot and were present when a murder was committed, but no one of them came forward to support the prosecution case. Among others, this omission was considered by the Court against the prosecution. Fourthly, it looks quite unnatural on the part of PW-7 (Zubair) that instead of lifting up the injured victim for medical treatment, he simply rushed to his house to inform his father. The factum of unnatural conduct on the part of prosecution witnesses has been held fatal umpteen times in numerous pronouncements. Guidance can be taken from the judgment of the Supreme Court in *Zaheer Sadiq* case⁴. Reference may also be made to the latest cases of *Syed Ali Akbar*⁵ and *Javed Khan*⁶.

8. Yet another aspect worth noting in the statement of PW-10 is that when the victim then injured was lifted from the place of the occurrence, he was initially taken to the P.S. Yarik from where he was shifted to the hospital. Keeping in view the fact that the injured victim disclosed to PW-7 that the appellant fired at him, it follows that the victim in injured condition was in a position to speak sensibly. The victim should have lodged the report in P.S. Yarik. According to the statement of Dr. Hissam-ud-Din (PW-3), when the injured victim was brought to the hospital, he was found unconscious. It is also in the evidence that while on the way to the hospital, some mechanical defect occurred in the private vehicle in which he was lying. He was thus shifted to another

³ *Muhammad Idrees and others v. State through Advocate-General and others*, (2021 YLR 48).

⁴ *Zaheer Sadiq v. Muhammad Ijaz and others*, (2017 SCMR 2007).

⁵ *Syed Ali Akbar v. State*, (2023 YLR 901 Lahore).

⁶ *Javed Khan v. The State and 2 others*, (2023 PCrLJ 17 Peshawar).

vehicle. It may be said that on the way to the hospital, the condition of the injured victim grew from bad to worse, leading to his unconsciousness and ultimately, his death. In short, his shifting in the Yarik Police Station was a proper opportunity for making report. In a 2019 case⁷, a victim succumbed to injuries on the spot. A learned Division Bench of this Court held that the complainant should have lodged the report in the police station situated on the way to hospital. The learned Bench read it from the perspective of delay in lodging the report. The same aspect is quite relevant in the context of making a direct report in the shape of dying declaration to involve the appellant.

9. The appellant was arrested on 06.4.2019, the day of the occurrence. A .30 bore pistol was shown recovered from his baithak on his pointation. Inspector Saghir Gillani, the SHO of P.S. Yarik (PW-13) arrested the appellant. As per his statement, the appellant made pointation during what he called 'cursory interrogation'. He recovered the pistol vide a memo. In addition to one Constable Muhammad Imran, a private person Sher Akbar was cited as a marginal witness to the recovery memo. The aforesaid Sher Akbar was examined as PW-9. In his examination-in-chief, he deposed that the appellant Saqib had murdered his cousin Hizbulah and he was about to go to D.I.Khan. In the meanwhile, the appellant in handcuffs was brought by the local police to the place of the occurrence. The local police asked him to accompany him to the baithak of the appellant. In his baithak, the appellant pointed out the place where he had concealed the .30 bore pistol. He stated that in respect of the aforesaid pointation, he signed a blank paper. He deposed that in his presence, nothing was handed over by

⁷ *Qaizar v. Tariq and others*, (2019 YLR 2115).

the SHO to the I.O. On the request of the prosecution, he was declared a hostile witness. He was, then, subjected to cross-examination by the prosecution. Even while under the cross-examination, he reiterated that he had signed a blank paper. He was confronted with the recovery memo on which he admitted his signature as correct. Though, he declared incorrect a suggestion that he did not sign a blank paper, in the next breath, he voluntarily stated that he had signed a blank paper. He also denied a suggestion that in his presence, the SHO gave to the I.O the aforesaid alleged weapon of offence. In this respect, the deposition of the DSP Circle Saghir Gillani (PW-13) is also worth perusal. He, in his examination-in-chief, stated that on tentative interrogation that the appellant pointed out the place where he had allegedly concealed the weapon of offence. When he took the appellant to his baithak, he further added, a private person namely, Sher Akbar, came there whom he cited as a marginal witness to the recovery memo. Thus, it is established that the prosecution failed to prove the recovery of weapon of offence. The above appraisal of evidence led us to conclude that the recovery of the weapon of offence is highly doubtful. In these circumstances, the recovery has become inconsequential especially when the ocular account has been disbelieved. Reference may be made to cases of *Zahid Mehmood*⁸, *Muhammad Hanif alias Fouji*⁹ and *Mst. Zarina*¹⁰. The case of *Aqil Zaman alias Aqeel*,¹¹ a recent one, is also worth referring, wherein it was observed:

Even otherwise when ocular account has been disbelieved, the recovery and the expert report however strong may be cannot be a base for recording conviction.

⁸ *Zahid Mehmood and others v. The State and others*, (2020 YLR 62 Lahore).

⁹ *Muhammad Hanif alias Fouji v. The State*, (2017 YLR 543 Lahore).

¹⁰ *Mst. Zarina and others v. The State and others*, (2016 P CrLJ 20).

¹¹ *Aqil Zaman alias Aqeel v. The State and another*, (2022 P CrLJ 1576 Lahore).

10. The appellant made confession before the Judicial Magistrate-I, D.I.Khan (PW-12). The order dated 08.4.2019 of the Judicial Magistrate shows that the appellant was handed over to the Naib Court for sending him to the judicial lock-up. In this respect, statement of Sub-Inspector Azad/I.O (PW-6) is worth perusal. He partially investigated the case. The record shows that he produced the appellant before the Judicial Magistrate for recording his confessional statement. While under cross-examination, he was asked as in which vehicle he took the appellant to the Court of the Judicial Magistrate, for how long he was stayed there and who took him to the judicial lock after making the confessional statement. He tendered his replies in the following words:



I produced the accused before the competent Court for recording his confessional statement through official vehicle and it took about an hour. I cannot tell exact time when we reached the Court of learned Magistrate. The accused was handed over to me after 12 minutes of our production of the accused before the Court. The accused had confessed his guilt before the Court. The photocopy of the confessional statement was annexed with the judicial file. Usually, it took 15-20 minutes in shifting the accused from the Court of JM to Jail. In the instant case, we also spent about same time while shifting the accused from the Court of Magistrate to Central Jail, D.I.Khan in the company of 3-officials excluding me.

From the above statement, it appears that the appellant was handed over to PW-6 after recording his confessional statement. It further reflects from the above statement that the appellant was handed over to him after 12 minutes of

his production before the Judicial Magistrate. He stated that three other police officials accompanying him, shifted the appellant to judicial lock-up after recording confessional statement. The above referred replies materially contradict the statement of the Judicial Magistrate (PW-12), his order dated 08.4.2019 pertaining to the judicial remand and the certificate he issued in respect of the confessional statement. The certificate shows that the appellant was produced before the Judicial Magistrate at 01:30 p.m., he gave 30 minutes time to the appellant for thinking over his decision to make confessional statement, he started recording confessional statement at 02:00 p.m. and finished it at 02:15 p.m. The Judicial Magistrate, when entered the witness box, admitted during cross-examination that in the application submitted to him by the I.O he got the appellant examined from an authorized Medical Officer before recording of the confessional statement. When asked, he could not tell the exact time he consumed while explaining the questionnaire to the appellant. He rather furnished a general reply stating that sufficient time was consumed. The appellant stated in his confessional statement that on the day of the occurrence, he had used intoxicating drugs and that while committing the offence he was under the influence of the said drugs. The Judicial Magistrate was asked about the intoxicating effect on him, to which he replied in the negative. He denied a suggestion that he spent 10 to 15 minutes in completing the whole proceedings of recording of confession. He deposed that he had granted one day physical custody of the appellant to the I.O.

11. When the appellant disclosed in his confessional statement the fact that he was under the influence of some intoxicating drugs at the time of the

occurrence, the Judicial Magistrate should have found out whether this fact was noted or, so to say, stated by the appellant to the arresting police officer or the same police officer himself came to know that he was intoxicated. In his statement under section 342 Cr.PC, the appellant retracted from his confession. In reply to question No.18, he stated:

I never confessed anything before any Court. I was produced before the Court by the SHO and the I.O and after view minutes I was handed over back to the same police officer who managed to shift me to the judicial lock-up.

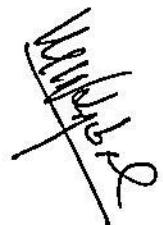
The Judicial Magistrate was not cross-examined on this aspect of the confessional statement and from his order dated 08.4.2019, it is clear that he had handed over the appellant to the Naib Court for his onward transmission to the judicial lock-up. It is nevertheless very much clear that the appellant somehow or the other was again given into the hands of the I.O. We observe that the Judicial Magistrate could not be blamed for this. However, as discussed with reference to the statement of PW-6, it is quite clear that the I.O managed to get back the appellant into his control and custody. Thus, the police high-handedness is apparent from the evidence, which has a material bearing on the voluntariness of the appellant. Here, it is imperative to state that when the very voluntariness of a confessional statement becomes a begging question and when ocular account is also disbelieved then in the absence of any other confidence inspiring evidence, it would not be safe to make such a confessional statement a base for conviction. Reliance is placed on *Hashim Qasim* case,¹² wherein the Supreme Court observed:

¹² *Hashim Qasim and another v. The State*, (2017 SCMR 986).

12. It is trite law that for accepting a confession, two essential requirements must be fulfilled i.e. that the confession was made voluntarily, it was based on true account of facts, leading to the crime and the same was proved at the trial. The superior courts have also given strict guidelines for the Magistrate, recording confession, to be followed without any exception which need not be repeated herein, because long line of authorities on this point is already in the field.

Similarly, in the earlier case of *Azeem Khan*¹³, the Supreme Court held:

14. The judicial confessions, allegedly made by both the appellants are the material piece of evidence in the prosecution hand, therefore, we would deal with the same in the first instance.



15. Keeping in view the High Court Rules, laying down a binding procedure for taking required precautions and observing the requirements of the provision of section 364 read with section 164, Cr.P.C. by now it has become a trite law that before recording confession and that too in crimes entailing capital punishment, the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that, all signs of fear inculcated by the Investigating Agency in the mind of the accused are to be shedded out and he is to be provided full

¹³ *Azeem Khan and another v. Mujahid Khan and others*, (2016 SCMR 274).

assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person is willing to confess, then all required questions formulated by the High Court Rules should be put to him and the answers given, be recorded in the words spoken by him. The statement of accused be recorded by the Magistrate with his own hand and in case there is a genuine compelling reason then, a special note is to be given that the same was dictated to a responsible official of the Court like Stenographer or Reader and oath shall also be administered to such official that he would correctly type or write the true and correct version, the accused stated and dictated by the Magistrate. In case, the accused is illiterate, the confession he makes, if recorded in another language i.e. Urdu or English then, after its completion, the same be read-over and explained to him in the language, the accused fully understand and thereafter a certificate, as required

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under section 364, Cr.P.C. with regard to these proceedings be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official/officer whether he is Naib Court wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.

[...]

18. In our considered view, the confessions of both the appellants for the above reasons are of no legal worth, to be relied upon and are excluded from consideration, more so, when these were retracted at the trial. Confessions of this nature, which were retracted by the appellants, cannot mutually corroborate each other on the principle that one tainted evidence cannot corroborate the other tainted piece of evidence. Similar view was taken by this Court in the case of Muhammad Bakhsh v. The State (PLD 1956 SC 420), while in the case of Khuda Bux v. The Crown (1969 SCMR 390) the confession made, was held not voluntary because the accused in that case was remanded back to the police after making confession.

Even then if, for the sake of arguments, the confessional statement is considered as true and voluntary, reliance on it alone for conviction would not be possible. In other

words, the remaining evidence such as ocular account and the recovery of the weapon of offence have already created material dents in the prosecution case which do not substantiate the confessional statement.

12. We may touch upon the motive. In support of the motive, the prosecution examined Akbar Ali Jan, an IHC of police station Cantt (CW-2), who produced copy of an application submitted by the complainant to the SHO on 22.3.2018. In the application, the complainant voiced his grievance that the appellant was teasing the victim when the latter goes to school. CW-2 deposed that the application was assigned to him for consideration. He stated that he was able to resolve the issue due to which the complainant didn't pursue the matter. To this effect, he recorded a statement in the police station in the presence of witnesses. Sher Akbar (PW-9) was one of the witnesses of that statement. He remained silent on the motive. Other witnesses were not produced. Despite all this, motive, as a double-edged weapon, could be used either way. Where charge is not proved, it will strike at the prosecution case. In the circumstances of the case even if the motive is believed to be true, it also cannot be considered sufficient proof of the charge.



13. It is of paramount importance to mention that under the criminal administration of justice, the benefit of every doubt arising out of the prosecution case has to be resolved in favour of a person accused of a criminal charge. The absolute principle of criminal jurisprudence that prosecution and prosecution alone has to prove its case against an accused beyond any reasonable shadow of doubt. The benefit of every inconsistency, loophole or contradiction which pricks the judicious mind must be extended to the accused, not as a matter of grace or concession, but as of right. Reliance is

placed on the latest case of *Ahmed Ali*¹⁴ wherein the Supreme Court held:

Even otherwise, it is well settled that for the purposes of extending the benefit of doubt to an accused, it is not necessary that there be multiple infirmities in the prosecution case or several circumstances creating doubt. A single or slightest doubt, if found reasonable, in the prosecution case would be sufficient to entitle the accused to its benefit, not as a matter of grace and concession but as a matter of right.

14. For the foregoing reasons, this Court is of the considered view that the prosecution has miserably failed to prove its case against the appellant. Therefore, this appeal succeeds and is allowed. Consequently, the conviction and the sentence awarded by the learned trial Court, vide impugned judgment, dated 27.02.2023, are set aside and the appellant is acquitted of the charge while extending him the benefit of doubt. He shall be released forthwith if not required in any other custody case.

15. The above are the detailed reasons for our short order of even date.

Announced.
Dt: 11.9.2023.
Imran/*


Faheem
JUDGE


28/09
Khurshid Iqbal
JUDGE

(D.B)
Hon'ble Mr. Justice Muhammad Faheem Walli
Hon'ble Mr. Justice Dr. Khurshid Iqbal

¹⁴ *Ahmed Ali and another v. The State*, (2023 SCMR 781).