

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 178-M/2017

Umar Hayat son of Muhammad Yaqoob (Appellant)
Versus

(1) The State
(2) Said Rahman son of Fazal Qadar (Respondents)

Present:

Mr. Said Hakim, Advocate.

*Mr. Rahim Shah, Asstt. Advocate General
for the State.*

Barrister Asad-ur-Rehman, Advocate.

Date of hearing:- **11.03.2019**

JUDGMENT

SYED ARSHAD ALI, J.- This criminal appeal is directed against the judgment dated 27.07.2017 rendered by the learned Additional Sessions Judge/Izafi Zila Qazi Malakand at Dargai, in case F.I.R No. 190 dated 31.08.2015 registered under section 302 of the Pakistan Penal Code 1860 ("**PPC**") at Police Station Dargai District Malakand, whereby the appellant Umar Hayat was convicted under section 302 (b) PPC and sentenced to life imprisonment along with payment of compensation of Rs. 100,000/- (one lac) under section 544-A of the Criminal Procedure Code



("Cr.P.C") payable to the legal heirs of the deceased, or in default thereof, he shall further suffer six (6) months simple imprisonment. However, the accused/appellant was extended the benefit of section 382-B Cr.P.C.

2. As per contents of the FIR, the complainant Said Rahman, PW-7 on 31.08.2015 at 21:00 hours reported the incident to Mohtashim Mian, IHC, PW-10 at emergency ward of *Dargai* hospital in respect of murder of his deceased son Ubaid-ur-Rahman by unknown accused. On the basis of report of the complainant the '*Murasila*' Ex. PA/1 was drafted, which culminated into FIR *ibid* Ex. PA registered against unknown accused at PS concerned.

3. On the following day i.e. 01.09.2015 the complainant had recorded his statement under section 164 Cr.P.C wherein he had charged the present appellant for the murder of his son Qari Ubaid-ur-Rehman. Similarly, the statements of the alleged eye-witnesses Saddar Khan, Nosher Ali and

Ali Rehman were also recorded under section 164 Cr.P.C.

4. The dead body of the deceased was medically examined by Dr. Gul Badshah, PW-2 and the case was investigated by Mohtashim Mian, IHC PW-10, who on receipt of information about the murder visited the *Dargai* hospital, where the complainant had reported him the matter about the death of his son. He took into possession blood stained garments of the deceased Ex. P-1 having corresponding marks of bullets on the same vide recovery memo Ex. PW-5/1. He had also recovered crime empties from the spot Ex. P-2 along with blood stained earth Ex. P-3. He had prepared the site plan Ex. PB on the pointation of the eye-witnesses. The accused was arrested vide card arrest Ex. PW-10/6 from the graveyard on 02.09.2015 and on his pointation the weapon of offence i.e. 30 bore pistol Ex. P-3 was recovered vide recovery memo Ex. PW-9/1, therefore, a separate case vide FIR No. 191 dated 02.09.2017 under section 15



A.A. was registered against the appellant at PS concerned.

5. After completion of investigation, complete *challan* was submitted before the Court. The charge was framed against the appellant, to which he pleaded not guilty and claimed trial. The prosecution in support of its case examined as many as ten (10) witnesses, whose statements were recorded and placed on file. On closure of the prosecution evidence, accused was examined under section 342, Cr.P.C, wherein he denied the charges, claimed innocence and stated to have falsely been implicated in the case.

6. On conclusion of the trial, the learned trial Court convicted the appellant vide the judgment impugned herein. Hence, the present appeal.

7. Arguments heard and record of the case was perused with the able assistance of learned counsels for the parties including the learned A.A.G. representing the State.



8. It is evident from record that on 31.08.2015 at about 21:00 hours the complainant Saeed-ur-Rehman, PW-7 reported the matter to Mohtashim Mian, IHC, PW-10 at emergency ward of *Dargai* hospital to the effect that after *Isha* prayer when his son left the mosque at about 20:30 hours, he heard a sound of firing. When he reached near the house of Umar Rehman, he found his son injured and soaked in blood. With the help of the locals, the injured was put in a Suzuki Pick up and was brought to the hospital. In the hospital, his son succumbed to the injuries. The complainant in this report did not charge anyone for the murder of his son.

9. On the following day of the occurrence i.e. 01.09.2015 the complainant had recorded his statement under section 164 Cr.P.C wherein the present appellant was charged for the murder of the deceased.

10. The prosecution case mainly rests on the statements of the eye-witnesses Noshir Ali, PW-6, Ali Rehman, PW-8, the

complainant Saeed-ur-Rehman, PW-7 and the judicial confession recorded by the appellant before the Judicial Magistrate *Dargai*, PW-4 allegedly on the following day of his arrest i.e. on 03.09.2015.

11. Since the most important evidence against the present appellant is his confession before the Judicial Magistrate, which was allegedly recorded on the following day of his arrest i.e. on 03.09.2015, therefore, first we take the same for our discourse. We have carefully perused the memorandum of questionnaire, the contents of confession and the certificate appended with the said confession. In the memorandum of questioner Ex. PW-4/1 in reply to a question his کیا تم اقبال جرم اپنے مرضی اور بغیر کسی دباؤ یا لالچ کے کر رہے ہو؟ answer was “جی نہیں”. Similarly, in response to a question regarding his period of custody, he has stated that he remained in the police custody for 2 days. The certificate, Ex. PW-4/3 along with the confessional statement, Ex. PW-4/2 shows that he was produced on 12:00

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P.M before the Judicial Magistrate and his confession was recorded at 12:15 P.M. Thus, only 15 minutes were given to him for wondering/thinking. The Investigation Officer, PW-10 in his cross-examination has confirmed/admitted that he was never asked by the Judicial Magistrate for the medical examination of the accused/appellant and after recording his confessional statement the accused was handed over to him at 01:00 o clock.

12. Although, according to card of arrest, Ex. PW-10/6 the appellant was shown to have been arrested on 02.09.2015 and was produced before the Judicial Magistrate on 03.09.2015, however, not only in the memorandum of questioner the appellant has stated that he remained in police custody for the last 2 days but the alleged eye-witness Ali Rehman, PW-8 before the Court has stated/confirmed that when they had charged the present appellant for commission of offence, the present appellant was already arrested by the police. It is evident from record that the statement of the said eye-witness PW-8 was

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recorded on the following day of the occurrence i.e. on 01.09.2015. Thus, there is serious doubt on the date of arrest of the present appellant. We have no doubt in our mind that a promptly recorded confession by accused even if it is retracted in later stage of the proceedings is a sufficient ground for conviction of the accused provided the conscience of the Court is satisfied that the said confession was voluntary and true and corroborating by other evidence.

13. The learned Judicial Magistrate has recorded the confession of the accused/appellant in a very casual manner. When in response to a question regarding the voluntariness of his confession, the answer of the appellant was in negative then it was incumbent upon the learned Judicial Magistrate to have attended the appellant very seriously. He should have provided him a very conducive atmosphere thereby removing all kind of fear from his mind and should have further inquired about the nature of undue influence and

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temptation, which he had complained in his reply. However, to the contrary, the learned Judicial Magistrate had provided only 15 minutes to the appellant for thinking over the matter and only after just 15 minutes his confessional statement was recorded. Not only his confessional statement was recorded in a very casual manner but the custody of the accused as evident from the statement of the Investigation Officer, PW-10 was given to the police official after recording the confessional statement, which is another serious irregularity raising a serious question on the voluntariness of the appellant to confess his guilt. Thus, this kind of confession was never accepted by the superior Courts. In this regard, reliance is placed on the judgment of Honourable Supreme Court of Pakistan titled "Asif Mahmood vs the State (2005 SCMR 515)", wherein it was held that:-

Confessional statement for being relied upon should

not only be true, voluntary and believable but should be without fear, favour or any inducement.

In respect of return of accused to police custody after recording his confession, wisdom is derived from the judgment of august Supreme Court of Pakistan titled "Muhammad Pervez and others v/s The State and others" (2007 SCMR 670)", wherein it was observed that:- *Accused, after recording of confessional statement were handed back to police, such type of confession was irrelevant. Accused remained in police custody before and after recording confession for 24 hours and Magistrate had taken only one hour to record confession of the accused, such type of confession would not fall in the category of voluntary confession."*

Thus, the confession of the accused does not appear to be voluntary.

14. The evidentiary value of this confession can be viewed yet from other angle. Since the said confession was retracted, therefore, the same would require further corroboration from the record qualifying to be a valid ground for conviction. In this regard, reliance is placed on the judgment of the Hon'ble Apex Court titled "Nadir Hussain v/s The Crown (1969 SCMR 442)", wherein it was held that:- "*Retracted confession should not be acted upon unless corroborated in material particulars.*"

This view was also affirmed by the august Supreme Court of Pakistan in case titled "The State through A.G. then the N.W.F.P now Khyber Pakhtunkhwa v/s Waqar Ahmad 1992 SCMR 950", wherein it was observed that:- "*Though it was not a rule of law that confession whether retracted or not could not be the sole basis for conviction but principle of procedure and rule of caution required that a*

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retracted confession must be supported by some other connecting evidence.”

It was further held in case titled “Bahadur Khan vs. The State” reported as PLD 1995 S.C. 336 that:- *“Retracted confession has to be accepted only if it is corroborated by clear, cogent and independent evidence.*

15. In order to trace the other corroborative piece of evidence, we move forward to the ocular testimony of the two witnesses, Nosher Ali, PW-6 and Ali Rehman, PW-8. Since the statements of these alleged eye-witnesses of the occurrence were recorded on the following day of the occurrence, therefore, the same are to be considered with due caution and care and to be thoroughly scrutinized and it is to be seen as to whether their testimony in the circumstances of the case is reasonable, probable or plausible and could be relied upon in respect of guilt of the present appellant. In this regard, wisdom can be drawn from the judgments of august Supreme Court of Pakistan, wherein it was held that credibility of a witness becomes highly

suspicious if his statement is recorded with delay without offering any plausible explanation, reliance can be placed on the case law cited as "Muhammad Sadiq vs the State" (PLD 1960 Supreme Court 223), "Tariq Gul vs Ziarat Gul (1976 SCMR 236), "Muhammad Iqbal vs the State" (1984 SCMR 930), "Haroon alias Harooni vs the State and another" (1995 SCMR 1627) and "Muhammad Khan's case vs Maula Bakhshah" (1998 SCMR 570).

16. Ali Rehman, PW-8 is the driver of the Suzuki Pick up, in which the deceased and his father the complainant were taken to the hospital. This Ali Rehman is the cousin of the deceased. In his statement, he has stated that he is plying a Suzuki vehicle for earning his livelihood. At about 8:30 P.M he was coming back to his house and when reached at the spot, he heard the sound of firing and thus parked his vehicle, in the headlights of his Suzuki vehicle he saw the appellant running towards the graveyard along with the pistol. Hence, he put the deceased with the help of other people in his



Suzuki and took him to the hospital. Thus, despite the fact that the deceased was his cousin and the complainant was his uncle in the way he did not disclose the said incident so that the present appellant could be charged immediately for the murder of deceased. His this conduct is unusual and as such his delayed statement is not confidence inspiring and it will be highly unsafe to rely on his statement for awarding punishment to the appellant.

17. Similarly, the other alleged eye-witness Nosher Ali, while appearing as PW-6 has stated that on 31.08.2015 at about 8:30 hours he along with Manzoor Alam and the appellant Umar Hayat were sitting in his shop/Cabin. In the meanwhile, when the deceased Qari Ubaid-ur-Rehman came to his Cabin, the appellant started firing at him and thereafter he decamped towards the graveyard. However, he did not accompany the deceased to the hospital. In his cross-examination, he has admitted that he had also recorded statement before the Magistrate and in the said statement he has stated that he did not know the accused and he was told about the incident by Manzoor



Alam. Thus, this glaring contradiction/improvement in his statement also makes him an untruthful witness.

18. The close perusal of the aforesaid statements not only shows their unnatural conduct but their statements appear to be unreasonable, improbable and not plausible. Thus, it would be very dangerous to rely on the testimony of such witnesses. In this regard, reliance is placed on the judgment of august Supreme Court of Pakistan titled "Saifullah v/s The State (1985 SCMR 410)", wherein it was held that:- *"Both eye-witnesses real brothers inter se and uncles of the deceased. One showing extraordinary strange conduct as close relative after having been nephew murdered and other tried his best to suppress facts which he had mentioned in his earlier statement thus proving that it was an un-witnessed occurrence. Accused acquitted in circumstances"*.

The same ratio further reflects in case titled "Haroon alias Harooni v/s The State (1995 SCMR 1627)", wherein it was observed by the Hon'ble Apex Court that:-

“Statement of a witness must be in consonance with probabilities fitting in the circumstances of the case and also inspire confidence in the mind of a reasonable prudent man. If these elements are present, then the statement of the worst enemy of an accused may be accepted and relied upon without corroboration, but if these elements are missing, then statement of a pious man may be rejected without second thought.”

19. In view of the above it appears that the occurrence was un-witnessed and thus the only piece of evidence with the prosecution against the present appellant is the confessional statement of the accused/appellant and the recovery of fire arm weapon i.e. 30 bore pistol through recovery memo Ex. PW-9/1 on pointation of the appellant. As far as the confessional statement of the appellant is concerned, we have already discarded the same from consideration in the preceding Paras.

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Regarding the recovery of fire arm weapon suffice it to mention that the very date of arrest of the appellant is shrouded in serious doubts then how can the said recovery be relied

upon. Even otherwise, it is settled law that the recovery of crime weapon etc. are always considered to be a corroborative piece of evidence and such kind of evidence by itself is not sufficient to bring home the charges against the accused especially when the other material/evidence put-forward by the prosecution in respect of guilt of the accused/appellant has already been disbelieved. In this regard, reliance is placed on the judgment of the august Supreme Court of Pakistan titled "Imran Ashraf and 7 others vs the State" (2001 SCMR 424), wherein it was held that:- *"Recovery of incriminating articles is used for the purpose of providing corroboration to the ocular testimony. Ocular evidence and recoveries, therefore, are to be considered simultaneously in order to reach for a just conclusion."*

Likewise, if any other law is needed on the same analogy, reference can be placed on the judgment of the Hon'ble Apex Court titled "Dr. Israr-ul-Haq vs Muhammad Fayyaz and another" (2007 SCMR 1427) wherein it was observed that:- *"Direct evidence*

having failed, corroborative evidence was of no help. When ocular evidence is disbelieved in a criminal case then the recovery of an incriminating article in the nature of weapon of offence does not by itself prove the prosecution case.

20. In view of the above discussion, we are of the absolute view that the prosecution has failed to prove its case against the accused/appellant beyond any shadow of doubt; therefore, his conviction cannot be maintained, resultantly, we accept this appeal by setting aside his conviction and sentence recorded by the learned trial Court through the impugned judgment dated 27.07.2017 and acquit him of the charges levelled against him, by extending him the benefit of doubt. He be set free forthwith, if not required in any other case.

21. These are the reasons of our short order of even date.

Announced
Dt. 11.03.2019


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