

JUDGMENT SHEET

**PESHAWAR HIGH COURT, MINGORA
BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.A No. 204-M/2020

*Najeeb Ullah son of Muhammad Ilyas (Appellant)
Versus*

*(1) The State through A.A.G.
(2) Jamil Khan IHC of Police Station Dargai
(Respondents)*

Present: *Mr. Said Hakim, Advocate.
Mr. Sohail Sultan, Asst: A.G.
Muhammad Raziq, Advocate.*

Cr.R. No. 12-M/2019

*Hayat Khan son of Sher Ali Khan
Versus
(Petitioner)*

*(1) State through A.A.G.
(2) Najeeb Ullah son of Muhammad Ilyas
(Respondents)*

Present: *Muhammad Raziq, Advocate.
Mr. Sohail Sultan, Asst: A.G.
Mr. Said Hakim, Advocate.*

Date of hearing: **28.01.2021**

JUDGMENT

WIQAR AHMAD, J.- Appellant namely Najeeb Ullah has called in question judgment of his conviction and sentence dated 14.01.2019 passed by learned Additional Sessions Judge/Juvenile Court

Malakand at Dargai, vide which he was sentenced as follows;

- *U/S 302 (b) PPC to life imprisonment as Tazir along with compensation of Rs. 50,000/- (fifty thousand) under section 544-A Cr.P.C payable to legal heirs of the deceased, or in default thereof, accused shall further undergo six months simple imprisonment.*
- *Appellant was also extended benefit of section 382-B Cr.P.C.*

2. Appellant faced trial in the criminal case registered vide FIR No. 335 (Ex.PA) dated 04.09.2016 under section 302 PPC at Police Station Dargai District Malakand, on the basis of 'Murasila' (Ex. PA/1) sent by Jameel Khan, IHC (PW-8) to the police station on 04.09.2016. Complainant namely Jameel Khan, IHC along with other police 'Nafri' had gone to the place of occurrence i.e. mountain, after receiving information that dead body of a male deceased had been lying there, in mutilated condition. During search of the dead body, the police recovered a National Identity Card from his pocket, disclosing his name as Dawlat Khan son of Sher Ali Khan. The police had also found marks of wounds on body of the deceased. 'Murasila' was drafted which culminated into ibid FIR registered against unknown accused at police station concerned.

Thereafter, appellant was found connected with commission of the offence, initially on the basis of CDR data and he was arrayed as an accused in the case in hand.

3. After registration of the case, investigation ensued. Investigating Officer had recovered blood from the place of deceased vide recovery memo Ex. PW-4/1 dated 04.09.2016. He also recovered a live cartridge and an empty shell of pistol vide recovery memo Ex. PW-4/2 dated 04.09.2016. The appellant was arrested on 07.09.2016, whose confessional statement was recorded by the Magistrate on 10.09.2016. The police also recovered a weapon of offence i.e. 30 bore pistol along with charger loaded with four live rounds from possession of one Noman on the basis of information allegedly disclosed by the appellant, vide recovery memo Ex. PW-7/1 dated 08.09.2016. Crime empty so recovered from the spot and the weapon of offence had also been sent to Forensic Science Laboratory (hereinafter referred to as "FSL") for comparison, report (Ex.PZ) received therefrom was placed on file.

4. On completion of investigation, complete *challan* was submitted against appellant before learned Juvenile court. After compliance of proceedings under section 265-C Cr.P.C, charge was framed against him on 03.01.2017 to which he pleaded "*not guilty*" and claimed trial. Prosecution produced eight witnesses, whose statements were recorded and placed on file. On conclusion of proceedings in the case, accused was examined under section 342 Cr.P.C. Learned trial Court convicted and sentenced the appellant vide impugned judgment dated 14.01.2019, as stated earlier.

Feeling aggrieved from his conviction and sentence, accused/appellant has filed the instant appeal before this Court while petitioner has also filed connected Criminal Revision No. 12-M of 2019 for enhancement of the sentence awarded to accused/respondent.

5. We have heard arguments of learned counsel for the parties, learned Asstt. A.G. appearing on behalf of State and perused the record.

6. Perusal of record reveals that prosecution have mainly been relying upon confessional statement of the appellant (Ex.PW-1/2) recorded on 10.09.2016. Age of the accused/appellant was shown as 18 years in the card of arrest Ex. PW-8/6 but later on his date of birth has been determined as 02.04.2001 on the basis of school record. There has been no dispute thereafter that his date of birth has actually been 02.04.2001 and he had been a juvenile of the age of less than 16 years at the time of commission of the offence. It was for said reason that challan against him was submitted before juvenile Court and he has been tried as a juvenile. His age has been shown as 16 years in the charge framed which has nowhere been disputed by the prosecution. Recording of a confessional statement of a juvenile accused required more care and caution as held by Hon'ble Supreme Court of Pakistan in its judgment given in the case of "Hashim Qasim and another v/s The State" reported as 2017 SCMR 986 wherein the Hon'ble Court has held;

"In the instant case, we are confronted with confession consisting of almost six full scape sentences. The accused, Khayam Khurshid was treated as Juvenile by the prosecution itself being of the age of sixteen years or less at the relevant time; he remained in the custody of the police for many days, however, the recording Magistrate did not provide him sufficient time for reflection to recompose. Being a Juvenile (minor), it was appropriate and desirable that he should have been provided counseling/consultation facility of natural guardian or any close blood relative of mature age, having no clash of interest with him in the case in hand but no such care and caution was observed by the Magistrate."

Section 10 of the Juvenile Justice System Ordinance 2000 (hereinafter referred to as "Ordinance") provided the mode and manner in which a juvenile offender has to be dealt with, at the time of his arrest. Said section being relevant is reproduced hereunder for ready reference;

Arrest and bail. (1) *Where a child is arrested for commission of an offence, the officer incharge of the police station in which the child is detained shall, as soon as may be, inform.. a. the guardian of the child, if he can be found, of such arrest and inform him of the time, date and name of the Juvenile Court before which the child shall be produced; and b. the concerned Probation Officer to enable him to obtain such information about the child and other material circumstances which may be of assistance to the juvenile Court for making inquiry.*

(2) *Where a child accused of non-bail able offence is arrested, he shall, without any delay and in no case later than twenty-four hours from such arrest, be produced before the Juvenile Court.*

(3) *Without prejudice to the provisions of the Code, a child accused of a bail able offence shall, if already not released under Section 496 of Code, be released by the juvenile Court on bail, with or without surety, unless it appears that there are reasonable grounds for believing that the release of the child shall bring him into association with any criminal or expose the child to any danger, in which case, the child shall be placed under the custody of a Probation officer or a suitable person or institution dealing with the welfare of the children if parents or guardian of the child is not present, but shall not under any circumstances be kept in a police station or jail in such cases.*

(4) *The Juvenile Court shall, in a case where a child is not granted bail under sub-section (3), direct for tracing the guardian of such child and where the guardian of the child is traced out, the juvenile Court may immediately release the child on bail.*

(5) *Where a child under the age of fifteen years is arrested or detained for an offence which is punishable with the imprisonment of less than ten years, shall be treated as if he was accused of commission of a bailable offence.*

(6) *No child under the age of fifteen years shall be arrested under any of the laws dealing with the previous detention or under the provisions of Chapter VII of the Code.*

(7) *Notwithstanding anything contained in the Code and except where a Juvenile Court is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, a child who, for commission of an offence, has been detained, shall be released on bail.*

There is nothing on record to suggest that either any intimation or information had been given to any guardian of the appellant at the time of his arrest or before recording of his confession or that he had ever been provided a counsel at the time of his arrest or at the time of recording his confessional statement. He had been arrested on 07.09.2016 and produced for recording his confession before the Magistrate on 10.09.2016 but nowhere it could be shown that he had ever been provided any counsel or an opportunity of consulting with his guardian. In the case of "Abdul Haleem v/s The State" reported as 1984 P Cr. LJ Karachi 611 Hon'ble Karachi High Court has held that an accused of such an age could easily be duped to give

statement as tutored to him by the local police and due to said reason the Magistrate had to be extra-cautious in recording confession of a minor. It was held that before recording the confession he had to make sure that the accused had been giving the confessional statement freely and without any pressure or coercion. This Court in its earlier judgment given in the case of "Zahir Rehman and another v/s State through A.A.G and another" reported as 2018 P Cr.LJ 1465 has also held, regarding the susceptibility of a minor to tutoring, pressure and coercion by the police;

Confession of a minor is to be assessed on the same touchstone as to that of statement of a child witness rather child witness is brought to the dock by relatives while on the contrary child accused is brought to the Court by police officials for recording his confessional statement where possibility of tutoring and police fear is always there. Reliance is placed on the judgment in the case of "State through Advocate General, Sindh, Karachi v. Farman Hussain and others" (PLD 1995 Supreme Court 1).

"Whether the appellant was able to understand the nature of questions put to him by the Judicial Magistrate or otherwise, in this regard an example of answer given by the appellant to Question No.13 has already been given in the preceding para from which it can easily be assessed that the appellant was not able to understand the nature of the questions or to give rational answers thereof. This Court while deciding the case of "Abdul Hamid v. The State" (PLD 1980 Peshawar 25) observed that :-

".....Besides the other discrepancies in their statements, one thing is very significant and it suggests very strongly that though they are disinterested witnesses yet because of their tender age, they were positively under the influence of the Investigating Agency. This we say so

because unless they were tutored either by the Investigating Agency or by their elders they could not have possibly stated that the accused was armed with a rifle and has used the same in the commission of the offence".

16. *In the circumstances when utmost care is to be taken while assessing the testimony of a child witness, on the same yardstick extraordinary care and caution should have been taken by the Judicial Magistrate while recording the confessional statement of the appellant and the learned trial Court as well by evaluating his such statement for his conviction especially when the offence carries capital punishment."*

No extra care or caution appears to have been taken by the Judicial Magistrate in the case in hand while recording confession of the appellant. He had just been given a short period of 30 minutes for pondering over his confession and then the confession had been recorded in a mechanical manner. Such a time span of 30 minutes was insufficient to remove the fears and apprehensions from his mind which might have been inculcated in his mind by the long police custody. Such a time has even been held to be insufficient in case of even major accused in earlier judgment of this Court in the case of "Kabir Shah v/s The State through A.A.G and another" reported as 2016 YLR 1291.

7. Learned counsel for complainant as well as learned Astt:A.G tried to justify as to why had he not been treated by the arresting officer as

well as the Magistrate as a juvenile is required to be treated under section 10 of the Ordinance, by arguing that his age had first been written as 18 years in the card of arrest and it was on 17.09.2016 that his actual date of birth had come on record. This explanation cannot be taken as a plausible reason, due to the fact that even writing of his age by arresting officer as 18 years at the time of his arrest seem to have been motivated by the desire of such officer to deprive the appellant from his rights under the Ordinance. At the time of recording his confession he had also disclosed to the Magistrate that he had been a student of class 10, but even then the learned Magistrate had not taken care to confirm his date of birth and to deal him as a juvenile accused. In the given circumstances, confessional statement of the appellant cannot be relied upon so as to maintain a conviction on a capital charge.

Besides there has not been strong evidence available with the prosecution which could have corroborated the confessional statement of appellant. In the case of "Muhammad Ismail v/s The State" reported as 2017 SCMR 898 when the Hon'ble Supreme Court

of Pakistan had not found the retracted confession supported by an independent corroboration, the accused had been extended benefit of doubt by setting aside the conviction. Relevant part of observations of the august Court is reproduced hereunder for ready reference;

"The only other piece of evidence remaining in the field was a judicial confession allegedly made by Muhammad Iqrar, Khalid Hussain and Shakir Ali appellants before a Magistrate under section 164, Cr.P.C. but admittedly the said judicial confession had been retracted by the appellants 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 appellants' convictions."

8. The other piece of evidence prosecution have been relying upon was the CDR data brought on record as Ex. PW8/4. Said data cannot be relied upon for the reason that the cell number attributed to the appellant had not been on his name. It has though been on the name of his brother Inayat Ullah but no other evidence has been led before the trial Court so as to establish that the mobile Sim or phone had been in use of the appellant. Same cannot therefore be relied upon safely.

9. So far as the recovery of weapon of offence and its matching FSL report is concerned, it is conspicuous on record that recovery of the pistol

had not been effected from direct possession of the appellant, or on his pointation. The pistol had been recovered on pointation of one Noman. The Investigating Officer while appearing in Court as PW-8 has tried to explain that said pistol had in-fact been handed over by Noman to his friend namely Mushtaq Khan and from him it had been acquired by the appellant but neither Noman nor his other friend namely Mushtaq Khan could be produced by the prosecution, as witnesses. Appellant cannot be tagged with recovery of the pistol on mere statement of the Investigating Officer. When recovery of weapon of offence was not shown to have been effected from the appellant then the matching FSL report would be of no help to the case of prosecution.

10. There has not been any independent evidence of the motive for commission of the offence also. It was a case of circumstantial evidence and prosecution was duty bound to have established the whole chain of circumstances in their evidence in a way that it got netted together a chain starting from the dead body at one end and touching neck of the

accused on the other, as held by Hon'ble Supreme Court of Pakistan in the case of "Hashim Qasim and another v/s The State" reported as 2017 SCMR 986.

11. Prosecution have not been able to bring home guilt of the accused/appellant beyond reasonable doubt. The accused/appellant is therefore acquitted of the charges by allowing the instant appeal and extending him benefit of doubt. He be released forthwith if not required in any other case. Criminal Revision No. 12-M of 2019 has become infructuous and same is dismissed accordingly.

12. These are reasons for our short order of even date, which read as follows;

"For reasons to be recorded later, we allow this appeal, set-aside the judgment of conviction dated 14.01.2019 passed by learned Additional Sessions Judge/ Judge Juvenile Court Malakand at Dargai in case FIR No. 335 dated 04.09.2016 registered under section 302 PPC at Police Station Dargai District Malakand and resultantly acquit the appellant namely Najeeb Ullah of the charges levelled against him. He be released forthwith if not required in any other case."

Announced
Dt. 28.01.2021

JUDGE

JUDGE

Nawab

(D.B.) Hon'ble Mr. Justice Ishtiaq Ibrahim
Hon'ble Mr. Justice Wiqar Ahmad

Office
16/02/2021
W/R