

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

Cr.A No. 607-P/2009

JUDGMENT

Date of hearing: **11.11.2015**

Date of announcement: **12.11.2015**

Appellant: (Usmanullah) by Mr. Jalal-ud-Din Akbar
Azam Khan Gara, Advocate

Respondents: (Sharafat Khan and others) by
M/S Amir Gulab Khan & Syed Fayaz
Muhammad Qazi, Advocates.
(State) by Mr. Sabir Shah, A.A.G.

HAIDER ALI KHAN, I.- Through this single judgment we intend to dispose of the instant criminal appeal as well as the connected appeals bearing Cr.A No. 608-P/2009, Cr.A No. 09-P/2010 and Cr.A No. 67-P/2010 because all the matters arise from the judgments dated 22.10.2009 of the learned Additional Sessions Judge/Izafi Zilla Qazi, Chitral, delivered in case F.I.R No. 57 dated 17.09.2008 under sections 302/34 PPC registered at Police Station Torkoh, District Chitral.

2. Precise and relevant facts of the case as per contents of the FIR lodged at the instance of the complainant Usman Ullah are that on 28.07.2008 at 05:00 hours the complainant present in his house was informed by his cousin Niaz-ur-Rahman that their cousin Sharaf Zarin has committed suicide in his house by firing through a gun. On this information, the complainant went to the house of his brother-in-law Muhammad Amin and informed him of the occurrence where it was transpired that Sharafat Khan etc had spent the night of occurrence in the house of deceased. As there was a land dispute between the deceased and Sharafat Khan, therefore, the complainant showed the apprehension that the deceased might have been killed by Sharafat Khan etc, however, he did not charge any one directly in his report. Inquiry was initiated on the report of complainant, wherein statements of Mst. Abida Bibi widow, Mst. Chastana Bibi sister of

deceased, Sharafat Khan, Niaz-ur-Rahman and Iqrar-u-Din were recorded under section 164, Cr.PC who narrated the story of suicide committed by the deceased.

On 05.08.2008, Mst. Ikhlas Bibi etc sisters of the deceased submitted an application (Ex:PW-8/6) for inquiry by stating that the case was that of murder and that their brother had not committed suicide. In light of the inquiry, on 12.09.2008 the above mentioned F.I.R (Ex:PW-8/7) was registered against the accused/ respondents for the murder of the deceased and they were arrested in the case. Some of the accused/ respondents namely Ijaz Ahmad, Niaz-ur-Rahman and Mst. Abida Bibi recorded their confessional statements (Ex:PW-22/7 to PW22/15) before the learned Judicial Magistrate, Buni, District Chitral.

3. On completion of the investigation, the case was put in Court which was entrusted to the

Court of learned Additional Sessions Judge/Izafi Zila Qazi, Chitral, for disposal. It is noteworthy that the respondent/accused namely Niaz-ur-Rehman was a juvenile, therefore, separate challan under the Juvenile Justice System Ordinance was submitted in Court for his trial. Formal charge was framed against the accused/respondents by the trial Court to which they pleaded not guilty and opted to face the trials. The prosecution produced and examined as many as twenty five witnesses in support of its case, whereafter statements of the accused/respondents under section 342, Cr.P.C were recorded wherein they professed innocence and denied the allegations levelled by the prosecution, however, they felt no need to produce any evidence in their defence and similarly they did not opt to be examined on oath according to section 340 (2), Cr.P.C. On conclusion of the trial, the accused/respondents were acquitted from the charges leveled against them by the learned

trial Court vide impugned judgments dated 22.10.2009. Being aggrieved, the appellant/complainant Usmanullah preferred the instant appeal as well as the connected appeal bearing Cr.A No. 608-P/2009 whereas the State filed the connected appeals bearing Cr.A No. 09-P/2010 and No.67-P/2010 which are being disposed of through this single judgment.

4. Learned counsel for the appellant/complainant contended that the prosecution has produced convincing evidence in support of its case but the trial Court has failed to appreciated the same in its true perspective. He further contended that from the material available on the record it is clear that the occurrence was that of homicide and not a suicide. It was also argued that exhumation of the dead body has been conducted by Medical Board headed by Dr. Zahid Hussain Khalil (PW-24) and his report in this regard fully supports

the prosecution version besides, the respondents/accused Ijaz Ahmad, Mst. Abida Bibi and the juvenile accused Niaz-ur-Rehman have recorded their confessional statements before the competent Court but the learned trial Court did not consider the same and recorded acquittal of the respondents/accused which is not legally sustainable.

5. On the contrary, learned counsel for the respondents/accused contended that the prosecution has deviated from its former standpoint of suicide and later on charged the respondent/accused for the murder of Sharaf Zarin. He also referred to 164, Cr.P.C statements of Mst. Chastana Bibi and contended that the witness has adopted two different versions in her statements. It was further argued that the alleged confessional statements of the respondents/accused were not recorded in accordance with law besides the same are retracted

confessions, therefore, the respondents/accused cannot be legally convicted on the basis thereof. The learned counsel concluded that the prosecution evidence is suffering from glaring contradictions, hence, the same is not worth reliance, hence, the impugned judgment needs no interference by this Court.

6. The learned A.A.G. appearing on behalf of the State adopted the arguments of learned counsel for the appellant and prayed for setting aside the impugned judgment and conviction of the respondents/accused in accordance with law.

7. We have heard learned counsel for the parties and have gone through the record in light of their valuable assistance.

8. Perusal of the record would reveal that initially the occurrence was reported by the complainant as suicide and in this regard 164, Cr.P.C statements of the respondents/accused as

well as of Mst. Chustana Bibi, sister of the deceased, were recorded wherein they stated that the deceased Sharaf Zarin had committed suicide. However, later on sisters of the deceased moved an application to the high ups of the Police Department on which inquiry under 174, Cr.P.C was conducted by the DSP concerned and the case was registered against the respondents/accused. Record shows that exhumation of the dead body was also conducted on 07.11.2008 by the Medical Board constituted in this regard. Although, the report of concerned doctors in this regard shows that death of the deceased was caused due to firearm injury and no signs of asphyxiation have been shown in the report besides the post-mortem report also reveals that the nature of death was most probably suicide. But there are some other pieces of evidence on the record which exclude the possibility of suicide in the given circumstances. In this regard, there is recovery of

two empty shells one from the spot of occurrence and the second from inside the shotgun in loaded position. In the ordinary course of nature the person who commits suicide can fire only one shot and gets no further chance for the second fire. Some of the prosecution witnesses and even the accused are unanimous in their statements that they have heard thuds of two gun shots on the night of occurrence. There is also report of DSP Operation, Chitral who conducted inquiry in the case under section 174, Cr.P.C. According to this report, the Inquiry Officer recorded statements of Khosh Khan and Mir Baiz Khan who gave post-death bath to the deceased and according to their statements there were two wounds on the body of the deceased i.e one on his stomach and the other beneath the armpit. Admittedly, the deceased received injuries as a result of firing with an SBBL shotgun and two empty shells have been recovered from the spot,

these facts and circumstances show that the occurrence was not of a suicide at least because it is most improbable that a person who received one shot and could load the gun again in injured condition for the second fire. Thus, it is held that the deceased had not committed suicide rather he was done to death by someone else.

9. The second piece of most important evidence is that of the confessional statements recorded by respondents/accused Ijaz Ahmad, Mst. Abida Bibi and Niaz-ur-Rehman. The learned trial Court has held that the respondents/accused have not recorded their confessional statements voluntarily rather the same were the result of duress and violence as the respondents/accused remained in police custody for sufficient time. Record shows that pre and post police custody examinations of the respondents/ accused have been conducted by the Medical Officer concerned and as per his reports no

signs of violence or torture were found on their bodies. Moreover, the Judicial Magistrate concerned has recorded the statements of the respondents/accused according to the procedure laid down in the Code of Criminal Procedure and no procedural irregularities could be found therein, therefore, this Court is not in agreement with the above mentioned findings of the learned trial Court that the respondents/accused gave confessions as a result of police torture. Learned counsel for the respondents/accused also contended that the respondents/accused have retracted from their confessions, hence, they cannot be legally convicted on the basis of the confessions which have already been retracted by the respondents/accused. It is true that the respondents/accused have retracted from their confessions, however, conviction on the basis of even retracted confession can be awarded to an accused if the Court is satisfied that the confessional

statements were true and were made voluntarily.

Guidance in this regard is sought from the judgment

reported as **“Manjeet Singh Versus. The State”**

(PLD 2006 Supreme Court 30), wherein the august

Supreme Court observed that:-

“This is settled law that a retracted confession either judicial or extra-judicial, if is found truthful and confidence inspiring and also qualifies the test of voluntariness, can be used for conviction without looking for any other sort of corroboration. The petitioner, an Indian citizen and being an illegal immigrant while was working as an agent of RAW (an Indian Intelligence Agency) in Pakistan was arrested as suspect and during the interrogation, disclosed that he was deputed to commit terrorist activities in Pakistan and was involved in the bomb blast cases referred hereinbefore. The petitioner having disclosed his mission in Pakistan, showed his willingness to make a confessional statement, therefore, he was produced before a Magistrate, who after satisfying himself about the willingness and voluntariness of the petitioner to make the confessional statement, recorded his

statement wherein he disclosed the manner in which he caused the explosion at Lahore and Faisalabad.”

As observed earlier that the confessional statements have been recorded in accordance with law and the relevant procedure and there is nothing on the record to show that the same statements were not recorded voluntarily, therefore, the retracted confessions cannot be discarded at all mere on the ground of being inconsistent inter se. However, it is observed in light of the confessional statements that the main role played in the occurrence is that of respondent/accused Sharafat Khan because all the co-accused are unanimous in their statements that accused Sharafat Khan first subjected the deceased to asphyxiation and later on when the deceased was breathing his last, he fired at him with the shotgun. Moreover, the motive behind the occurrence as depicted by the prosecution also strengthens the belief that the main role in

committing the murder of the deceased had been played by accused Sharafat Khan. It is also noticed that the accused Sharafat Khan had a dominant position over the other co-accused especially on the night of occurrence. Furthermore, the motive behind the occurrence i.e the land dispute between the deceased and accused Sharafat Khan also affirms the apprehension of the complainant he disclosed in his initial report regarding the murder of the deceased by accused Sharafat Khan. The statements of some of the prosecution witnesses also indicate to the fact that the deceased himself had disclosed before them his apprehension of life threat from accused Sharafat Khan and wife Mst. Abida Bibi. The relevant statements of the prosecution witnesses in this regard are worth consideration and there is no reason for disbelieving the same.

10. The learned trial Court in its judgment impugned herein has also referred to the statement

of minor witness namely Hafeez-ur-Rehman (PW-11) who is the sole eye-witness to the occurrence, however, his statement was not given credence by the trial for the reason that the same is inconsistent with the statements of other prosecution witnesses. No doubt, there is no eye witness to the occurrence except the child witness Hafeez-ur-Rehman and the prosecution has produced him as the sole eye witness to the occurrence whose presence on the spot has been established as well. It is noticed that the child alone had sympathy and natural love with his father i.e the deceased whereas his mother Mst. Abida had also joined hands with the accused, therefore, in such like situation the statement of the natural and sole eye witness should have been considered by the trial Court. It is also a fact that PW-11 was nine years of age at the time of recording his statement and being a child witness his statement should not be compared with the

statements of other major witnesses as much accuracy and complete consistency of his statement with that of the remaining witnesses cannot be expected keeping in view his minor age and other circumstances of the case. However, the statement of PW-11 (the child witness) is consistent with the confessional statements of the respondents/accused regarding the facts that his father had been subjected to asphyxiation at the night of occurrence and that he was removed from the scene by the juvenile accused Niaz-ur-Rehman.

So far statement of Mst. Chustana is concerned, it is true that she had recorded her statement under section 164, Cr.P.C twice wherein she told two different stories and her statement does not match with that of the minor witness, however, it is observed that the accused had tried to bury the matter by showing the occurrence as of suicide and later on it became known that the occurrence was

that of homicide when inquiry was conducted in the case after recording the initial report. Moreso, Mst. Chustana (PW-17) has averred in her examination-in-chief that she was deaf and this fact has been reconfirmed by the defence counsel at the very beginning of the cross-examination besides, the same fact has not been rebutted later on during her cross-examination. The defence counsel has tried to bring on the record that she answered the questions asked by him in low tone from the witness (PW-15) but the Court has no such source to ascertain the above stance of the defence counsel. Hence, the stance of the PW-15 that she did not hear the noise or the sound of the firing on the night of occurrence and came to know about the death of her brother at morning, is not against the ordinary course of nature especially in the case of her established deafness.

11. So far question of asphyxiation is concerned, record shows that exhumation of the dead body was conducted after more than three

months of the occurrence and presence of signs of strangulation on the neck of the deceased cannot be expected after such long period especially in the situation that the dead body had nearly decayed as per exhumation report Ex.PW-24/5. Although, PW-8 (SHO concerned) who conducted the initial investigation in the case, has stated in his cross-examination that he had carefully examined the neck of the deceased but could not find any signs of strangulation or violence thereon, however, his opinion cannot be relied upon being not an expert in this regard and the concerned doctor (PW-1) who conducted the post-mortem, has not been asked any question in this regard. However, the witnesses are unanimous on this point that prior to firing the deceased was overpowered and asphyxiated.

12. To sum up, this Court is of the considered view that the prosecution has proved its case against the accused Sharafat Khan and the learned trial Court has not properly appreciated the

evidence to his extent, hence, the same is not sustainable. Moreover, the role of the co-accused in committing the murder of the deceased cannot be established with certainty. It is also evident that one of the co-accused was a juvenile at the time of the occurrence and one is female and from their confessional statements it is clear that the main role was played by accused/respondent Sharafat Khan in furtherance of a motive, therefore, in our view the accused/respondents except Sharafat Khan are entitled to be acquitted from the charge.

13. In view of what has been discussed above, we partially allow this appeal, set aside the impugned judgment dated 22.10.2009 of the learned Additional Sessions Judge/Izafi Zila Qazi, Chitral, to the extent of acquittal of the accused/respondent Sharafat Khan and resultantly, convict him under section 302(b) PPC and sentence to imprisonment for life with fine of Rs.5,00,000/- (rupees five hundred thousand) as compensation payable to the

legal heirs of the deceased or in default thereof the same shall be recovered as arrears of land revenue. However, benefit of Section 382-B Cr.P.C is extended to convict/respondent, whereas, this appeal to the extent of rest of the respondents/accused is dismissed and the impugned judgment to their extent is maintained. The respondent-convict Sharafat Khan present in Court is directed to be taken into custody and be dealt with in accordance with law. The connected appeal bearing Cr.A No. 608-P/2009, being devoid of merits, is dismissed. Similarly, the appeals bearing Cr.A No. 09-P/2010 and Cr.A No. 67-P/2010 preferred by the State are also dismissed for having become infructuous.

Above are the reasons for our short order of the even date announced in the open Court.

Announced.
Dt: 12.11.2015.

JUDGE

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