

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH.

(Judicial Department)

Cr.A No.51-B of 2015.
Abdul Rehman
Vs
The State & sahar Gul

JUDGMENT

Date of hearing _____ 11.04.2017 _____.

Appellant-Petitioner: **By Syed Fakhrud Din Shah Advocate**
& Khosh Ameer Advocate.

Respondent: **State By Shahid Hameed Qureshi, Addl. AG**
& Others By Anwar Khan Maidad Khel,
Advocate.

ISHTIAQ IBRAHIM, J.--- This Criminal Appeal No.51-

B/2015, has been filed by convict/ appellant Abdur Rehman

and the connected Criminal Appeal No.54-B/2015 filed by

convict/ appellant Raqibullah and Criminal Revision No.01-

B/2016 has been preferred by Mst. Tapala widow of deceased

Nasim Gul, for enhancement of sentence of appellants Abdur

Rehman and Raqibullah, arise from the judgment of learned

Additional Sessions Judge-III, Bannu dated 16.04.2015,

whereby both the appellants Abdur Rehman and Raqibullah,

convicted under section 302(b) P.P.C and sentenced to imprisonment for life, with compensation amounting to Rs.200000/- (two lac) each to the LRs of deceased under section 544-A Cr.PC and in default thereof to further undergo for six months SI. Convicted under section 382 P.P.C and sentenced to undergo for five (5) years imprisonment. Both the sentences shall run concurrently. Benefit of section 382-Cr.PC was extended in favour of both convicts/appellants.

2. Since both appeals and criminal revision are the outcome of one and the same occurrence/ F.I.R, therefore, these are being disposed of by way of this single judgment.

3. Sahar Gul, the complainant on 03.02.2014 at 19.30 hours, in emergency room of Civil Hospital, Bannu reported the matter to the local police that his brother Nasim Gul left his house for the purpose of business of motorcycle and property dealing, at 05.30 P.M he received information through mobile cell that dead body of his brother Naseem Gul was lying in Darga known as Adhami Nala in the limits of Dogar Umerzai, who was done to death by firing at him.

He proceeded to the spot and found his brother dead. he lodged the report against unknown accused.

4. Rustam Khan ASI (PW2) recorded report of complainant in shape of ***murasila*** (Ex:PA), readout contents of ***murasila*** to him, who after admitting the same correct signed the same as a token of its correctness. he prepared injury sheet Ex:PW 2/1, inquest report Ex:PW 2/2, of the deceased Naseem Gul and sent the deadbody to the doctor for Post Mortem examination under the escort of FC Badshah Hussain No.190 (PW-1), while the ***Murasila*** was sent to the Police Station through FC Shabib Rehman No.1800. Mr. Qaza Khan ASI (PW-4) culminated the contents of ***Murasila*** in shape of F.I.R No.23 (Ex:PW 4/1), copy of which was handed over to Muzamil Khan SI (PW-6), who in receipt of copy of F.I.R proceeded to the spot, prepared site plan Ex:PB on the pointation of complainant Sahar Gul, took into possession blood stained earth from the place of deceased, two empties of 7.62 bore and prepared recovery memo Ex:PW 6/1. He took into possession blood stained belongings of deceased vide recovery memo Ex:PW 6/2. He took into

possession one mobile cell from accused Raqibullah vide recovery memo Ex:PW3/1, admitting to be the property of deceased. A Kalashnikov No.1964CE0335 recovered from accused Raqibullah and for the same separate F.I.R No.33 dated 18.02.2014 under section 13 A.O was registered. Convict /appellant Raqibullah was arrested on 18.02.2014, he made confessional statement before the learned Judicial Magistrate on 21.02.2014. Convict/ appellant Abdur Rehman was charged by the appellant Raqibullah in his confessional statement, who was arrested on 21.02.2014 by Qaza Khan ASI.The IO recorded statements of PWs as well as accused under section 161 Cr.PC, placed on file other case F.I.Rs showing involvement of accused/ appellants, placed on file F.S.L (Ex:PW 6/9) report in respect of serologist and F.S.L (EX:PW 6/10) arm expert report. F.S.L report with respect of empties and recovered Kalashnikov Ex:PW 6/11 was placed on file by the I.O and after completion of investigation case file was handed over to the S.H.O Mohammad Riaz (PW-9), who submitted complete challan (ExPW 9/1) against the accused.

5. The prosecution in order to prove guilt of accused/ appellants, produced and examined as many as eleven PWs. On conclusion of trial, the statement of accused was recorded under section 342 Cr.PC, wherein they professed innocence, however, they neither wished to produce defence evidence nor opted to be examined on oath as provided under section 342 (2) Cr.PC. Learned trial court after hearing arguments of both sides, vide impugned judgment dated 16.04.2015 convicted the accused/ appellants. Both the accused/ appellants have preferred their separate appeals, while the complainant filed criminal revision petition. Both the appeals and criminal revision are going to be decided through this single judgment.

6. Arguments heard and record perused.

7. Record divulges that admittedly, the deadbody of deceased Nasim Gul was found lying abandoned in Darga Known as Adhami Nala in the limits of Dogar Umerzai. The complainant, who happened to be the brother of deceased rushed to the spot after receiving information on cell phone.

Admittedly, no motive was alleged in the first information report nor any person was charged for the offence. The occurrence has taken place at unknown time, while his deadbody was found and then report was lodged at emergency room of Civil Hospital, Bannu on 03.02.2014 at 19.30 hours. The complainant thereafter recorded supplementary statement, wherein he charged the accused/ appellant Raqibullah, who after arrest recorded confessional statement, wherein given effective role of firing to accused/ appellant Abdur Rehman, due to which he was also implicated in the instant case. In such eventuality, it would be seen in light of the evidence and available record that on which source of information the complainant charged the accused/ appellant Raqibullah the evidentiary worth of his confessional statement coupled with its corroboration with recoveries, F.S.L reports and other circumstantial evidence.

8. The complainant Sahar Gul examined as PW-10, he in examination in chief stated that:

***“The accused Party conveyed us that
the accused Raqibullah has***

***committed the offence and thereafter,
I charged him for the commission of
offence.”***

It is very much astonishing that the accused party himself conveyed the message that they have committed the murder of deceased, which fact is not appealable to prudent mind, as no person wants to borrow trouble for himself.

9. The most important evidence in the case against the accused/ respondents is confessional statement of accused/ appellant Raqibullah, recorded by Adam Khan Suleman Khel learned Judicial Magistrate, Bannu, on 21.02.2014. Learned judicial Magistrate appeared before the Court as PW-11, in his cross-examination he admitted that the accused was arrested in case F.I.R No. 33 on 18.02.2014 under section 13 A.O and remained in police custody till recording his confessional statement on 21.02.2014, such delay has not been explained, which makes the confessional statement involuntary and unsafe to be made basis for conviction. The accused/ appellant Raqibullah remained in

police custody after his arrest till recording confessional statement, therefore, the principle that longer the police custody of an accused, lesser the evidentiary value of his confession apply in this case. Answer to a question No.3, in questionnaire shows that accused remained in custody for five days, while record shows otherwise, how the prosecution would meet this anomaly in order to prove that confession was voluntary, rather it can be safely assumed that accused was kept in wrongful confinement, his date of arrest was shown different to the actual one.

10. Adam Khan Suleman Khel, , the learned Judicial Magistrate (PW-11) in his cross examination stated that *“I have not asked about the educational qualification of the accused at the time of recording confessional statement, 5 to 10 minutes were given to the accused for thinking over his confessional statement.”* while the learned Judicial Magistrate was supposed to have given at least 30 minutes for thinking over his confessional statement. five to ten minutes time given for thinking over his confessional statement after remaining 5/6 days in custody is very short,

rendered the concessional statement not voluntarily. Section 13 (a) Chapter 13, Volume-III of Rule and Orders of the High Court of Judicature at Lahore, read as under:

“(a) Accused should be left for some time away from influence of Police.--- In order to ensure that a statement or confession under section 164 of the Code of Criminal Procedure is made voluntarily, the following precautions should be taken. Before the Magistrate proceeds to record the confession, he should arrange. so far as is compatible with his safety and that of his staff and with the safe custody of the prisoner. that the latter is left for some time (say, for half an hour) out of the hearing of police officers or other persons likely to influence him.

11. The confessional statement should be clear and its contents appeal to reasons and if the same is corroborated by other facts and circumstances of the case, then it may be relied upon, but in the instant case, the very story of confession is against the human conduct, unbelievable and seems to be a cock and bull story.

12. There is no corroboration with other ocular or circumstantial account, except two crime empties of 7.62 bore recovered from the spot on 03.02.2014 and recovery of Kalashnikov on 18.02.2014, both were sent to the F.S.L and received their on 28.02.2014, without any explanation that where the same remain during the interregnum. In such circumstances, this report cannot be relied upon, as concoction and fabrication of the same cannot be ruled out. Moreover, the appellant Raqibullah in his statement recorded under section 342 Cr.PC, answer to question No. 6, has denied the recovery of Kalashnikov. Even the prosecution case as per connected F.I.R No. 33 under section 13 A.O is that the same was recovered from his residential *kotha* of accused/appellant Raqibullah the same Kalashnikov was recovered. There is nothing on record that the same *kotha*/room was ownership or in possession of the accused/appellant Raqibullah, while admittedly in the house from where alleged Kalashnikov was recovered, other inmates also reside therein. The prosecution has failed to connect the

alleged recovered Kalashnikov with the accused/appellant Raqibullah beyond any reasonable doubt.

13. While the evidence available against the co-appellant Abdur Rehman is the confessional statement of co-accused, if one goes to the confessional statement of appellant Raqibullah, it transpires that effective role of firing at the deceased has been attributed to co-accused Abdur Rehman, such confession of co-accused but not implicating himself rather pleading innocence is not covered by Article 43 nor “evidence” as defined in Article 2 of the Qanun-e-Shahadat Order. Confession made by co-accused cannot be used as a substantive piece of evidence to make it a basis of conviction of other accused but it can be used as a corroborated piece of evidence, if corroborated by independent evidence, while in the instant case, except confessional statement of co-accused there is no evidence available in the entire record. Hence, such confession of co-accused is no evidence against another accused, more or when retracted and uncorroborated. Reliance is placed on

case titled “State Vs Asfandyar Wali and 2 others (1982 SCMR 321)

"Clearly, therefore, the confession of a co-accused is not evidence against another accused, the more so, when it is retracted. And, as pointed out by Sir John Beaumont in Bhuboni Sahu v. The King (PLD1949PC90), a confession of a co-accused :- .

"Does not indeed come within the definition of evidence contained in section 3. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of these infirmities. Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act; but the section does not say that the confession is to amount to proof. Clearly, there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence. The confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction."

These observations were approved by this Court in Zulfikar Ali Bhutto v. The State

(PLD1979SC53), and therefore, Nisar Khan's retracted confession might have been of some assistance to the prosecution, if there had been other evidence against Asfandyar to corroborate his retracted confession. But, as there is no such evidence, Nisar Khan's confession cannot furnish this crucial link in the case against Asfandyar, and, it is, therefore, of no assistance to the prosecution case against him."

14. It is settled law that for giving the benefit of doubt it is not necessary that there should be many circumstances creating doubts. Single circumstance creating reasonable doubt in a prudent mind about the guilt of accused makes him entitled to its benefit, not as a matter of grace and concession but as a matter of right. Reference is made to case **"Muhammad Akram v. State" (2009 SCMR 230)**. All these serious issues created doubts in our mind regarding the guilt of the accused/appellants and these material facts favouring the accused/appellants were not considered by the learned trial Court, while appraising the evidence of the prosecution. The occurrence is unwitnessed; complainant has not charged an accused culprit in his first information report; no motive is available; so called confession is neither

inculpatory nor believable or corroborated by ocular or circumstantial account, in such eventuality, the learned trial court has erred in law by not extending benefit of doubt in favour of accused/ appellants,

15. In view of what has been discussed above, this criminal Appeal No.51-B/2015 filed by accused/ appellants Abdur Rehman and Cr. A No. 54-B/2015 filed by appellant Raqibullah, are accepted, conviction and sentence recorded by the learned trial court vide judgment dated 16.04.2015 is set aside and the appellants are ordered to be acquitted of the charges in case FIR No.23 dated 03.02.2014, under sections 302/382/34 P.P.C., at Police Station, Town Ship, Bannu. They shall be released forthwith if not required in any other case. While connected Cr. R No.01-B/2016 filed by Mst. Tapala, widow of the deceased stands dismissed.

16. Above are the reasons of our short order of the even date.

Announced.

11.04.2017

Azam/P.S

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