Judgment Sheet

IN THE PESHAWAR HIGH COURT, ABBOTTABAD BENCH
JUDICIAL DEPARTMENT

Cr.Appeal No. 07-A/2013 with M.R.No.01-A/2013.

JUDGMENT

Date of hearing…….**29.03.2017**……...

Appellant. (Rafaqat Hussain) By M/s. Zulfiqar Ahmad & Zaheer Ahmad Qureshi, Advocates.

Respondents. (State) By Raja Muhammad Zubair, AAG and (Complainant) By Qazi Muhammad Arshad, Advocate.

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ISHTIAQ IBRAHIM, J.- This criminal appeal is directed against the judgment dated 21.12.2012 of the learned Additional Sessions Judge-II, Haripur delivered in case FIR No. 36/10 dated 06.06.2010 under sections 302 / 109 PPC registered at Railway Police Station Havelian District Abbottabad whereby the appellant has been convicted under Section 302 (b) PPC and sentenced to death with a compensation amount of Rs.2,00,000/- payable to the legal heirs of the deceased under Section 544-A Cr.P.C or in default to suffer further imprisonment for six months.

2. Since the learned trial Judge has also sent Murder Reference bearing No. 01-A/2013 against the appellant for confirmation of his death sentence, therefore, both these

matters, being the outcome of one and same trial, are to be disposed of by way of this single judgment.

3. According to the initial report made by Mushtaq Ali Shah (PW-8) to Javed Iqbal, SHO PS Railway Havelian (PW-11), it was on 05.06.2010 at 23:40 hours when Sadaqat Hussain, his adopted brother, informed him about the death of his deceased son namely, Ahsan Ali Shah, who was murdered by someone with firearm, thus he rushed to the place of occurrence and found the information correct, however, he did not charge anybody in the FIR for commission of the offence and requested for investigation. Later on the police, during the course of investigation and after collecting information from mobile data, the complainant recorded his supplementary statement on 07.06.2010 wherein he has charged not only the present appellant but his father Sadaqat Hussain as well. The former was arrested on 30.06.2010 while the latter was arrested on 01.07.2010.

4. After completion of the investigation, challan was submitted against the appellant and his co-accused (Sadaqat Hussain) before the learned trial Judge, who were formally charge sheeted, to which they pleaded not guilty and claimed trial. However, in order to prove its case at the trial, the prosecution examined as many as eleven (11) witnesses in all.

5. After close of prosecution evidence, statements of appellant (Rafaqat Hussain) and his co-accused (Sadaqat Hussain) were recorded under section 342 Cr.P.C, wherein they denied the allegations leveled against them. However, they neither opted to be examined on oath under section 340 (2) Cr.P.C nor wished to produced defence evidence, thus, the trial culminated into acquittal of the co-accused (Sadaqat Hussain) and conviction of the present appellant, who was sentenced as above, hence, the present appeal.

6. The learned counsel for the appellant argued that the impugned judgment is against law which is the result of misreading and nonreading of evidence as it is a blind murder and initially nobody was charged in the FIR, but

later on the complainant got recorded his supplementary statement and charged the appellant and his co-accused (father and son) for commission of the offence and that the recoveries were planted against the appellant and dubiously procured, besides the fact that there is no obvious motive which could connect the appellant with the commission of offence except circumstantial evidence which too is neither consistent nor confidence inspiring. He further contended that neither the confessional statement is true nor voluntary being retracted before commencement of the trial and prays for the acquittal of the appellant.

7. On the other hand, the learned counsel assisted by the learned AAG argued that although the occurrence is unwitnessed and no one was charged in the FIR but soon after the occurrence the police on the basis of mobile data collected including supplementary statement of the complainant charged the appellant for commission of the offence. They further argued that not only the crime weapon was recovered on the pointation of the appellant

but the empties, recovered from the spot, when sent to the firearm expert for analysis report of the same was received in affirmative. They lastly contended that the appellant himself and without any duress or pressure embraced the guilt by recording his confessional statement, wherein he confessed that the deceased was keeping evil eye on his sister namely, Mst. Rukhsana, that's why he killed the deceased, thus, the judgment of the learned trial court is not open to any exception.

8. We have heard the arguments of learned counsel for the parties as well as the learned AAG and gone through the record with their valuable assistance.

9. It transpires from the record that father of the appellant (Sadaqat Hussain) informed the complainant (PW08) qua the incident on the night of occurrence and when the latter reached the spot, there the police contingent were already present, to whom he reported the matter which was incorporated into murasila Ex.PA/1 and later on FIR was lodged on the next day of the occurrence. After conducting investigation, the police arrived at the

conclusion that it was the appellant and his father, who immediately before commission of the offence had called the deceased but the complainant too while recording his supplementary statement stated that when the deceased came to his house, he was called upon by the appellant (Rafaqat Hussain) and soon after taking meal, the deceased left the house whereafter he did not turn up and lastly the co-accused (Sadaqat Hussain) came to his house and informed him about the tragedy that the dead body of his son was lying on the railway track. It is also discernible from the record that while in custody the appellant led the police party to his house on 30.06.2010 and on his pointation discovered mobile phone of the deceased from beneath of sofa but again on 02.07.2010 he again led the police party and on his pointation the crime weapon was also recovered from bushes near the place of occurrence for which a separate FIR No. 41/10 was registered on 02.07.2010 against him.

10. On 03.07.2010 the appellant when produced before the learned Judicial Magistrate (PW-9) confessed his guilt

by mentioning in detail the reason of murder of the deceased as below:

بیان کیا کہ مورخہ 05.06.2010 کو میں اور احسن شاہ ولد مشتاق شاہ جیل چوک سے ریلوے سٹیشن ہری پور گئے جہاں ہم اکٹھے بیٹھے ہوئے تھے۔ مقتول احسن شاہ میری بہن رخسانہ بتول پر غلط نظر رکھتا تھا جو کہ میں نے اسے پہلے بھی سمجھایا تھا کہ باز آجائے مگر وہ باز نہ آیا۔ بروز وقوعہ میں نے اسے دوبارہ کہا کہ وہ اپنی غلط حرکت سے باز آجائے جو کہ اس نے پستول نکال کر مجھے مارنے کی کوشش کی۔ میں نے اس سے پستول چھین لیا اور اس پر دو فائر کئے جو کہ موقع پر فوت ہو گیا۔ بعد میں اسکے موبائل سے میں نے اپنے والد کو فون کیا جو آئے اور مجھے لے کر چلے گئے۔ میں نے اپنے والد کو نہیں بتایا تھا کو میں نے احسن شاہ مقتول کو قتل کیاہے۔ مجھ سے غلطی ہوئی ہے معا ف کیاجاوے۔

However, the appellant retracted from his confession.

11. In this case the only substantive piece of evidence with the prosecution is confessional statement of the appellant. From perusal of the same it transpires that the same is voluntary and according to the narration of the

occurrence because the appellant had disclosed such facts which otherwise were neither known to the complainant nor to the investigating officer that the deceased was keeping evil eyes on his sister, thus, the confessional statement in view of the appellant's disclosure regarding the family honour has rightly been believed by the learned trial court, duly corroborated by the recovery of pistol at the pointation of the appellant vide recovery memo Ex. PW-1/4 and positive report of the forearm expert.

12. The contention of learned counsel for the appellant is that the confessional statement was retraced soon before commencement of the trial. This court is of the view that even conviction can be based on retracted judicial confession provided it is true and voluntary and corroborated by some strong piece of independent evidence. In this case the confession of the accused was recorded not only in accordance with Sections 164 / 364 Cr.P.C but also in accordance with the provisions of High Court Rules and Orders.

13. It is well embedded principle of the criminal justice that when there is no other evidence then the confession or for that matter the statement of the accused is to be taken in totality. The court is not left with any choice but to take into consideration the same in toto. Of course, if there is other convincing evidence with the prosecution then the exculpatory part of the confessional statement can be discarded but in the present case no evidence has been led by the prosecution which contradicts the exculpatory part of the confession, so this court would take the entire confessional statement into consideration inclusive of both exculpatory and inculpatory. In this regard for advantageous purpose reliance can be placed on the case law reported as **PLD 1978 SC 200** titled *"Najib Raza Rehmani Vs. The State"* where the following view was taken by the Apex Court: -

> ***"Another illegality in the judgments under appeal is that the conviction of the appellant by both the Courts is really based, as I explained, on this so-called confession only. But as this so-called***

confession was a repudiation of liability, what the Courts did was that they accepted those passages in the statement Exh. P. Z. which appeared in their opinion to support the case of the prosecution and they rejected the exculpatory part of the statement. Mr. Ismail submitted that it was open to a Court to base a conviction solely on the confession or on the statement of an accused, but in that event the Court, could not reject that part of the statement or confession which went against the prosecution case."

14. Besides the above, in the case titled *"Faiz and another Vs. The State"* reported as **1983 SCMR 76** the Hon'ble Apex Court has held as under: -

"The judgment of the High Court makes it abundantly clear that the ocular evidence was totally discarded and the only material utilized by the Court for determining the guilt of the appellants was the "defence version". There were no proved or established facts to test the defence version. This distinguishes the decision in Imamudain's case which had proved or established facts. In Balmakund case a reference to Full Bench of the High Court became necessary because the Judges hearing the case found the exculpatory

part of the statement of the accused to be so unworthy of belief that no Court could act upon them."

15. The above view has further been strengthened by the Hon'ble Apex Court in the case titled *"Sultan Khan Vs. Sher Khan and others"* reported as **PLD 1991 SC 520** where it has been held as under: -

"After excluding the entire prosecution evidence against the accused, the question calls for determination is whether the statement of the accused is to be accepted as a whole or exculpatory part of the statement could be excluded from consideration and. his conviction can be based on the inculpatory statement. There is no doubt that the statement of an accused recorded under S.342, Cr.P.C. may be taken into consideration but the Court cannot select out of the statement the passage which goes against the accused. Such statement must be accepted or rejected as a whole. The Federal Court in Rahim Bakhsh v. Crown P L D 1952 F.C. 1 has observed that "if the conviction of the petitioner is to be based solely on his statement in Court it is obvious that this statement should be taken into consideration in its entirety". The statement of an accused should be taken

into consideration in its entirety and not merely the inculpatory part of it to the exclusion of the exculpatory part unless there is other reliable evidence which supplements the prosecution case. In such a condition, the exculpatory part if proved to be false may be excluded. See Balmakund v. Emperor A I R 1931 All. 1; Sher Gul v. Emperor A I R 1935 Lah. 671, Muzaffar Khan v. The State P L D 1956 (W.P.) Lah. 1045, Mohan Lal v. Ajeet Singh AIR 1978 SC 1183 and Ghulam Muhammad v. The State P L D 1961 (W.P.) Lah. 146."

16. Now adverting to the quantum of sentence that whether the learned trial court was justified by awarding death sentence to the appellant on the strength of the evidence led by the prosecution in the present case. In our view the learned trial Judge has rightly found guilty the appellant but has erred in law while awarding him death sentence because the appellant was empty handed and the deceased was having pistol which he took out and aimed at the appellant, which was snatched from him by the appellant and thereafter he fired at the deceased with his

own pistol, so it is lack of pre-meditation on the part of the appellant and it is a case of self defence but, in our view, the appellant has exceeded the same by firing two shots upon the deceased.

17. After the promulgation of *"Qisas and Diyat Ordinance"* all the matters which were initially dealt with by Section 304 PPC (repealed) are now to be considered under Section 302 (c) PPC and this question has been settled by the Apex Court in the case titled *"The State Vs. Muhammad Hanif & 05 others"* **1992 SCMR 2047** where the following view has been taken: -

> ***"Muhammad Hanif has taken the plea of grave and sudden provocation which is not available to him now as section 300, P.P.C. has been substituted by a new section 300, P.P.C. and the exceptions contained in the old section have been deleted. The definition of Qatle-i-Amd has been given in the new section 300, P.P.C. Any how it serves as a mitigating circumstance in favour of Muhammad Hanif. Another fact that he has taken revenge of the murder of his brother Khurshid is also an extenuating circumstance which goes in his favour. I find Muhammad Hanif guilty under section 302(c), P.P.C. and award him ten***

> ***years' rigorous imprisonment. Muhammad Hanif accused is also directed to pay. Rs.25,000 as Arsh to the heirs of the deceased, in default of the payment of the said amount, he shall further undergo rigorous imprisonment for two years."***

18. The above view has further been elaborately discussed by emphasizing the *Quranic Verse* by the Hon'ble Supreme Court in the case titled *"Ali Muhammad Vs. Ali Muhammad & others"* **PLD 1996 SC 274**.

19. It is well entrenched principle of law that even if an accused does not take the plea of self defence and it is discernible from the prosecution evidence then, benefit of the same is to be given to the accused and the same cannot be taken into consideration. In this regard, reliance may be placed on the case law reported as **1993 SCMR 417** titled *"Ashiq Hussain Vs. The State"* as well as **1993 SCMR 1628** titled *"Zaheer Din Vs. The State"*.

20. In this case, the deceased first pulled out his pistol upon the appellant and during scuffle the appellant snatched it from him and whereafter the incident

occurrence, so in our view a case for self defence is made out, however, the appellant has exceeded the same by firing at the deceased two fire shots, thus, in the circumstances, this appeal is partially allowed. Conviction of the appellant is altered from Section 302 (b) PPC to Section 302 (c) PPC and as such his sentence is modified from death to fourteen (14) years R.I while the sentence of payment of compensation amount of Rs.2,00,000/-, payable to the legal heirs of the deceased under Section 544-A Cr.P.C shall remain intact, recoverable as arrears of land revenue and in default thereof he shall also suffer further imprisonment for six months. Benefit of Section 382-B Cr.P.C is also extended to the appellant.

The Murder Reference is answered in the negative.

Announced:
29.03.2017.

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