

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

**Cr.A No. 131-M/2015**

(1) *Zahir Rahman son of Muhammad Rahman r/o of Bila Mira Khall, District Dir Lower.*

(Appellant)

Versus

(1) *State through Additional Advocate General Peshawar High Court, Mingora Bench.*

(2) *Mujahid Khan son of Bakht Zamin r/o village Sacha, Tehsil Khall, District Dir Lower.*

(Respondents)

**Present:**

*Mr. Hazrat Rehman, Advocate for the appellant.*

*Muhammad Rahim Shah, Assistant Advocate General for State.*

*Mr. Saeed Ahmad, Advocate for the complainant/respondent.*

**Cr.R No. 30-M/2015**

*Mujahid Said s/o Bakht Zamin r/o of Sacha, Tehsil Khall, District Dir Lower.*

(Appellant)

Versus

*Zahir Rahman s/o Muhammad Rehman and State*

(Respondents)

**Present:**

*Mr. Saeed Ahmad, Advocate for the complainant/petitioner.*

*Muhammad Rahim Shah, Assistant Advocate General for State.*

*Mr. Hazrat Rehman, Advocate for the respondent/convict.*

Date of hearing: **23.10.2017**

**JUDGMENT**

**ISHTIAQ IBRAHIM, J.-** Through this single

judgment we intend to dispose of this criminal

appeal i.e Cr.A No. 131-M/2015 as well as the

connected Cr.R No. 30-M/2015 as both these matters emanate from one and the same judgment dated 28.05.2015 rendered by the learned Additional Sessions Judge/Izafi Zilla Qazi, Chakdara, Camp Court Timergara, District Dir Lower in case F.I.R No. 636 dated 21.09.2013 under Section 302 PPC registered at Police Station Khall, District Dir Lower whereby the appellant was convicted under Section 302 (c) PPC and sentenced to fourteen (14) years simple imprisonment with payment of rupees one million as compensation to legal heirs of the deceased under Section 544-A, Cr.P.C or in default thereof he was ordered to undergo further six months S.I.

2. Abstract of the prosecution case as set out in the first information report is that on 21.09.2013 ASI Bakhtiar Khan of Police Station Khall received information regarding murder in Bila. For confirmation he rushed to the spot where he found the dead body of a young boy namely Afsar Ali alias Sheno son of Bakht Zamin. Mujahid Khan, brother of the

deceased, who was present with the dead body reported to the local police that the deceased was dealing in tyre<sup>VS</sup> vulcanizing at Khall Bazaar. He went out of his house on 20.09.2013 at evening time by saying that he has received a phone call from someone and is going to meet him and will return, however, he did not return till the next morning. The complainant further reported that today (on the day of report) he came to know through his villagers that a dead body is lying in the fields near hospital Kooz Kalay Bila. When he rushed to the spot he found the dead body of his brother Afsar Ali who had been done to death by some unknown accused by causing firearm injuries at his neck, eye and head. The complainant while reporting the matter further stated that neither he nor his deceased brother had any enmity with anyone and may be the occurrence have been witnessed by someone. He charged unknown accused for the murder of his brother. It is noteworthy that later on correction was made in the name of deceased

from Afsar Ali to Afsar Zamin Khan vide  
Ex.PW-13/6.

3. The ASI named above (PW-11) reduced the report of complainant into *Murasila* (Ex.PA/1). He also prepared injury sheet/inquest report of the deceased (Ex.PW11/1 & Ex.PW-11/2) and sent the *Murasila* through Constable Azimullah No. 2325 to police station Khall where Muhammad Ibrar Muharrir (PW-10) chalked out F.I.R (Ex.PA) by incorporating therein the contents of *Murasila*.

4. The task of investigation in the case was entrusted to Bagh-e-Haram S.I (PW-13) who prepared the site plan (Ex.PB) on pointation of complainant, collected blood-stained earth from the place of presence of deceased vide recovery memo (Ex.PW-2/1) and collected two empty shells vide recovery memo (Ex.PW-2/2). He also took into possession the blood stained garments of deceased vide recovery memo (Ex.PW-2/3) whereas through recovery memo (Ex.PW-2/4)

he took into possession packing of Nokia mobile phone. Vide application (Ex.PW-13/5) the I.O sought CDR data of the accused and the report in this regard was placed on file as Ex.PW-13/8.

4. On 02.10.2013, Bakht Zamin Khan and Mujahid Khan (complainant), father and brother of the deceased respectively recorded their statements under Section 164, Cr.P.C wherein they charged Zahir Rehman, the present appellant, for the murder of Afsar Zamin Khan who was arrested by local police on the same day. The I.O allegedly recovered the crime weapon on pointation of the accused and took the same into possession vide recovery memo (Ex.PW-13/15). Likewise the crime empties as well as the crime weapon were sent to F.S.L and positive report thereof was placed on file as Ex.PW-13/24.

5. Investigation in the case was completed whereafter complete challan was submitted in Court for trial of the accused. On 30.11.2013, the learned trial Court formally

indicted the appellant for the offence to which he pleaded not guilty and opted to face the trial. Prosecution produced and examined as many as thirteen witnesses and closed its evidence whereafter statement of the accused under Section 342, Cr.P.C was recorded wherein he denied the allegations leveled by prosecution. In response to the offer made by the trial Court, the accused did not opt either to produce evidence in his defence or to record his own statement on oath in terms of Section 340(2), Cr.P.C. At the conclusion of the trial, the accused was convicted and sentenced as mentioned earlier, hence, this appeal. The complainant, being aggrieved of the lesser punishment awarded to the appellant, has filed Cr.R No. 30-M/2015 seeking enhancement in the sentence.

6. Learned counsel for the appellant, *inter alia*, contended that the impugned judgment regarding conviction of the appellant is against law, facts on record and provisions of Juvenile Justice System

Ordinance, 2000. That there is no direct evidence against the appellant and the trial Court has relied only upon circumstantial pieces of evidence of unsafe nature in the form of CDR data, alleged confessional statement of the convict and recovery of pistol. Further contended that the learned trial Court has wrongly associated the CDR data with the appellant as he was minor and student of 8<sup>th</sup> Class having no identity card at the time of the alleged occurrence, hence, the prosecution has badly failed to prove that the SIM was registered in the name of the appellant. Learned counsel added that in fact the appellant has made no confession at all because at the time of recording his statement the appellant was a juvenile and was afforded no opportunity of consultation with his parents/guardian or a counsel before recording his confessional statement under the Juvenile Justice Ordinance, hence, the same having no evidentiary value cannot be used against the appellant. Learned counsel maintained that the

pistol allegedly recovered from an open room which was not in the exclusive use of the appellant, as such, the alleged recovery of pistol is highly doubtful. That there are material contradictions in the statements of prosecution evidence which have totally been ignored by the learned trial Court while convicting the appellant. That the prosecution has badly failed to prove the guilt of the appellant beyond shadow of reasonable doubt and while ignoring this aspect of the case, the learned trial Court has deviated from the well settled principles of criminal justice. Learned counsel submitted that conviction and sentence of the appellant be set aside by allowing this appeal.

7. As against that learned counsel for the complainant argued that the appellant has confessed his guilt before the competent Court and his statement is duly corroborated by other circumstantial evidence available on the record, therefore, the learned trial Court has rightly convicted him in accordance with

law. Further contended that sufficient trustworthy and convincing evidence is available on the record which proves the guilt of the appellant beyond any doubt, hence, the prosecution is successful in discharging its burden. Learned counsel maintained that the learned trial Court has properly appreciated the prosecution evidence and convicted the appellant through a well-reasoned judgment the legality whereof cannot be questioned in on any ground whatsoever. He requested that this appeal, having no merits, be dismissed and the sentence awarded to the appellant be enhanced in accordance with law.

8. Learned Assistant Advocate General appearing on behalf of the State followed the arguments of learned counsel for the complainant and contended that the appellant being convicted for the brutal murder of an innocent person, is not entitled to any concession.

**9.** We have gone through the record in the light of valuable assistance of learned counsel for the parties as well learned A.A.G.

**10.** Before proceeding further with this judgment, we deem it appropriate to give detail of the injuries on the body of the deceased as observed by Dr. Muhammad Kamil Khan, Medical Officer, D.H.Q Hospital Timergara (PW-9) who examined the dead body and prepared his report as Ex.PM. The detail of wounds is as under:-

- i) An entry wound penetrating and destroying right eye globe. The exit wound is on right occipital area.
- ii) One entry wound with charring circular ring is present on right side of neck.

Rigor mortis and signs of levidity fully developed. Mazzal brought out by a deep cut on left lateral neck and bullet found behind vertebral column. Mazzal and report handed over to A.S.I Bakhtiar Khan No. 106, P.S Khall.

**Duration of death and injury is about 10-18 hours.**

**No other signs of violence found".**

**11.** Admittedly, the occurrence is unseen one and the prosecution case mainly hinges on confessional statement (Ex.PW-12/2) recorded by the appellant before the Judicial Magistrate, recovery of

pistol and report of F.S.L qua the two empties collected from the spot and C.D.R data brought on the record.

**12.** While framing formal charge against the accused, his age was mentioned by the trial Court as 16/17 years. Admittedly, the appellant was minor and that is why he was tried under the Juvenile Justice System Ordinance, 2000, a special law enforced in order to safeguard the rights of children/minors and to provide for their protection and rehabilitation in the society. The question before this Court is as to whether the Judicial Magistrate has carefully recorded the confessional statement of the appellant who was admittedly a minor at that time. In the present case, the trial Court has mainly relied on circumstantial evidence and in the circumstances of the case, the trial Court was under the obligation to consider each and every aspect of the confessional statement for getting the satisfaction as to whether all the formalities have been complied with or not. It

is well settled that before recording confessional statement of an accused, the Judicial Magistrate should essentially observe all the mandatory precautions as per High Court Rules and Procedure so that all signs of fear inculcated by the investigating agency in the mind of the accused are to be shed out. Reliance is placed on the case titled "Azeem Khan and another V/s. Mujahid Khan and others" (**2016 SCMR 274**). But we see no such precautionary measures in the present case which, in the circumstances of the case, were pre-requisite for recording the confession of a minor.

**13.** Before this Court is the case of a minor who has mainly been convicted on the basis of his judicial confession, therefore, extra ordinary care and caution was required to have been taken by the concerned Judicial Magistrate before recording his confessional statement. Record shows that the appellant was arrested on 02.10.2013 and produced before the Judicial Magistrate on 03.10.2013.

The appellant, being a minor, was provided no opportunity of counseling neither by his guardian nor by a lawyer rather his confession was recorded in presence of Naib Court who was duly uniformed at that time. It was desirable in the interest of justice that the appellant, being a juvenile, should have been provided counseling facility of guardian or a lawyer of his choice but no such opportunity has been afforded to him by the Judicial Magistrate before recording his confessional statement. Reliance in this regard is placed on the judgment of the apex Court in the case titled "Hashim Qasim and another V/s. The State" (2017 SCMR 986).

In cross-examination, the Judicial Magistrate (PW-12) stated that the appellant refused when he asked him to have a meeting with his counsel but no such question and answer is available in the questionnaire. There is no other independent source from which the above assertion of the Judicial Magistrate could be ascertained, hence, we have on other

option but to presume that no offer was made to the appellant for counseling. Even during the time given to the appellant for thinking, the Judicial Magistrate afforded him no opportunity to be alone rather he remained sitting on the dice alongwith the Judicial Magistrate during the said period of half an hour for deliberation. Admittedly, the offence with which the appellant has been charged entails capital punishment and keeping in view the intensity of the charge on one hand and minority of the appellant on the other, the Judicial Magistrate ought to be extra-cautious while recording the confessional statement of a minor as the same statement could be used for his conviction at trial stage. Reliance is placed on the case of "Abdul Haleem V/s. The State" (1984 P Cr.L J (Karachi) 611) wherein it was held that:-

“.....Accordingly we are inclined to agree with the view that the accused of his age could easily be duped to give statement as was tutored to him by the police. In the case of this nature, the learned magistrate had to be extra-cautious in recording the confession of the accused of his age. He had to make sure that accused had given the

confessional statement under absolute freedom, without any pressure or coercion having been brought to bear upon him for giving the said statement".

**14.** Perusal of the confessional statement further reveals that Question No. 13 was put before the appellant which is reproduced alongwith reply of the appellant for convenience.

(۱۳) سوال۔ آپ کیوں مقدمہ ہنامیں اقبال جرم کرنا چاہتے ہو؟

جواب: جی ہاں۔ میں تیار ہوں۔

The answer given to the above question by the appellant on its face appears to be irrational and indicates that the appellant was not in a position to give reasonable answers to the questions of the Judicial Magistrate. The Judicial Magistrate has also admitted this fact in his cross examination that the appellant did not disclose any reason for recording his confessional statement. The logic behind such question is to bring forth many clues regarding truth or voluntariness of confessional statement but from the above answer of the appellant it cannot be ascertained whether the confession was

voluntarily made or otherwise. In this regard we would refer the judgment rendered by this Court in case titled "Murtaza and two others V/s. State" (PLJ 1996 Cr.C (Peshawar) 371)

wherein it was held that:-

**“.....In the circumstances, it is not believable that the accused would make a confession in the normal course. Obviously a question would arise in the mind of the Court as to why at all the accused were going to make a confession. Such question was never asked by the learned Magistrate before recording the confessional statement. An answer to such question can provide many clues regarding the truth or voluntariness of the confessional statements. No such question is asked”.**

In the present case though the same question was asked from the appellant but his reply is quite ambiguous, as such, the very purpose for which the question was asked could not be achieved and so voluntariness of the appellant qua his judicial confession appears highly improbable in the given circumstances.

**15.** 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/s. 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/s. 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. It appears from the printed questionnaire form that the Judicial Magistrate filled the answers by adopting a stereotypical way without adhering to the codal formalities and without considering the intellectual level of the minor who was

unaware of the consequences of his statement.

Likewise, the possibility of the appellant, being minor, to have been tutored or tortured by the local police before recording his confessional statement cannot be ruled out especially when no opportunity of counseling by parents or a lawyer was afforded to him.

By considering the above facts and circumstances regarding the judicial confession of the appellant, we feel no hesitation in holding that the requisite care and vigilance has been taken neither by the Judicial Magistrate before recording confessional statement of the appellant nor by the trial Court when he was convicting him on the basis of the same statement, hence, it would be highly unsafe to rely upon the confessional statement of the appellant for maintaining his conviction.

**17.** Coming to corroborative evidence in shape of alleged recovery of pistol on pointation of the appellant. Record shows that the pistol has been recovered from a room

(hall) of the house clung to a wooden pillar. This room was jointly used by all the inmates of the house and was not in the exclusive use/control of the appellant. Moreso, no independent witness was associated with the alleged recovery. The application for opinion of the arms expert regarding the crime weapon and the empty shells was made on 02.10.2013 but the same received to F.S.L on 11.10.2013 though prior to that there was an application for verification of the empties as to whether the same were fired from one or different weapons. There is nothing on the record to explain that why the above incriminating articles were retained for 9 days and the prosecution has not bothered to examine the person who took the parcel to F.S.L or Muharrir of the police station who might have kept the same in his custody. Moreso, the contents of F.S.L report (Ex.PW-13/24) and that of the application for opinion of arms expert (Ex.PW-12/17) are contradictory. As per prosecution version, the

crime empties had already been sent to F.S.L and were still there in safe custody till recovery of the pistol but according to the F.S.L report both the pistol and the crime empties were received to the laboratory on 11.10.2013 as there is no explanation in the said report that the crime empties were already available there. Thus, not only the recovery is doubtful but the status of the F.S.L report has also become suspicious in view of the above mentioned unexplained delay as well as contradictions inter se the F.S.L report and application moved by local police to the lab, hence, the same is of no use to the prosecution.

**18.** Adverting to the other evidence in the shape of C.D.R data, it is not clear as to whether the telephone/SIM number was in the name of the appellant as the same fact has not been established through record. Even assuming that the last call was made by the appellant to the deceased that may be for any other reason and not for the offence, therefore,

just by placing mobile data on the record would hardly be of any use to the prosecution.

**19.** The above discrepancies in the prosecution evidence not only create serious and reasonable doubts in prudent mind the benefit of which must go the accused, being a well cherished principle of criminal justice but the same have further obscured the retracted confessional statement of the appellant. It is settled principle of law that conviction cannot be based only on the confessional statement of the accused unless the prosecution is able to substantiate its case against the accused by trustworthy and inspiring evidence which is not available in the present case. Even otherwise, the confession here in this case being retracted one which is not corroborated by the other oral as well as circumstantial evidence on the record, hence, the same cannot be used for conviction of the accused. Reliance is placed on the judgment in the case titled *Muhammad Ismail and others V/s. The State (2017 SCMR 898)* the Superior Court held that:-

**"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".**

20. In the backdrop of the above discussion, the learned trial Court has failed to properly analyze the prosecution evidence especially the confessional statement of the appellant according to the principles laid down by the Superior Courts, therefore, this appeal is allowed, the impugned judgment dated 28.05.2015 of the learned Additional Sessions Judge/Judge Juvenile Court, Chakdara at Camp Court Timergara, Dir Lower is set aside and the appellant-convict Zahir Rahman son of Muhammad Rahman is acquitted of the charge in case F.I.R No. 636 dated 21.09.2013 under section 302 PPC of Police Station Khall, District Dir Lower. The appellant named above be released forthwith

from jail if not required in any other case.

Cr.R No.30-M/2015 is dismissed for having become infructuous.

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

Announced  
23.10.2017

JUDGE

JUDGE

*Justice  
27/10*