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

JUDGMENT

Cr.A.No.153-M of 2014 alongwith
M.R No. 6 of 2014.

Date of hearing: **11.02.2016**

Appellant:- (Sanobar) by:

Muhammad Zahir Khan, Advocate.

Respondents: (the State & another) by:

Mr. Sabir Shah AAG & Mr. Razaullah, Advocate.

MUHAMMAD DAUD KHAN, J.- Impugned herein is the judgment dated 03.6.2014 passed by learned Additional Sessions Judge/Izafi Zilla Qazi, Dir Lower, at Samarbagh, whereby Sanobar son of Muhammad Ali was convicted under section 302(b) PPC and sentenced to death (on two counts) with compensation under section 544-A Cr.P.C of Rs:10,00,000/- each payable to the legal heirs of the deceased or in default thereof to further undergo six months S.I.

2. Murder Reference No. 6-M of 2014 is also before us for confirmation and since both the appeal and reference arises out of the same occurrence/F.I.R, therefore, these are being disposed of by way of this single judgment.

3. As per contents of the F.I.R, on 02.02.2013 at 00.10 hours, Haider Zaman Khan, SHO to P.S. Lal Qila (PW-7) was on "*Ghust*" of the "*Illaqa*" alongwith other police party and in the meanwhile received information in respect of the commission of double murder at the vicinity of village *Karamar*. For confirmation and other legal formalities, he rushed to the venue of "*Wardaat*", found the dead bodies of both the deceased accompanied by complainant, Israrullah (PW-1), who reported the matter to the local police to the effect that his sister Mst. Sharafat Bibi got married to one Ghulam Haider some 4/5 months prior to the occurrence. On the invitation of his sister, he alongwith his cousin Ishfaq Ahmad (deceased) on 01.02.2013 at 12:00 hours visited her house and were present in the "*Baitak*" while she used to come to the "*Baitak*" for serving of tea as well as dinner and after finishing dinner, they were busy in gossiping, when his sister Mst. Sharafat Bibi (deceased) came to the *Baitak* and remained busy in arranging quilt on the cots and told them to get prepare for sleep. In the meanwhile, the convict-appellant (who is uncle of his sister's husband) duly armed with Kalashnikov came to there and exchanged hot words with his sister Mst. Sharafat Bibi on the pretext that why she came to *Baitak* at night time and started altercation with them. Thereafter, the appellant started indiscriminate firing upon

Ashfaq Ahmad & Mst. Sharafat Bibi, as a result of which both of them died at the spot. The motive behind the occurrence was that the appellant was suspicious that the deceased have illicit relation with each other. The occurrence was witnessed by the complainant and he charged the appellant/ convict for the commission of crime.

4. After recording report of the complainant, it was read-over and explained to him, who after admitting it to be corrected impressed his thumb. After inspection of the bodies of the deceased by Haider Zaman Khan SHO, he prepared injury sheets alongwith inquest reports and sent it for post-mortem examination, whereas the *Murasala* Ex. PA/1 was dispatched to the P.S. Lal Qila and on the basis of marasila F.I.R. No. 50 dated 02.02.2013 was registered against the convict/appellant under section 302 PPC.

5. On arrest of the accused/appellant and subsequently on completion of investigation conducted by the local police of P.S. Lal Qila, complete *challan* was submitted against the appellant to the Court of learned Izafi Zila Qazi Samarbagh, where at the commencement of the trial, the prosecution produced as many as twelve (12) witnesses, whose statements were recorded and placed on file.

6. On close of the prosecution's evidence, accused was examined under section 342 Cr.P.C. Describing himself as scapegoat; denied the charges, professed innocence and stated to have falsely been implicated in the case. He, however, wished to produce no defence nor to examine himself on oath as required under section 340 (2) Cr.P.C.

7. The learned Trial Judge on conclusion of the trial convicted and sentenced the accused/appellant vide judgment impugned herein.

8. Learned counsel for the appellant-convict argued that sole testimony of the complainant was not sufficient to bring home the charges leveled against the appellant, as at the time of occurrence the complainant was not present at the venue of *wardaat* and the occurrence has not been taken placed in the mode and manner as described by the prosecution. He further added that material contradiction existed in the statement of alleged eyewitness and other evidence produced by the prosecution, thus, the impugned conviction and sentence by the learned trial Court was not warranted in light of the facts and circumstances of the case. He lastly argued that the confession was obtained through third decree method, which was neither voluntary nor true and the same was retracted one as well as also questioned the

recovery of weapon to be planted one by the complainant against the accused by joining hands with the police party.

9. Learned A.A.G. appearing on behalf of the State and learned counsel for complainant on the other hand argued that the appellant is directly and singularly charged in the FIR for committing double murder, which is supported by the confessional statement of accused coupled with testimony of the eyewitness/complainant (PW-1), medical evidence, recoveries in shape of empties from the spot and Kalashnikov, as weapon of offence, at pointation of appellant, blood stained garments of both the deceased and positive FSL reports in respect of recoveries and negative FSL report regarding swabs taken from both the deceased. They further submitted that the prosecution's witnesses were consistent on material particulars; therefore, the conviction is based on proper appreciation of evidence on record and call for no interference.

10. We have considered the arguments rendered by learned counsel for the parties and have gone through the entire record with their valuable assistance.

11. In support of the charge prosecution examined 12 PWs gist of which is as under:

PW 1 is the complainant and star witness who has reiterated the stance taken in his report.

PW 2 Gul Naseed has received dead body of his daughter Mst. Sharafat Bibi.

PW 3 Gul Hayat is the marginal witness of recovery memo Ex PW 3/1 through which blood stained shirt of Mst. Sharafat Bibi was taken into possession.

PW 4 Latif ur Rehman has received the dead body of his son deceased Ashfaq Khan.

PW 5 is Shah Faisal Judicial Magistrate who has recorded confessional statement of appellant/convict.

PW 6 is Dr. Jamil Khan who has conducted postmortem of the deceased.

PW 7 Haidar Zaman Khan SHO has recorded report of complainant, prepared injury sheets, inquest reports and arrested the appellant. He has also recovered the weapon of offence Kalashnikov on the pointation of appellant/convict.

PW 8 Abdur Rauf ASI is the scribe of FIR.

PW 9 Suliman Shah is the marginal witness of the recovery memo of weapon of offence P1.

PW 10 Rehmat Younas is the Investigation Office in the present case who has inspected the spot; prepared site plan; recovered blood stains earth and piece of carpet from

the place of occurrence; recovered 17 empties of 7.62 bore along with 4 spent bullets; prepared list of LRs of deceased; sent blood stained articles to FSL along with bullets, empties and weapon of offence; took into possession quilt and other belongings to deceased i.e mobile phones.

PW 11 Jamilullah had received sealed bottles from the doctor and handed over to the I.O.

PW 12 Saeedullah is marginal witness of the recovery memo Ex PW 12/9 through which bottle contained Swabs were taken into possession.

12. It appears from the record that the prosecution's case mainly hinges upon the ocular evidence furnished by sole eyewitness of the occurrence i.e. complainant Israrullah (PW-1). In the present case, the occurrence took place on 02.02.2013 at about 00.10 hours in the house of deceased Mst. Sharafat Bibi at the vicinity of village Karamar, wherein as per prosecution version, the complainant Israrullah, brother of the deceased Mst. Sharafat Bibi alongwith his cousin Ashfaq Khan went to the house of deceased, so, as to bring her to her parents' house. They were present in the *Baitak* as guest in her house and she came to *Baitak* in order to arrange the bed sheets of the cot for them and told them to go to sleep, when, the accused/appellant came to there and asked the deceased-lady that for what purpose she came to

the *Baitak* at nighttime? Thereafter, the appellant exchanged hot words with them and fired upon at Ashfaq Khan and Mst. Sharafat Bibi, as a result of which both of them died at the spot. As stated earlier, the occurrence was witnessed by complainant. Now the question arises that whether the complainant was present at the place of occurrence alongwith the deceased Ashfaq Khan and Mst. Sharafat Bibi in her house or not?

As is evident from the record, the occurrence was taken placed on 02.2.2013 at 00.10 hours, whereas, it was reported to the local police on 1.30 A.M. within the span of 1:20 hour and the concerned S.H.O. stated in his statement, while appearing as PW-7 that when he reached to the spot, Israrullah complainant was present in the house alongwith bodies of the deceased and lodged the report in the shape of *Murasala* Ex. PA/1. When other prosecution's witnesses Gul Nasib and Latif-ur-Rahman, fathers of the deceased, recorded their statements as PW-2 and PW-4 respectively stated in their cross-examinations that the village wherein the alleged crime has been committed was situated at considerable distance from their village .i.e. 30/40 miles and can be covered through vehicle within 1 ½ to 2 hours. Certainly no plausible reason has been established by the defence to indicate why the complainant/sole-eyewitness of the

occurrence would charge the appellant by leaving the real culprits. Besides, keeping in view, the distance between the two villages, it is not appealable to common sense that in such a short span of time the complainant would come from his far-flung village and will identify himself in the crime village as an eyewitness of the alleged occurrence, so, the testimony of this sole- eyewitness is natural and convincing one and it statement finds ample corroboration from other evidence produced by the prosecution. Even otherwise, he was put to lengthy and searching cross-examination by the defence, but nothing detrimental to the cause of prosecution has been come out from his mouth, which could show that the occurrence has not been taken placed on the mode and manner as alleged by the prosecution or for that matter he alongwith his cousin have not visited the house of the deceased Mst. Sharafat Bibi. There exist no previous ill-will between the parties and the convict-appellant had committed the double murder on the pretext that he was suspected that the deceased were having illicit relations and it seems that he committed murder of the deceased in sudden provocation, as both the deceased were cousin interse and aged about 17 to 20 years, moreso, it is not a rare phenomenon to visit the house of married cousin alongwith her brother and it is also comes within the domain of our tradition that whenever the

close relatives .i.e. brothers and cousins visited the house of married sister, she used to come and meet the guests and also to serve meal, tea or to do other routine works. From the above testimony of the prosecution witnesses it is established that the complainant was present at the place of occurrence along with the deceased.

13. Adverting to the question that whether the deceased were in compromising position or not?

Evidence on the face of record reveals that the occurrence took place at the odd hours of the night in a house wherein two persons lost their lives on the ground that they were found in compromising position with each other. In support of his plea, the appellant stated in his confessional statement that his sister-in-law conveyed him information about the alleged act of indulgence of sexual intercourse by Mst. Sharafat Bibi with a guest, wherefater, he went to the spot duly armed with deadly weapon and fired upon the deceased, who tried to decamp from the spot, but could not do so and after receiving firearm injuries died at the spot.

14. When, we put the above-referred stance of appellant into juxtaposition with the evidence produced by the prosecution, it transpired that the deceased were examined by Doctor Jamil Khan, PW-6 and during examination of bodies of the deceased, he has taken swabs

for chemical examination from both of the deceased, which were sent to F.S.L. and the reports received whereof are in negative. Likewise, it is in the evidence that when the I.O. has taken into possession blood stained garments/clothes of the deceased, which were having corresponding cut marks, meaning thereby, that at the time of occurrence both the deceased were wearing the clothes. So, the plea of appellant, which he has taken in his confessional statement to the effect that his sister-in-law informed him that Mst. Sharafat Bibi lying in blanket with a guest and she is indulged in sexual activity, could not be proved on record in shape of circumstantial evidence, as when the deceased were brutally murdered they were dressed up and moreso, the result of their swabs tests were also received in negative.

15. The learned trial court mainly relied upon the testimony of the eye witness/star witness i.e complainant Israrullah. It is now well settled that conviction could be based on testimony of a single witness if court is satisfied that witness is reliable. The court has to go with the quality and not with the quantity of evidence necessary for proving or disproving a fact and particular number of witnesses is not required for the proof of any fact and the same can be produced by a single witness under the Provisions of *Art. 19 (2) (b) of Qanoon-e-Shahadat Order, 1984*. Wisdom is

derived from *Farooq Khan's case reported in 2008 SCMR 917 and Muhammad Mansha vs. the State, reported in 2001 SCMR 199*.

16. Now adverting to the very moot question of retracted confession made by appellant/convict before the Judicial Magistrate.

The record reveals that just after the occurrence the accused/appellant was arrested on 2.2.2013 and during preliminary investigation he professed his guilt before the I.O. So, on the next date .i.e. 3.2.2013, he was produced before Mr. Shah Faisal, Learned Judicial Magistrate, PW–5, who recorded his confessional statement. For the sake of convenience, confessional statement of the appellant/convict is reproduced as under:

"بیان ازانصنوبر ولد محمد علی بعمر42سال قوم مشاڑی سکنہ برہانے کڑہ مار لعل قلعہ زیر دفعہ 164/364ضابطہ فوجداری

بروز وقوعہ میں گھر میں رات کو سویا ہوا تھا۔ تقریباً رات کے بارہ بجے میری بھابھی جو کہ علیحدہ گھر میں رہتی ہے میرے گھر آئی اور مجھے بتایا کہ شرافت بی بی ایک مہمان کے ساتھ کمبل میں لیٹی ہوئی ہے اور بدکاری کررہی ہے۔ اس کے بعد میں نے اپنے بھائی محمد شیر کے گھر سے کلاشنکوف اٹھا کر لوڈ کیا۔ میں جب بیٹھک پہنچا اور اندر داخل ہوا تو دونوں یعنی شرافت بی بی اور مہمان ایک دوسرے سے جدا ہوکر بھاگنے کی کوشش کررہے تھے کہ میں نے دونوں مقتولین پر فائرنگ کی ۔ جس سے لگ کر دونوں موقع پر ڈھیر ہوگئے۔ مہمان فرش پر گر پڑا جبکہ شرافت بی بی قالین پر گر پڑی۔ اس کے بعد میں بھائی شیر محمد کے گھر بیٹھک سے چلا گیا۔ تقریباً ایک گھنٹے بعد پولیس آگئی۔ میں نے بمعہ کلاشنکوف خود کو پولیس

کے حوالہ کیا۔ میں نے غیرت کے نام پر مسماۃ شرافت بی بی اور مہمان کو قتل کیا ہے اور میں پشیماں نہ ہوں۔

A casual glance at the above quoted confessional statement of the appellant/convict would show that there is no missing link in the chain of available circumstances and it seems that the confession made by accused/appellant is not only voluntary, without any duress, inducement, coercion but also based on truth and it is immaterial that he has later on retracted from such confession. The apex court has held in **1992 SCMR 950** that:

> *"No basic difference exists between confession or a retracted confession, if the element of truth is not missing and it is always a question of fact which is to be adjudged by the courts on the attending circumstances of a particular case. When an accused has given an account of the incident and its truth is not doubted and such statement is proved to be correct in all its parts, such solitary piece of evidence can be used against the accused without any further corroboration. Where the confessional statement of the accused is found to be true and voluntary, conviction can be recorded on such statement"*

Same view has been adopted by august Federal Shariat Court in the cases reported in **1998 MLD 944** and **2013 P.Cr.L.J 1288**. In the case reported in **PLD 1995 Supreme Court 336**, the apex court has observed that as against the maker

himself his confession, judicial or extra judicial, whether retracted or nor retracted can in law validly form the sole basis of his conviction if the court is satisfied and believes that it is "true and voluntary" and was not obtained by torture or coercion or inducement.

In case titled *Wasair Khan vs. The State* reported in *1989 SCMR 446*, the apex Court rejected the plea that retracted confession was not sufficient in law to maintain conviction and held that there was no legal bar for recording conviction on a confession which was subsequently retracted if it was voluntary and true. Similarly, in a case of *Mst. Nasreem Akhter v.s the State* ,*1999 SCMR 1744*, it was reiterated that conviction for a capital offence could be sustained on the basis of a retracted confession alone provided it was voluntary and true and the Courts as a rule of prudence, look for its corroboration by other reliable evidence. It was further observed that any lapse on the part of the Magistrate in recording a confession may not be fatal as to its evidentiary value provided the court was satisfied that the lapse on his part had not, in any way, adversely affected its voluntariness or truthfulness. In a case ***Suleman vs. The State 2006 SCMR 366***, *it has been held that the judicial confession alone if it is found true, convincing and made*

voluntarily without any duress or coercion, the same can be made basis for conviction.

17. No doubt, the convict-appellant has retracted from his confessional statement but the same would not lose its value for the mere reason that it was retracted. In a case titled ***Tariq Hussain Shah vs. The State 2003 SCMR 938***, it has been held that *retracted confession of accused when confidence inspiring alone is sufficient for conviction*.

18. The above cited case laws make the proposition fully established that the confessional statement, even if retracted subsequently, but found to be voluntary and true and is supported some corroborative material, the same can solely be made basis for conviction.

19. In the case in hand on the basis of available circumstances it has established beyond any reasonable doubt that confession of accused recorded on the very next day of his custody is not only voluntary, without any duress and inducement but is also based on truth which is also corroborated by recoveries of empties of 7.62 bore from the venue of crime and weapon of offence .i.e. Kalashnikov (P1) at the pointation of accused/appellant alongwith statement of sole eyewitness of the occurrence and other trustworthy evidence produced by the prosecution. Moreover, the said empties recovered from the spot and the weapon of offence were sent

to F.S.L. for opinion of fire-arm expert and as per FSL report, Ex. PZ/3, received in positive, 17 empties were found fired from SMG rifle No. 3838, while same rifle is 7.62 bore (foreign made). Thus, the prosecution fully established guilt of the accused/appellant through positive F.S.L reports in respect of empties effected from the spot and weapon of offence i.e. Kalashnikov recovered on his pointation.

20. Apart from the above, the medico-legal reports furnished by Doctor Jamil Khan, PW-6 also fully supports the version of prosecution, wherein, it has been mentioned that the deceased were done to death through firearm injuries and the entry wounds on the persons of both the deceased were of same dimension.

21. Thus, in wake of the above discussion, we are clear in mind that the prosecution fully established the guilt of convict-appellant, who is singularly charged for firing at both the deceased. There is no possible reason to believe that the complainant party would let-free the real culprit and involve the present appellant, because substitution in place of the real culprit, in any case, is rare phenomenon. Nothing has been brought on record to show that the occurrence has not taken place in the mode and manner as alleged by the prosecution. Therefore, taking into consideration the above evidence, we are convinced to hold that the conclusion drawn by the learned

Trial Court regarding the guilt of appellant in the commission of above offence is based on sound and cogent reasons.

22. For what has been discussed above, we do not find any merits in the appeal in hand on the question of guilt of the appellant, therefore, the judgment of conviction and sentence recorded by the learned Trial Court is maintained and this appeal is hereby dismissed. Similarly, the Murder Reference No. 6 is also answered in positive and death sentence is, thus, confirmed.

Announced.
Dt.11.02.2016

JUDGE

JUDGE