

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal No.1118-P/2019

Muhammad Bilal son of Muhammad Rasool,
 resident of Charbagh District Swabi.

Appellant (s)

VERSUS

The State etc

Respondent (s)

| | |
|-------------------|-------------------------------------|
| For Appellant :- | <u>Mr. Muhammad Riaz, Advocate.</u> |
| For State :- | <u>Mr. Mujahid Ali Khan AAG.</u> |
| For complainant:- | <u>Muhammad Abid, Advocate.</u> |
| Date of hearing: | <u>21.11.2019.</u> |

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This criminal appeal under section 410 Cr.P.C., has been filed by Muhammad Bilal, the appellant, against the judgment dated 29.08.2019, of learned Additional Sessions Judge/Judge Juvenile Court/MCTC, Swabi, whereby he has been convicted under section 302 (c) PPC and sentenced to undergo ten (10) years rigorous imprisonment (R.I) and to pay Rs.2,00,000/-, as compensation to legal heirs of Adil Hussain deceased in terms of section 544-A Cr.P.C. and in default thereof to undergo six (06) months S.I., in case FIR No.531 dated 31.07.2016, registered under section 302 PPC, at Police Station Kalu Khan, District Swabi. Benefit of section 382-B Cr.P.C., has been extended to him.

2. Amjad Ali petitioner/complainant has filed **Cr.R. No.232-P/2019**, seeking enhancement of sentence of the convict/respondent from ten years R.I. to normal penalty of death as provided for the offence.

3. Since, both the matters are emanating from one and the same judgment of the learned trial Court dated 29.08.2019, therefore, we propose to decide the same through this single judgment.

4. The prosecution case as unfolded in First Information Report (**FIR**) is that on 31.07.2016 at 2300 hours, complainant Amjad Ali (PW.5), in company of dead body of his brother, namely, Adil Hussain deceased, reported to Iftikhar Shah SI (PW.2), in casualty of civil hospital Kalu Khan, to the effect that on that day he after closing his shop when reached home and took meal, his father told him that the deceased has not returned home, so he tried to contract him on his cell phone number, but the deceased was not responding the call. He started search for him in the village, Bazaar and in the houses of his relative. As he (complainant) had heard the report of fire shot, therefore, he with the help of torch started search of the deceased and noticed his dead body in the nearby field, being done to death with firearm by unknown culprit (s). Disclosing no enmity or ill will with anybody he charged unknown culprit(s) for murder of the deceased. His report was recorded by Iftikhar Shah SI (PW.2), in the shape of

Murasila Exh.PA/1 which was also verified by his uncle Noor Jamal. PW.2 scribe of the Murasila, also prepared injury sheet and inquest report of the deceased Exh.PM/1 and Exh.PM/2, respectively of and referred his dead body to the mortuary where Dr. Mazhar Khan (PW.11) conducted his postmortem examination and found a firearm entry wound on right side forehead above eyebrow, measuring $\frac{1}{2} \times \frac{1}{2}$ inches with corresponding exit wound on the back of skull size 1x1 inch of the deceased. According to his opinion the deceased died due to firearm injury to his skull, brain, and membranes.

5. Mukhtaj Khan SI (PW.7) conducted investigation in the case, who proceeded to the spot and prepared site plan Exh.PB. During spot inspection he secured bloodstained earth from the place of the deceased vide recovery memo Exhs.PW.4/1. Vide recovery memo Exh.PW.4/2, he took into possession the last worn bloodstained garments of the deceased, sent by doctor through FC Altaf. Similarly, through recovery memo Exh.Pw.4/3, he took into possession an empty of 30 bore Exh.P.3 from the spot. He sent the bloodstained articles to the FSL for opinion of the Serologist as well as the empty for keeping it in safe custody. On 02.08.2016, he recorded supplementary statement of complainant Amjad Ali and on the same date, produced him before the learned Judicial Magistrate where he recorded his statement under section

164 Cr.P.C. in which he charged the appellant. On 2.08.2016, Iftikhar Shah ASI (PW.2), arrested the appellant along with 30 bore pistol bearing No.AF.4143 having fixed charger, containing four live rounds of the same bore. To this effect separate FIR was registered against the appellant under section 15 KP Arms Act, 2013. The appellant was then handed over to the Investigation Officer (PW.7), who obtained his physical remand. During interrogation the appellant disclosed the recovered pistol from his possession to be a crime weapon. He also confessed his guilt before the I.O. therefore he was produced before the learned Judicial Magistrate, where his confessional statement was recorded. PW.7 sent the pistol to the FSL for analysis with the crime empty, report whereof is (Exh.PK/1) was received in positive.

6. On completion of investigation challan was submitted against the appellant by Haroon Khan SHO before the learned trial Court under the juvenile Justice System Ordinance, where he was formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case the prosecution examined as many as eight witnesses. After closure of the prosecution evidence, statement of the appellant was recorded under section 342 Cr.P.C., wherein he retracted his confessional statement, denied the prosecution allegations and professed his innocence. He, however, neither wished to be examined

on oath under section 340(2) Cr.P.C., nor opted to produce evidence in defence. On conclusion of trial, the learned Trial Court, after hearing both the sides convicted and sentenced the appellant, as mentioned above.

7. We have heard the exhaustive arguments of learned counsel for the parties and perused the record with their able assistance.

8. Admittedly, it is a case of no eyewitness. The dead body of Adil Hussain deceased was found in the field of one Faqir Ullah by the complainant, wherefrom he was shifted to the hospital. In the initial report Exh.PA/1, complainant (PW.5) has charged unknown culprit(s) for murder of the deceased. After satisfaction, he on 02.08.2016 recorded his statement under section 164 Cr.P.C. before the learned Judicial Magistrate wherein he charged the appellant for murder of the deceased and advanced a motive behind the occurrence that deceased had friendly relation with Iqbal Hussain (brother of appellant Bilal) and the deceased informed Iqbal Hussain about bad character of the appellant, on which the appellant got annoyed. The just, fair and honest conduct of the appellant is apparent from his statement that initially he did not charge any innocent person. Had he any ulterior motive or grudge with the appellant, he would have easily charged him in the initial report. It is not disputed that the dead body of the deceased was first seen by Amjad complainant,

who had left the house in search of his brother (deceased). He deposed that he had heard a fire shot, therefore, in light of the torch he proceeded towards the place wherefrom he has perceived the sound of fire shot. He found the corpse of his deceased brother in the field being murdered by some unknown person with firearm. After report against unknown culprit, there was no rumor in the area about murder of his brother by appellant Bilal. After satisfying himself, he (complainant) recorded his supplementary statement wherein he charged the appellant.

9. As stated earlier it is a case of no ocular account and the entire case of the prosecution is based on circumstantial evidence coupled with the confessional statement of the appellant. The appellant was arrested on 02.08.2016 by Iftikhar Shah SI (PW.2) along with 30 bore pistol No.AF.4143 with fix charger containing 04 live rounds of the same bore. During interrogation he confessed his guilt before the Investigation Officer (PW.7), therefore, on 05.08.2016 he was produced before the learned Judicial Magistrate where he recorded his confessional statement. Before dilating upon the voluntariness of confessional statement of the appellant and its corroboration from other independent circumstances coupled with the fact that whether it has been recorded in accordance with law, we, would like to reproduce the confessional statement of the appellant as below:-

“Stated that some three years prior to the occurrence, Adil Hussain had given me intoxicant in Pepsi bottle and made my blue print/video, on the basis of which he used to blackmail me and commit sodomy upon me. After some period, deceased Adil told me that he has deleted my video; however, I was having suspicion and fear in my heart that he may not show my video to someone. On the day of occurrence the deceased came after me to my house, insisting for committing sodomy upon me, but I used the artifice and brought pistol from house and told to Bilal that I am going to Bazaar for purchase of grocery items for home. During this time Bilal was waiting me outside my home. I intentionally spent more time in the market but despite that when I reached near my house I saw the deceased there. On his demand, it followed him to the place of occurrence where he opened his trouser and asked me for opening my trouser. In the meantime, I opened fire at the deceased. There was complete dark. My fire shot hit the deceased who fell down and I run away from the spot. This is my statement. The deceased did a lot to me”.

10. The learned Judicial Magistrate while appearing as PW.8 deposed that on 05.08.2016, the appellant was produced before him for recording his confessional statement. He directed the I.O, to remove his (appellant's) handcuffs, who accordingly removed the same. The appellant showed his willingness to record his confessional

statement. He (PW.8) directed the police including the I.O and Naib Court to leave the court room so as to relax the appellant from any sort of pressure. The appellant was given 30 minutes time to think over his confession. He (the Magistrate), further deposed that he disclosed his identity to the appellant and told him that he is not bound to make a confession and if he does so it will be used against him as evidence. The appellant was also understood about the consequences of his confessional statement by PW.8. The learned Judicial Magistrate further deposed that after due satisfaction he recorded the confessional statement of the appellant. which was read over to the appellant and who after admitting it correct signed/thumb impressed the same. He exhibited confessional statement of the appellant as Exh.PW.8/2 and questionnaire as Exh.PW.8/1. The learned Judicial Magistrate (PW.8) has been subjected to lengthy and taxing cross-examination by the defence but nothing was brought from his mouth that confessional statement of the appellant was the result of torture, force, coercion or promise. In response to a question as to whether in the confession the confessor has taken the plea of self-defence, the learned Judicial Magistrate (PW.8) stated that since the confessional statement is self explanatory and it would be the learned trial Court to appreciate the same. In view of the statement of learned Judicial Magistrate (PW.8), we are

of the considered view that confessional statement of the appellant is voluntary and free from any sort of force, pressure, torture, inducement and promise.

11. The confessional statement of the appellant finds corroboration from other circumstances of the case, like medical evidence in the shape of autopsy report of the deceased and statement of Dr. Mazhar Khan (PW.1), according to which the deceased has sustained solitary firearm entry wound on right side forehead with corresponding exit wound on back of his skull. As per confessional statement of the appellant he fired single shot which hit the deceased. The bloodstained earth secured from the spot from the place of the deceased and his last worn bloodstained garments were sent to the FSL, report of the Serologist in respect thereof is in positive. Single crime empty of 30 bore pistol was recovered from the spot which was sent to the FSL for safe custody. The appellant was arrested on 02.08.2016 by Iftikhar Shah SI (PW.2) and a 30 bore pistol No.AF.4143 was recovered from his possession which was sent to the FSL for comparison with the crime empty already sent to the FSL. Report of the FSL in this regard Exh.PZ is in positive. In this view of the matter, the medical evidence as well as the above mentioned pieces of circumstantial evidence corroborates the confessional statement of the appellant.

12. No doubt, the appellant has retracted his confessional statement in his statement under section 342 Cr.P.C., but it is settled law that conviction of an accused can be recorded on the basis of retracted judicial confessional if the same was proved voluntary, true and corroborated by other strong circumstances of the case. Mere denial of accused in his statement under section 342 Cr.P.C. that confessional was not voluntary or that he has not made such statement would not make his confessional statement inadmissible. As per ratio of judgment of the Hon'ble Supreme Court in case titled, **“Manjeet Singh Vs the State” (PLD 2006 Supreme Court 30)**, retracted confession either judicial or extra-judicial, if found truthful and confidence inspiring as well as qualified the test of voluntariness, can be used for conviction without looking for any other sort of corroboration. In the judgment supra the Hon'ble Supreme Court while dilating upon the evidentiary value of the retracted confession held that no rule of criminal administration of justice existed to the effect that the court having found the retracted confession voluntary and true must look for the corroboration and that in absence of corroborative evidence, conviction cannot be maintained. Retraction of a Judicial or extra-judicial confession itself is not an infirmity to be considered sufficient to withhold the conviction, because evidentiary value of a confession is not diminished by the mere fact

that it was retracted by the maker at the trial. Independent corroboration from other sources direct or circumstantial, therefore, cannot be insisted in every case as a mandatory rule, rather the rule of corroboration is applied by way of abundant caution and in a case depending entirely on the confessional statement of a person or only on the circumstantial evidence, and this rule is applied more cautiously.

13. Deriving wisdom from the judgment (supra) of the august Supreme court, we entertain no amount of doubt in mind to hold that the confessional statement of the appellant being voluntary is fully corroborated by strong circumstances discussed above and has rightly been based by the learned trial Court for holding the appellant guilty of the offence to which no exception can be taken.

14. Now the moot question for determination is the quantum of sentence to be awarded to the appellant so as to meet the ends of justice. Admittedly, the appellant was a Juvenile at the time of occurrence. It is settled principle of criminal jurisprudence that whenever prosecution is relying on solitary confessional statement of an accused and there is no direct evidence then the confessional statement of accused is to be accepted or rejected in whole/toto. However, where direct and circumstantial evidence is available besides the confessional statement of accused in that eventuality, the portion of confessional

statement which supports the version of prosecution would be taken into consideration, whereas other portion of confessional statement which is inconsistent with it would not be taken into account. Guidance in this regard can be derived from case, titled, **“Gana Ram versus the State” (1999 P Cr L J 490) and “Ajab Khan vs the State (1995 MLD 1190).**

15. At the touch stone of the aforesaid principle if the confessional statement of the appellant is taken into consideration in toto then one thing is clear then crystal that the appellant has committed the offence to save himself from the sexual assault of the appellant. The deceased was constantly harassing the appellant and on the day of occurrence he was bent upon to commit sodomy upon the appellant. He (the deceased) compelled the appellant for subjecting him to the act of sodomy. According to confessional statement of the appellant, the deceased was persistently blackmailing the appellant and the appellant had even made a complaint to brother of the deceased about sodomitical character.

16. From the peculiar facts and circumstances of the case coupled with the confessional statement of the appellant, we are of the considered view that the appellant has committed murder of the deceased to defend himself from sexual and blackmailing by the deceased. However,

the appellant by selecting vital part of body of the deceased i.e. skull has exceeded the right of self defence.

17. In such eventuality the petitioner by taking shelter under section 100 PPC cannot be acquitted out rightly, rather, keeping in view juvenility of the appellant and the peculiar facts and circumstances of the case, ten years rigorous imprisonment already awarded to the appellant by the learned trial Court is just and appropriate.

18. Accordingly, the appeal of the appellant and the criminal revision filed by the petitioner/complainant being meritless are hereby dismissed.

Announced:

21.11.2019

M.Siraj Afridi PS

JUDGE

JUDGE

**DB of Hon'ble Mr. Justice Rooh ul Amin Khan and
Hon'ble Mr. Justice Muhammad Nasir Mehfooz.**