

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

Crl. Appeal No.32-P/2016

Ibrarullah son of Rasheed Khan,
r/o Kala District Swabi.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Petitioner :-	<u>Malik Nasrum Minallah, Advocate.</u>
For State :-	<u>Mr. Mujahid Ali Khan AAG.</u>
For Respondent :-	<u>Sahibzada Riazat ul Haq, Advocate.</u>
Date of hearing:	<u>15.10.2019</u>

JUDGMENT

ROOH-UL-AMIN KHAN, J:- This criminal appeal under section 410 Cr.P.C., has been filed by appellant Ibrarullah against the judgment dated 23.12.2015, passed by learned trial Court/ASJ-IV, Swabi, whereby the appellant having been found guilty of committing sodomy upon Abdubar aged 11/12 years and thereafter committing his murder, has been convicted as under:-

Under section 377 PPC:- To undergo 05 years rigorous imprisonment and to pay a fine of Rs.50,000/- or in default thereof to undergo 6 months S.I.

Under Section 302 PPC:- to undergo imprisonment for life and to pay Rs.1,00,000/-, as compensation to legal heirs of the deceased in terms of section 544-A Cr.P.C. in case FIR

No.845 dated 19.06.2010, under sections 302/377/109 PPC, at Police Station Swabi.

Both the sentences shall run concurrently. Benefit of section 382-B Cr.P.C. has been extended to the appellant.

2. As per contents of FIR, on 19.06.2010 at 09.00 hours, Fazal Wahab (PW.5) reported to Rahat Khan SI on the spot to the effect that his son, namely, Abuzar aged 11/12 years used to play cricket with his co-villager, namely, Ibrarullah (the appellant) in the field near appellant's *Kandhar* (remains of a deserted house), situated at *Khwar Ghara* of village Kala Swabi. On 18.06.2010, his son did not return home, therefore, he (complainant) along with his relatives started his search near "Khawar Ghra". During search of "Khandar" of appellant Ibrarullah, they saw fresh dumping of mud in the courtyard of appellant's Khandar. On removal of the same they noticed legs and clothes of his deceased son so they informed the police who reached the spot and recovered the dead body of the deceased who had been murdered with firearm and his dead body was put in a pigeon well. He charged the appellant, his father Rasheed and one Raef Khan (acquitted co-accused), for commission of the offence. His report was recorded in the shape of Murasila Exh.PA/1 by Rahat Khan SI (now dead) on the basis of which FIR Exh.PA was registered. He prepared injury sheet and inquest report Exh.PM/1 and Exh.PM/2 of the deceased

and shifted his dead body to the mortuary, where Dr. Bakht Jamal (PW.2) conducted autopsy and observed firearm entry wound 1x1 inch on right side of forehead of the deceased with corresponding exist on the back of his skull as well as tears in his anus. According to his opinion the death of the deceased was instantaneous due to firearm injury to his skull and brain. In this regard he has furnished autopsy report which is Exh.P.M.

3. Mir Fazalullah Khan SI (PW.8) conducted investigation in the case. He proceeded to the spot and prepared site plan Exh.PB at the instance of complainant, recorded statements of PWs, took into possession the last worn blood and semen stained garments of the deceased Exh.P.1 and Exh.P.2 vide recovery memo Exh.PW.7/1. Vide recovery memo Exh.PW.7/2 he took into possession a phial containing anus swab of the deceased sent by the doctor. He sent the blood and semen stained garments of the deceased and the phial containing anus swab of the deceased to the FSL. He arrested the appellant and recovered a 30 bore crime pistol from his possession vide recovery memo Exh.PW.7/4. He produced the appellant before the learned Illaqa Judicial Magistrate for his physical remand and for recording his confessional statement, which was accordingly, recorded.

4. After completion of investigation, challan was submitted against the appellant as well as co-accused

Rasheed and Raef Khan before the learned trial Court, where they were formally charge sheeted, to which they pleaded not guilty and claimed trial. The prosecution evidence was being recorded when on 07.06.2011 the appellant submitted an application for suspension of the proceedings on the ground that he is suffering from a disease of Schizophrenia. He was referred to Standing Medical Board by the learned trial Court. As per opinion of the Standing Medical Board, the appellant being unfit to understand the proceedings, his trial was suspended vide order dated 29.10.2011. Trial of co-accused Rasheed and Raef Khan was concluded, resultantly, they were convicted and sentenced under sections 201/202 PPC vide judgment dated 08.12.2012, against which they preferred **Cr.A. No.09-P/2013** before this Court, which was allowed and they were acquitted vide judgment dated 19.06.2015.

5. On recovery of the appellant from illness, his trial was restored vide order dated 08.05.2014 and on conclusion thereof, the learned trial Court, after hearing both the sides, convicted and sentenced him vide judgment dated 23.12.2015, hence, this appeal.

6. Arguments of learned counsel for the parties heard and record perused.

7. No doubt, complainant Fazal Wahab (PW.5) or any other person has witnessed this untoward incident, therefore, he could not furnish ocular account, however, it

cannot be controverted that the dead body of the deceased child has been recovered from a “pigeon well” inside the bounded premises, in exclusive possession of the appellant. Besides, another important substantive piece of evidence with the prosecution is the confessional statement of the appellant which has been believed and relied upon by the learned trial Court while recording conviction of the appellant. Though, the appellant has retracted his confessional statement during trial, but before dilating upon the evidentiary value of his retracted confession and its voluntariness or otherwise, for the sake of convenience, we deem it appropriate to produce English translation of confessional statement of the appellant below:-

“Children used to play cricket in his field. On the day of occurrence at evening time the children after finishing cricket, left for home whereas I took Abduzar deceased to my Khandar (remains of a house). I gave him money to bring watermelon, which he did. After eating watermelon, I committed sodomy upon Abuzar and thereafter committed his murder with my pistol. I threw his dead body in the “pigeon well”. I called labour Raeef and we both put mud on the dead body of the deceased and concealed the same under the mud. I then went to my home. I have committed the offence on a motive that Haji Muhammad Nawab (grandfather) of the deceased used to blame/disgrace my mother that he has committed Zina with her on payment of Rs.2000/-.”

8. It is settled law that retracted confession, if corroborated by independent evidence of reliable nature, can be made basis for conviction on a capital charge, but it must be subject to thorough judicial scrutiny. On the aforesaid principle we would dilate upon the confessional statement of the appellant. Fazal Wahab and Aman Ullah (PW.5) and (PW.6), respectively, in their statements have deposed that during search of the deceased they notice fresh dumping of mud in the Kandhar of the appellant and on removing some mud, they noticed, clothes and legs of the deceased in a "Pigeon Well, so they informed the police, who reached the spot and helped them in bringing out the dead body of the deceased from the pigeon well. Perusal of the confessional statement of the appellant reveals that he has disclosed therein the same fact as stated by the PWs that after committing sodomy upon the deceased and then committing his murder with pistol, threw his dead body in the pigeon well and then put mud over the same. In this view of the matter, the confessional statement of appellant finds corroboration from the testimony of PWs Fazal Wahab and Aman Ullah as well as author of the Murasila Rahat Khan SI (now dead). Dr. Bakht Jamal, while appearing as PW.2 deposed that he observed one firearm entry wound measuring 1x1 inch on right side forehead of the deceased with corresponding exit on his back skull and tears in his anus. He took anus swab

of the deceased and handed over to Fazalullah Khan SI (PW.8)/Investigating Officer, who took the same into possession vide recovery memo Exh.PW.7/2. The blood and semen stained garments as well as the anus swab were sent to the FSL for analysis. According to FSL report, the semen on the shalwar/trouser of the deceased child was found to be of human. The Serologist report about the bloodstained garments of the deceased is also in positive. The medical evidence as well as the positive FSL reports support and corroborate the confessional statement of the appellant. Similarly, a 30 bore crime pistol has also been recovered from the appellant at the time of his arrest. In view of the above, we are firm in our view to hold that circumstantial pieces of evidence coupled with medical evidence fully corroborate and support the confessional statement of the appellant.

9. The next point for determination is whether the confessional statement of the appellant was voluntary or otherwise. It is trite law that for accepting a confession, two essential requirements must be fulfilled i.e. the confession was made voluntarily, it was based on true account of facts, leading to the crime and the same was proved at the trial. It appears from record that appellant was arrested on 22.06.2010 and after remaining in police custody for four days, he recorded his confessional statement on 27.06.2010. An iota of evidence is not

available on record to remotely show that the appellant was subjected to any torture, inducement or promise. Mr. Sher Aziz Khan, the learned Judicial Magistrate, who has recorded confessional statement of the appellant while appearing as PW.11 deposed that after fulfilling all legal formalities within the meaning of section 364 Cr.P.C., he recorded confessional statement of the appellant; that 30 minutes time was given to the appellant to think over his confession. Before recording confessional statement of the appellant, he has answered questions No.4 and 7 of questionnaire, extract of which are reproduced below:-

Q.4. Have you been subjected to any torture, threat or force or given any inducement for making the confession?

Ans. No.

Q7. Are you making the confession voluntarily?

Ans. Yes.

Replies of the appellant to the aforesaid questions leave no room for any doubt that his confessional statement is involuntarily or the result of torture, force, inducement or promise. Sher Aziz Judicial Magistrate (PW.11), has been subjected to lengthy and taxing cross-examination by the defence but nothing could be extracted from his mouth to prove that the confessional statement of the appellant was the result of force, torture, promise or inducement. The learned Magistrate while recording confessional statement of the appellant has taken all the precautions and had faithfully complied with all the formalities as envisaged

under section 364 Cr.P.C. It is evident from record that during the days of occurrence as well as arrest of the appellant, his father was an employee of Police Department, posted as Assistant Sub-Inspector and the appellant was also a Police Official. In such a situation, a delay of four days in recording confessional statement of the appellant would not render it involuntary or result of torture, particularly, when it is corroborated by other strong circumstances of the case. Guidance derived from case titled, **“Khan Muhammad and others vs the State” (1999 SCMR 1818)**, relevant part of which is reproduced below:-

“It was further contended that the appellants were arrested on 09.08.1989 and their custody having been remanded to the police, their confession was recorded on 20.08.1989 and therefore, the same cannot be termed voluntary. We have considered this aspect of the case and we are of the view that this issue cannot be resolved in its generality, but each case has to be considered on its own facts. **Delay in recording the confession by itself cannot** render the confession nugatory if otherwise it is proved on record that the same was made voluntarily. We are fortified in this view by a Judgment of this Court reported as Muhammad Ismail and another vs State 1995 SCMR 1615”.
(emphasis supplied).

In the judgment (supra) it has been further held by the Hon’ble Supreme Court that:-

“In law **conviction** on the basis of retracted judicial confessional **alone** is sustainable

provided the confession has been recorded in accordance with law. However, by way of abundant precaution, if we seek corroboration to the confession, the same is available on record of the case”. (**emphasis supplied**).

10. The prosecution’s case rests on the information furnished by Fazal Wahab (PW.5) to the effect that his minor son aged about 11/12 years was subjected to sodomy by the appellant for quenching his lust and then committed his murder with firearm, followed by putting his dead body in a ditch, meant for preserving water for pigeons. The following circumstantial evidence, fully corroborate version of PW Fazal Wahab:-

- i. The corpse of deceased child was recovered from a pigeon well, situated inside the abandoned house (Kandhar) of the appellant.
- ii. The unnatural death of minor body instantaneously accrued due to firearm injury to his skull and brain which has been proved to be true by Dr. Bakht Jamal Senior Medical Officer, Bacha Khan Medical Complex Mardan (PW.2), who conducted autopsy on the dead body of deceased child Abuzar.
- iii. Positive report of swab extracted by the doctor from anus of the deceased child and his last worn semen and bloodstained clothes.
- iv. Recovery of pistol as a crime weapon from the appellant at the time of his arrest.
- v. Proved and voluntary confessional statement of the appellant unerringly pointing

towards the other circumstantial evidence collected by prosecution.

vi. The totality of the circumstances appearing on the record of the case disclosed that complainant has no motive to falsely involve the appellant, who resides in his neighborhood by letting off the real culprit of his minor son.

11. During arguments, though learned counsel for the appellant referred to certain discrepancies in the prosecution case to the effect that there is no proof about ownership of “Kandhar”; that no independent source has been disclosed by the complainant about getting information qua dead body of his deceased son inside the Kandhar; that there is no investigation regarding matching of semen found on the last worn clothes of the deceased and semen of appellant. In a case where a child of 11/12 years has been raped and murdered and incriminating recoveries have been shown effected from the appellant, the prosecution version cannot be discarded on mere discrepancies. It is settled law that where prosecution case is fully established by the testimony of witness, having no motive for false implication of accused; fully corroborated by medical evidence, recoveries of incriminating articles and positive report of Forensic Science Laboratory, then mere failure or omission on the part of the Investigation Officer during investigation of the case, could not be treated as sufficient to render the prosecution case doubtful or unworthy of belief. In case in hand, the circumstances

proved from themselves into a complete chain unerringly pointing to the guilt of the appellant. We have no hesitation to add here that there is mark difference between “discrepancy” and “contradiction”. No doubt, serious contradictions in the statement of a witness are fatal in a criminal case, but any discrepancy on the part of Investigating Officer, either willful or inadvertent, will not make the prosecution case doubtful.

12. As regards contention of learned counsel for the appellant that since the appellant is a Schizophrenia patient, therefore, his case is covered by section 84 PPC, according to which nothing is an offence which is done by a person who, at the time of doing it by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary, suffice it to say that an iota of evidence has not been produced by the appellant in this regard to prove that he was suffering from the said disease at the time of occurrence. After arrest he was produced twice before the learned Judicial Magistrate for physical remand but he never disclosed about his alleged illness. The appellant has also not disclosed about the alleged illness before the Medical Officer at the time of his post and pre medical examination during remand. Similarly, at the time of recording his confessional statement he has not disclosed the alleged illness before the Judicial Magistrate. No

doubt, trial of the appellant had been suspended on the opinion/report of the Standing Medical board due to his illness, however, on his recovery from illness, the trial was restored. No medical record showing previous treatment of the appellant before the occurrence has been brought/exhibited to prove his alleged illness during the days of occurrence. The appellant might have ill inside jail but on treatment he has been recovered. In this view of the matter, the plea of illness of the appellant would not advance his case.

13. For what has been discussed above, confessional statement of the appellant having been recorded in accordance with law and found voluntary, truthful, and corroborated by strong circumstantial evidence as well as supported by the medical evidence, has rightly been believed and relied by the learned trial Court for recording his conviction and sentence to which no exception can be taken.

14. Resultantly, the instant appeal being meritless is hereby dismissed.

Announced:
15.10.2019

JUDGE

JUDGE