

**JUDGMENT SHEET**

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

**Cr.A. No.286-M/2017**

**JUDGMENT**

Date of hearing: **07.03.2018**

**Appellant:- (Gul Majid) by Muhammad Ikram Khan,  
Advocate.**

**Respondent:- (Akhtar Mohammad & the State) by  
Mr. Rahim Shah, Astt: Advocate General.**

**MOHAMMAD IBRAHIM KHAN, J.-** Initially the

law of the land was run into motion when Assistant

Sub Inspector of Police Station Barawal on getting clue

that a dead body is lying in Barawal hospital proceeded

to the said hospital along with police other 'Nafri'.

When the complainant Akhtar Muhammad in the

company of corpse of his deceased brother Shafiullah

reported him the matter that today on 23.5.2015 at

16:30 hours the goats of Gul Majid

(accused/Appellant) had entered in their maize crops

situated at the vicinity of Luey Khwar Dogal and were

damaging it. When his brother Shafiullah tried to

restrain these goats from damaging maize crops upon

which an altercation took place between Shafiullah and Gul Majid. All of the sudden, out of both accused Gul Majid and Ihsanullah, accused Gul Majid started firing upon his brother. Due to which he was hit on his back and buttock, who later on succumbed to the injuries on the way to hospital. In addition to the complainant the occurrence was stated to be witnessed by his brothers Shakirullah, Akhtar Munir and Wazir. The motive was stated to be a dispute over damaging of maize crops by goats of the accused-party. On the basis of such assertions the '*Murasila*' was drafted followed by lodging of the First Information Report registered against the accused/Appellant Gul Majid and absconding co-accused Ihsanullah.

2. The charge framed by the learned Additional Sessions Judge/Izafi Zila Qazi Dir Upper on 19.8.2015 would divulge that on 23.5.2015 at 16:30 hours at a place known as Luey Khwar Dogal Shahikot falling within the criminal jurisdiction of PS Shahikot the accused/Appellant Gul Majid along with other

absconding co-accused Ihsanullah in furtherance of their common intention duly armed committed *Qatl-e-Amad* of Shafiullah, brother of the complainant by firing at him. Due to which he was hit and got seriously injured, thereby later on succumbed to the injury on the way to hospital. Hence, committed an offence within the meaning of section 302/34 PPC.

3. When the accused/Appellant did not plead his guilt, he claimed trial. Thus, in order to prove the assertions against the accused facing trial, the prosecution examined Ihman-ud-Din DFC as SW, Gul Fazil Khan SHO as PW-1, Suliman Constable as PW-2, Shahab-ud-Din as PW-3, Wahidullah Armorer as PW-4, Dr. Rahatullah as PW-5 who has conducted postmortem of the dead body of the deceased Shafiullah, Naseer Khan Constable as PW-6, Wali Muhammad Khan Senior Civil Judge Dir Bala as PW-7 who recorded confessional statement of the accused Gul Majid, Muhammad Khan as PW-8,

8-119-

Intiaz Ahmad ASI as PW-9 and Bacha Khan Retired SI as PW-10.

4. After the closure of prosecution evidence, accused/Appellant was examined under section 342 of the Code of Criminal Procedure, he negated his involvement in the present episode of murder of deceased Shafiullah and posed innocence.

5. At the end, in Sessions Case No. 91/2 of the year 2015, the learned Additional Sessions Judge-II/Izafi Zila Qazi Dir Upper came up with its judgment dated 14.11.2017, whereby this accused-Appellant Gul Majid enmeshed in case FIR No. 55 dated 23.5.2015 charged under sections 302,34 PPC registered at Police Station Shahikot was convicted and sentenced in the following manner:-

8-1401

*U/S 302 (b) PPC to life imprisonment and fine of Rs. 50,000/- or in default thereof shall further suffer imprisonment of six months. The accused/Appellant shall also liable to pay compensation of Rs. 100,000/- payable to the Legal Heirs of the deceased or in default thereof shall further undergo 6 months. However,*

*benefit of Section 382-B Cr.P.C was extended to him.*

6. Here is this Criminal Appeal bearing No. 286-M/2017 preferred by the convict-Appellant Gul Majid within the meaning of section 410 Cr.P.C read with Para 10 (8) of NAR 2009 looking forward for acceptance of prayer under the grounds enumerated in the appeal and for his liberty with the following prayer:-

*“In circumstances mentioned above, it is, therefore, most graciously prayed that on acceptance of this appeal, order/judgment of the learned trial Court dated 14.11.2017 may kindly be set aside and appellant may please be acquitted of the charge leveled against him.”*

7. Having heard arguments of learned counsel for the accused/Appellant and learned Asstt: Advocate General appearing on behalf of the State, record with their valuable assistance gone through. While as per report of the DFC PS Shahikot dated 27.01.2018 the complainant Akhtar Muhammad being involved in case FIR No. 3 dated 26.01.2015 charged

under section 14 Foreign Act (F.A) had been deported to the neighboring country Afghanistan being an Afghan National in the light of order rendered by the learned Senior Civil Judge Dir Bala.

8. It is an admitted fact surfacing on the record that the so called eyewitnesses including the complainant being Afghan Nationals have been deported/migrated to Afghanistan, therefore, they were abandoned by the prosecution, so, there is no ocular version in field in respect of guilt of the accused/Appellant Gul Majid. In such circumstances, the only incriminating evidence in the account of accused/Appellant is his retracted judicial confession which was solely relied upon by the learned trial Court while awarding major punishment of life imprisonment to the accused/Appellant. In context of the present case, the accused/Appellant was arrested on 24.5.2015 whereas his confessional statement was recorded on 27.5.2015 i.e. after 2 days of his arrest, meaning thereby, that the accused/Appellant remained in police

custody for 2 days, so, the possibility of obtaining of confession through means of coercion, inducement or torture cannot be ruled out.

In such like situation, it has been observed in many Judicial Pronouncements of the Hon'ble Supreme Court of Pakistan like 2017 SCMR 898 "Muhammad Ismail and others vs the State", wherein the relevant citation (b) speaks of:-

*Reappraisal of evidence. Judicial confession before Magistrate, retraction of---Effect. Judicial confession allegedly made by accused-persons/appellants before a Magistrate under S. 164, Cr.P.C had been retracted 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 accused persons' conviction. Convictions and death sentences awarded to accused persons were set aside in circumstances and they were acquitted of the charge of murder. Appeal was allowed accordingly.*

162  
Even otherwise, there is no cavil with this legal proposition that while evaluating confessional statement the main object of law is to ensure its voluntariness and truthfulness. It would be a right place

to mention here that a greater duty/responsibility has been casted upon the Magistrate recording confession to be satisfied that such a confession is voluntarily made and to that end he must make an inquiry before recording the confession.

No doubt, conviction can be based on the retracted confession alone but it is found voluntary, true and confidence inspiring. It has been held by the Honourable Supreme Court of Pakistan in case law cited as "Bahadur Khan vs. The State" (PLD 1995 S C 336) as under:-

*"Retracted confession has to be accepted only if it is corroborated by clear, cogent and independent evidence. Court is called upon to act upon a retracted confession to enquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true".*



In view of the wisdom contained in the esteem verdict of the Hon'ble Supreme Court of Pakistan reported as 2005 SCMR 515 "Asif Mahmood vs the State", wherein it has been opined:-



(a) Criminal Procedure Code (V of 1898)---

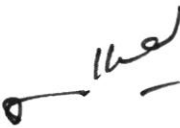
---S. 364---Penal Code (XLV of 1860),  
Ss.302, 392 & 411--Appreciation of  
evidence---Confession, when reliable---  
Principles--Confessional statement for  
being relied upon should not only be true,  
voluntary and believable but should be  
without fear, favour or any inducement.

The confessional statement would lose its  
evidentiary value and it cannot be made sole reason for  
conviction. Reliance has been placed on 2017 P Cr.L J  
479 "Noor Muhammad & others vs the State &  
others":

(d) Penal Code (XLV of 1860)---

---Ss. 302 & 34---Qatl-i-amd, common  
intention---Appreciation of evidence---  
Benefit of doubt---Retracted confession---  
Accused was charged for the murder of  
deceased---Accused made confession  
before Judicial Magistrate but later on  
retracted---Retracted confession of the  
accused was not corroborated by any  
evidence---Circumstances suggested that  
confessional statement retracted by the  
accused person, could not at all be called  
as voluntary judicial confession in the eye  
of law and the same had no legal effect---  
Conviction and sentence recorded by Trial  
Court were set aside in circumstances.

In such scenario, when the accused/Appellant admittedly remained in police custody for 2 days, so, the confession might have been procured from him by the police through coercion, inducement or torture. Moreover, from bare perusal of the questionnaire it transpires that the accused/Appellant was given 30 minutes time to inculcate over the matter before recording of confession from 9:00 A.M to 9:30 A.M while later on in the certificate it has been mentioned by the learned Senior Civil Judge Dir Bala (PW-7) that upon sweet will of the accused his confession was recorded on 9:25 A.M, meaning thereby, that even the mandatory period of 30 minutes have not been given as whole to the accused before recording of confession. Besides during cross-examination PW-7 Wali Muhammad Khan Senior Civil Judge Dir Bala admitted that at the time of recording of confessional statement no relatives of the accused were present with him and in respect of question No. 11 which is with regard to



consultation about recording of confession the accused did not give any answer. He further admitted that in questionnaire there is no mentioning of the accused being consulted by his counsel. In order to inculcate the true situation which arose at the relevant time of recording of confession question No. 11 and its answer asked from the accused are reproduced as under:-

11- سوال:- کیا تم کسی سے مشورہ کرنا چاہتے ہو؟

جواب: میرا کوئی نہیں ہے۔

Just from bare answer of this question No.

11 it is abundantly clear that no relatives of the accused were present with him, therefore, he deposed in a very lucid words "that none is there to help him and he is all alone". Hence, such confession deserves little consideration and is discarded accordingly.

9. Moreso, conviction of an accused cannot be based solely on confessional statement, unless the prosecution is able to substantiate its charge against the accused through trustworthy and confidence inspiring testimony of the witnesses, which standard of evidence could not be seen here in this case. As the

best piece of ocular evidence available with the prosecution has been abandoned for variety of reasons, therefore, in a sense, it is an unseen and un-witnessed crime. Reliance can be placed on 2017 YLR 436

**“Talib Hussain & another vs the State & another”:**

*(b) Criminal trial---*

*---Ocular testimony, disbelieved---Effect---*

*When ocular testimony was disbelieved then recovery as well as medical evidence were of no help to prosecution.*

*(c) Criminal trial---*

*---Onus of establishing case---Prosecution had to establish its own case independently instead of depending upon weaknesses of defence.*

*(e) Penal Code (XLV of 1860)---*

*---S.302---Criminal Procedure Code (V of 1898), S.342---Qatl-i-amd---Admission of guilt by accused---Prosecution failing to prove case---Effect---Where prosecution had failed to prove its case against accused beyond reasonable doubt, accused might be acquitted even if he had taken plea and admitted killing the deceased.*

8-1120

10. Whereas the factum of benefit of doubt is very much lucid in its entirety that if there exist a reasonable ground to believe that the

accused/Appellant has not participated in the commission of alleged crime in the mode and manner as advanced by the prosecution then there is no need of numbers of circumstances to prove the innocence of accused even a single circumstance creating reasonable doubt is sufficient for the acquittal of the accused. In this regard guidance is derived from the judgment cited as 2015 P Cr.LJ 554 (Peshawar) “ Sahibzada vs the State and 2 others”.

11. In the above prevailing situation, we after reappraisal of entire evidence are of the firm view that the prosecution case against the accused/ Appellant has not been proved beyond reasonable doubt and the judgment of learned trial Court is based on wrong appreciation of evidence and the law on the subject. Hence, we accept this appeal and set-aside the impugned judgment of conviction rendered by the learned Trial Court. Ergo, the accused/Appellant is acquitted of the charges leveled against him. He is

✓

in custody and be set free if not required in any other case.

12. These are the reasons of our short order announced in open Court on even date.

Announced.  
Dt: 07.03.2018

  
JUDGE

  
JUDGE

Offu  
22/03/18  
w/R