

*Judgment Sheet*

IN THE PESHAWAR HIGH COURT,  
ABBOTTABAD BENCH.

*JUDICIAL DEPARTMENT*

**Cr.Appeal.No.122-A/2013.**

**JUDGMENT**

*Date of Hearing* *20.02.2018*

*Appellants (Jameel & another) by* *M/S Naseem Khan Swati  
& Fazal e Haq Abbasi,  
Advocates.*

*Respondent (State) by* *Raja Muhammad Zubair  
AAG.*

*Complainant by* *Mr. Ghulam Mustafa Khan  
Swati, Advocate.*

**SYED ARSHAD ALI, J:-**Appellants-convicts Jameel and Aurangzeb sons of Jalal-ud-Din have filed instant appeal against the conviction and sentence passed against them by the learned Additional Sessions Judge, Balakot Camp Mansehra, vide judgment dated 12.07.2013 in case FIR No. 384 dated 22.06.2010 under Section 302/148/149 PPC of Police Station Shinkiari, District Mansehra, whereby the appellants-convicts were convicted under Section 302-B PPC and sentenced to life imprisonment on three counts

and to pay compensation amounting to Rs. 500,000/- under Section 544-A Cr.P.C. to the legal heirs of all the three deceased, in default whereof they have to further undergo SI for six months. Benefit of Section 382-B Cr.P.C has been extended to them.

2. Khan Asghar ASI PW-11, when informed about the present incident, reached at the spot at about 10:30 AM on 22.06.2010, where he received information from Muhammad Riaz S/o GoharRehman complainant to the effect that while he was present at his house, his father GoharRehman, brother Haq Nawaz and mother Mehr-un-Nisa had gone to *Racharri* for reaping grass. He was informed by Shoukat son of Abdul Qayyum that Aurangzeb and others have killed his parents and brother. On such information, he rushed to the spot along with other people, where he found that his father GoharRehman, mother Mehr-un-Nisa and brother Haq Nawaz were lying dead. There, his uncle Muhammad Afzal (PW-14) was also present who disclosed that at about 09:30 AM, accused Aurangzeb, Jameel, Abdur Rasheed, Fazal-ur-Rehman, Abdul Qayyum sons of Jalal-ud-Din and

Jalal-ud-Din son of Painda came at the spot and started quarreling with his parents. During that quarrel, Jalal-ud-Din and Abdul Qayyum caught hold of his brother and Aurangzeb accused inflicted axe blow on his head and killed him. Similarly, Abdur Rasheed and Jameel inflicted knife blows at the abdomen of his father GoharRehman who succumbed to the injuries. Jalal-ud-Din and Abdul Qayyum caught hold of his mother Mehr-un-Nisa and Jameel stabbed her with the knife due to which she also succumbed to the injuries. It was also reported that the occurrence was witnessed by Muhammad Afzal and Fazal-ur-Rehman. The said report was incorporated in the shape of Murasila Ex PW-11/1 on the basis of which FIR Ex PA was registered.

3. Accordingly, Khan AsgharASI prepared injury sheet of deceased Haq Nawaz (Ex PW-11/2), injury sheet of deceased GoharRehman(Ex PW-1/3) and injury sheet of Mst. Mehr-un-NisaEx(PW-11/4). He also prepared their inquest reports as Ex PW-11/5 to Ex PW-11/7 and handed over the dead bodies to Muhammad Javed(PW-3) for postmortem examination. Murasila was also sent through the same

constable Muhammad Javed for the registration of the case.

4. Dead bodies of male deceased were examined by Dr. Tariq Khan, Medical Officer, RHCSinkiari(PW-1). According to his report Ex PW-1/1, he found the following injuries on the body of deceased GoharRehman:-

- “1. At the right subcostal region in scapular line 3” x 5” long and deep to bone lower ribs fragmented.*
- 2. At mid axillary line 5” long gaped with underline bone fragmented. Liver damaged.*
- 3. Left occipital region, bone seen but not fractured.”*

While according to Postmortem report of deceased Haq Nawaz (Ex PW-1/3), he found following injuries:-

- 1. “First stab wound in mid scapula region 1” and sharp and deep into the thorax.*
- 2. Stab wound in the back in the scapular line 1” long sharp and deep into the thorax.*
- 3. 5” x 6” lacerated and gaped wound in the right subcostal region with under line bones, liver are damaged.”*

The dead body of deceased Mst. Mehr-un-Nisa was examined by Dr. Nargis Khan (PW-12) who found the following injuries on her body:-

- “1. Stab wound on left breast upper inner quadrant 1 cm deep and 3 cm in length.*
- 2. Stab wound 6/7 cm in length 2 cm in breadth (width) 1 to 1 ½ cm in depth in left flank region four fingers above the anterior superior iliacspined.*
- 3. Superficial peeled off skin about 3 cm on the back left scapular region.”*

5. The investigation of the case was entrusted to Fazal-ur-Rehman SI (PW-15) on the same day. Accordingly, he visited the spot along with Muhammad Farid IHC and constable Hamayun who were accompanied by Afzal Shah and Fazal-ur-Rehman. On pointation of eyewitnesses, he prepared site plan (Ex PW-15/1) and recovered blood stained earth from the places where the deceased were lying dead. The blood stained earth recovered from the places of each deceased was sealed in parcels Ex P-1, P-2 and P-3. He also recorded statements of the marginal witnesses of the recovery memos and also recovered blood stained garments of deceased

GoharRehman, Mehr-un-Nisa and Haq Nawaz which were sealed in parcels Ex P-6 to Ex P-8. The said parcels were sent to Serologist for examination and report. On 24.06.2010, accused Aurangzeb, Jameel, Abdur Rasheed and Jalal-ud-Din were arrested by the SHO from *Toll Gali, Dadar*, who were then formally arrested by the investigating officer and he issued their card of arrest Ex PW-15/2. Initially proceedings under Section 204 Cr.P.C. were initiated against accused Abdul Qayyum and Fazal-ur-Rehman, who were avoiding their arrested. During the investigation, weapon of offence i.e. knife (Churri) Ex P-1 was recovered at the pointation of Jameel accused from his house which was kept on a cot under folded quilt which was sealed into parcel No. 7 through recovery memo Ex PW-7/1. Similarly, on the pointation of Aurangzeb accused, from his house, a small size axe Ex P-9 was recovered vide recovery memo. Whereas Abdur Rasheed accused lead the investigating officer to his house where from inside a nook, a large knife (Churri) blood stained was recovered. All the accused were produced before the Judicial Magistrate for their custody. During

investigation, accused Jameel and Aurangzeb confessed their guilt before the Judicial Magistrate on 28.06.2010 Ex PW-6/2 and Ex PW-6/5 respectively. Accused Abdul Qayyum was arrested on 30.06.2010 when his pre-arrest bail was dismissed while accused FazalurRehman was arrested on 20.06.2010 on dismissal of his BBA. The weapons of offence were also sent to the Serologist for examination and report. According to the report of serologist Ex PW-15/14, all the articles contained human blood. After completion of investigation, he submitted complete challan for trial of the accused.

**6.** After supplying copies to the accused in compliance of Section 265-C Cr.P.C. the learned trial Court framed charge against the accused to which they pleaded not guilty and claimed trial. The prosecution was thus asked to produce its evidence. In order to prove its case against the accused, prosecution produced and examined 15 PWs and closed its evidence. The learned trial Court recorded statements of the accused under Section 342 Cr.P.C. After hearing arguments of learned counsel for the parties, the learned trial Court convicted the

appellants-convicts under Section 302-B PPC and sentenced them to undergo life imprisonment on three counts. They were further ordered to pay compensation of Rs. 500,000/- to the legal heirs of each deceased under Section 544-A Cr.P.C. and in default to further undergo SI for six months. Benefit of Section 382-B Cr.P.C. was extended to them. However, co-accused Jalal-ud-Din, Abdul Rasheed, Abdul Qayyum and Fazal-ur-Rehman were acquitted of the charge.

7. Arguments heard and record perused.

8. The prosecution case from the very inception rests on the oral testimony of complainant, statement of PW Shoukat S/o Abdul Qayum who informed the complainant about the occurrence and the eyewitnesses Muhammad Afzal and Fazal-ur-Rehman who have allegedly seen the occurrence; the confession of appellants-convicts Jameel and Aurangzeb and recovery of crime weapons as well as other incriminating materials.

9. We will first consider the oral evidence of the prosecution. Complainant in his report has stated that at the time of occurrence, he was present



at his home and the deceased had gone for reaping grass to the place of occurrence which is at a distance coverable within 15/20 minutes from his house. He was informed by Shoukat S/o Abdul Qayyum regarding the occurrence. As such, the complainant is not an eyewitness of the occurrence whereas Shoukat and Fazal-ur-Rehman were abandoned by the prosecution. Therefore, the prosecution was only left with the testimony of PW-14 Muhammad Afzal. While appearing as PW-14, he narrated the same story, as mentioned in the FIR. During his cross examination, he deposed that he was at a distance 25/30 yards from the place of occurrence, however, he reached the spot within 4/5 minutes. He also happens to be the brother of deceased GoharRehman and despite being at a close proximity to the site of occurrence, neither he nor the other witness made any effort to rescue the deceased, even though they had noticed that the accused while armed with knives and axe were quarreling with them. Thus, his presence at the crime spot due to his unnatural conduct has become highly doubtful. In a similar situation, the Honourable Supreme Court of Pakistan in case of

**“Pathan Versus The State (2015 SCMR 315)”**,

while interpreting Article 129 of the Qanun-e-Shahadat Order, has held as follows:-

*“Keeping in view the provision of Article 129 of the Qanun-e-Shahadat Order, which is to the following effect:--*

*"S.129. Court may presume existence of certain facts.---The Court may presume the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case--"*

*The presence of witnesses on the crime spot due to their unnatural conduct has become highly doubtful, therefore, no explicit reliance can be placed on their testimony. They had only given photogenic / photographic narration of the occurrence but did nothing nor took a single step to rescue the deceased. The causing of that much of stab wounds on the deceased loudly speaks that if these three witnesses were present on the spot, being close*

*blood relatives including the son, they would have definitely intervened, preventing the accused from causing further damage to the deceased rather strong presumption operates that the deceased was done to death in a merciless manner by the culprit when he was at the mercy of the latter and no one was there for his rescue. In similar circumstances, the evidence of such eye-witnesses was disbelieved by this Court in the case of Masood Ahmed and Muhammad Ashraf v. The State (1994 SCMR 6).*

*It was vehemently argued by the learned Advocate Supreme Court for the appellant that on the day of occurrence it was Sunday and being a Gazetted holiday, the appellant was not at all required to attend to his official duty at the school to which he was attached and for that reason the giving company to him by his son and by sheer chance the joining of the other two P.Ws. with them renders the testimony of the P.Ws. absolutely doubtful.”*

Probably it was due to the unnatural conduct of the prosecution witnesses which compelled the prosecution to abandon PWFazal-ur-Rehman and

Shoukat informer. Therefore, in the circumstances stated above the abandoning of the above witness will obviously lead to adverse inference in terms of Article 129-G of the Qanun-e-Shahadate Order, 1984. It is settled law that if any party withholds the best piece of evidence, then it can fairly be presumed that such party has some sinister motive behind it. Besides, it will create impression that, had such witness been produced into witness box, he might have not supported the prosecution case. “*Lal Khan Vs The State (2006 SCMR 1846), Muhammad Rafiq and others Vs the State (2010 SCMR 385)*”. Therefore, the learned trial Court has rightly disbelieved his testimony and the co-accused were acquitted against which the prosecution has not filed any appeal against acquittal.

**10.** Now moving on to the confessional statement of the accused and its evidentiary value. The only piece of evidence which prevailed before the learned trial Court to convict the appellants was their confessional statement before Judicial Magistrate and the recovery of crime weapons. It is settled law that confession must not only be

voluntary but it must also be true. In order to ascertain the truthfulness of confession, it must be visualized and examined in juxtaposition with the other evidence of the prosecution. For such comparison we would like to reproduce the confessional statement of both the accused:-

بیان جمیل ولد جلال دین ساکن بڑی بانڈی زیر دفعہ 164/364  
بیان کیا کہ وقوعہ سے سات روز قبل فیاض ولد گوہر رحمان نے میری بہن مسماء گل نساء کو اغوا کیا تھا۔ ہم لوگوں نے فیاض کے خاندان والوں کے ساتھ جرگے کئے کہ ہمارا معاملہ صاف کرو مگر وہ الٹا ہمیں طعنے دیتے تھے کہ تم لوگ بے غیرت ہو اور دھمکیاں دیتے تھے کہ جو کر سکتے ہو کرو۔ بروز وقوعہ میں اور میرا بھائی اور نگزیب جرگہ کی صورت میں فیاض کے گھر گئے مگر اس کے والد اور گھر والوں نے ہماری بے عزتی کی اسلئے ہم دونوں برادران نے فیاض کے والد گوہر رحمان، والدہ مہر النساء اور بھائی حق نواز کو چھریوں کے وار کر کے مار دیا۔ ہم نے اپنی بے عزتی کا بدلہ لینے کیلئے ان کو قتل کیا ہے۔

بیان اور نگزیب ولد جلال دین ساکن بڑی بانڈی زیر دفعہ 164/364  
ض ف

بیان کیا وقوعہ سے سات روز قبل مقتول گوہر رحمان کے بیٹے فیاض ہماری بہن کو اٹھا کر لے گیا تھا جس کی درخواست ہم نے تھانہ شنکیاری میں دی تھی۔ سات دن تک ہم نے مذکورہ فیاض کے خاندان والوں پر جرگے کیے کہ ہمارے ساتھ فیصلہ کرو مگر وہ الٹا ہمیں طعنے دیتے تھے اور دھمکیاں دیتے تھے کہ جو کر سکتے ہو کرو۔ بروز وقوعہ میں اور میرا بھائی جمیل مقتولین کے گھر جرگہ کی صورت میں گئے مگر انہوں نے ہماری بے عزتی کی اسلئے ہم دونوں برادران نے فیاض کے والد گوہر رحمان، والدہ مہر النساء اور بھائی حق نواز کو چھریوں کے وار کر کے مار دیا۔ ہر تین مقتولین اور فیاض نے ہماری بہن اغوا کر کے اور پھر ہمیں طعنے دے کر بے عزتی کی ہے اور ہم نے اپنی بے عزتی کا بدلہ لینے کی خاطر ان کو قتل کیا ہے۔ ہم دونوں کے علاوہ موقع واردات پر اور کوئی موجود نہیں تھا۔ چھری بھی پولیس نے برآمد کر لی ہے۔

**12.** Both the confessional statements, as evident from the certificates appended to the same,

were recorded at the same time and day. Contents of the confession of Aurangzeb are verbatim copy of the confession of Jameel except the last three lines, which is an addition in the confessional statement of Aurangzeb. In their confessional statement, the confessors have not given time of occurrence, whereas the venue of occurrence discerns from the said confessions is the house of the complainant. Against that the prosecution case is that the occurrence has taken place at “*Racharri*” which is situated at a considerable distance from the house of the complainant and the deceased had gone there for cutting grass and the blood stained earth was also recovered from the aforesaid place of occurrence. Therefore, the venue of occurrence has been narrated differently from the prosecution.

The case can be looked from another angle because as per prosecution case, the deceased at the relevant time had gone for cutting grass and it will be very unnatural that they would cut grass without any tools i.e. sickle etc. Therefore, it also appears very unnatural and improbable that the two accused were able to caught hold of the three

deceased, out of whom one Haq Nawaz was a young man, and in the said scuffle, the accused did not receive a single injury. As appellants were arrested on 24-06-2010 and there is no medical examination which suggest that either of them had any injury on their body. Therefore, the confessional story of the accused does not appear to be true. Indeed it completely belies the prosecution story. Regarding the voluntariness of the said confession, suffice it to mention that the same was recorded after four days of their arrest. In “*Muhammad Parvez and others Vs The State (2007 SCMR 630)*”, the apex Court has held that confessional statement recorded with a delay of four days, could not be made basis for conviction of the accused.

**13.** There is no cavil to the proposition that conviction can be awarded to the accused on the basis of their sole confession, however, for that the confession must be voluntary, true, without any inducement, fear and coercion. In “*Manjeet Singh Vs. The State (PLD 2006 SC 30)*”, the august Supreme Court held that:-

*“There is no rule of criminal administration of justice that the Court having found the retracted confession voluntary and true, must also look for the corroboration and in absence of corroborative evidence conviction cannot be maintained. The retraction of a judicial or extra-judicial confession itself is not an infirmity to be considered sufficient to withhold the conviction because the evidentiary value of a confession is not diminished by mere fact that it was retracted by the maker at the trial and thus the independent corroboration from other source direct or circumstantial, cannot be insisted in every case as a mandatory rule rather the rule of corroboration is applied as abundant caution and in a case depending entirely on the confessional statement of a person or only of the circumstantial evidence, this rule is applied more cautiously.”*

**14.** In the circumstance and the manner and mode, the confessions of the appellants-convicts were recorded which were subsequently retracted, as a rule of caution, it must be supported by some connecting/corroborative evidence. ***“State Vs Waqar (1992 SCMR 950), Nazir Hussain Vs The Crown***



*(1969 SCMR 442) , Habib Ullah Vs The State (1971 SCMR 341) and Staet Vs. Minhun (PLD 1964 SC 813)”.*

**15.** The prosecution claims corroboration from recovery of crime weapons i.e. *Churri* and axe. As alleged by the prosecution, both the crime weapons allegedly recovered contained human blood as per Serologist report, however, despite the fact that the blood stained garments and sand were also sent for examination, the prosecution has not bothered to simultaneously send the same for matching or grouping of the blood on the crime weapons with the blood on the clothes of the deceased. Therefore, this missing chain would obviously benefit the accused.

**16.** In the circumstances when the alleged confessional statement of the appellants-convicts not only belies the mode and manner of the occurrence as narrated by the prosecution, and the said confession is not corroborated by any other material evidence, then we are afraid that such confessional statement have been wrongly considered for passing conviction against the accused. Additionally, the motive behind the occurrence was that the brother of complainant

had contracted court-marriage with the sister of appellants-convicts, however, it is also a settled law that the motive is double edged weapon which cuts both sides.

**17.** In view of the above, we hold that the prosecution has failed to prove its charge against the appellants-convicts as well, beyond any shadow of doubt, therefore, while accepting this appeal, we set aside the impugned conviction and sentence passed against the appellants/convicts and acquit them from the charge leveled against them. They be set free forthwith, if not required in any other case/crime.

**18.** These are the reasons for our short order of the even date.

**Announced.**  
**Dt. 20.02.2018**

**J U D G E**

**J U D G E**

*Tufail/*\*

*Hon'ble JusticesLal Jan Khattak&Syed Arshad Ali.*