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

Cr. A No. 275-M/2021

(Mustansar Ahmad *Versus* The State and another)

Present: M/S Abdul Wali Khan and Gauhar Ali Khan, Advocates for the appellant.

Mr. Razauddin Khan, A.A.G for the State.

M/S Javed Ali Khan and Farid Ahmad, Advocates for the complainant.

Date of hearing: **20.09.2022**

JUDGMENT

Dr. Khurshid Iqbal, J.-

1. Appellant/convict Mustansar Ahmad faced regular trial for the offence u/s 302/34 PPC in case FIR No. 137 dated 14.05.2016 of P.S Booni, District Upper Chitral, on the charge of committing murder of Bahadar Ullah. On conclusion of trial, learned Additional Sessions Judge/Izafi Zilla Qazi/Judge Juvenile Court, Upper Chitral (Trial Court) convicted him u/s 302(b) PPC and sentenced him to undergo life imprisonment. He was also burdened for payment of Rs.300,000/- to legal heirs of the deceased as compensation in terms of section 544-A, Cr.P.C, in default whereof he was directed to undergo further six months S.I.

2. Brief facts of the case are that on 30.03.2015, IHC Siraj Wali (PW-6) of P.S Booni received information regarding existence of certain articles/belongings of some

unknown person in middle of Ghalshat bridge having been lifted by Munir Hussain. For confirmation and legal action, he proceeded to the spot where complainant Munir Hussain (PW-23) made a report to him stating that on the previous day i.e 29.03.2015 at 04:30 hours, his brother Bahadar Ullah (deceased) had left at his shop in Koragh in his personal vehicle. During night at about 10:00 P.M, someone knocked at the door of his house, when he came out, he found Inayat Ullah (PW-2), Najeeb Ullah (PW-2, 20) and Faisal (PW-13) at the door who informed him that his brother Bahadar Ullah had parked his vehicle due to some fault at Karak while he himself was missing. They further informed him that they had brought the vehicle and parked the same in a garage. Consequent upon receipt of the above information, he left his village Charoon for Koragh and asked about Amir Ali (PW-5) who had informed the above named PWs regarding the fault in vehicle of his brother, however, he could not be traced out, therefore, he returned to his village. Complainant further informed the police that he was under the impression that his brother, due to fault in his vehicle, would have stayed overnight with a friend. However, he left his house at morning on the same day i.e. 30.03.2015, and started search for his brother during which he attempted ¾ times to contact him through his cell phone in response whereof an unknown person attended the call who, on his query, introduced

himself as Sanaullah (PW-15) son of Abdur Rahim who informed him that cell phone with CNIC, purse, socks, boots and coat of Bahadar Ullah were lying in center of Ghalshat bridge. Hence, he went to the mentioned place and carried belongings of his brother to his house after taking the same into his possession. Complainant, however, expressed no suspicion or allegation against anyone.

3. Inquiry in the matter u/s 156, Cr.P.C was initiated by local police during which complainant recorded his statement u/s 164, Cr.P.C on 14.05.2016 wherein he charged the present appellant/convict Mustansar Ahmad and his accused Saif-ud-Din son of Yurmas Baig for murder of his brother. They were arrested the same day i.e 14.05.2016. During investigation, the appellant/convict recorded his confessional statement on 16.05.2016 before the Judicial Magistrate, Tehsil Booni which is available on record as Ex.PW-26/3. After completion of investigation, challan was submitted before the Juvenile Court for trial of the appellant being below the age of 18 years. Formal charge was framed against him to which he did not plead guilty and opted to face trial.

4. In order to further substantiate its case against the appellant, prosecution examined as many as 26 out of 46 PWs listed in the calendar of witnesses and closed the evidence. When examined u/s 342, Cr.P.C, appellant

professed innocence by stating that he has been charged in a false case. Though he did not produce any witness in his defence, however, opted to be examined on oath in terms of section 340(2), Cr.P.C which was recorded accordingly as DW-1. On conclusion of trial, the learned trial Court convicted him u/s 302(b) PPC vide impugned judgment and sentenced him in the manner already mentioned in detail in the earlier portion of this judgment. Through this appeal, he has challenged his conviction and sentence.

5. We have paid our anxious consideration to the arguments of learned counsel for the parties including the learned A.A.G representing the State and perused the record with their able assistance.

6. The occurrence has taken place on 29.03.2015 at unknown time, as such, the same has remained un-witnessed. The only evidence prosecution has relied upon is the judicial confession of the appellant/convict. Several points raised during arguments need resolution by this Court. First and the foremost is the confession recorded by appellant/convict who was juvenile at the time of the occurrence. Since, in the present case, the appellant convict has been tried as juvenile accused, therefore, that aspect of the case is required to be looked into in light of the settled principles and attending circumstances of the case. Secondly, it is to be seen whether the Judicial Magistrate has

fulfilled the legal requirements while recording confession of the juvenile accused in light whereof it is to be decided as to whether it was a true, cogent, voluntary and confidence inspiring confession or otherwise. Thirdly, the confession is required to be adjudged in light of corroborative evidence on record and lastly whether the learned trial Court was justified in recording conviction of the appellant solely on the basis of his confession especially when the same was retracted by him.

Coming to the first point, i.e., juvenility of the appellant/convict and as such the evidentiary value of his judicial confession. The card of arrest of the appellant/convict shows that when he was arrested on 14.05.2016, alongwith his physical features his date of birth was mentioned as 01.04.2000. A certificate (Ex.PW-10/2) in this regard issued by the Principal Islamia Model School Kosht, Chitral, showing his date of birth as 1st April, 2000, was taken into possession through a recovery memo while certificate of NADRA and birth certificate issued by Government of the Khyber Pakhtunkhwa available on record also disclose same date of birth of the petitioner. Even amongst the PWs, Munir Hussain (PW-23), brother of the deceased, admitted that appellant/convict was a minor at the time of the occurrence. In view of evidence collected by the I.O and opinion of DPP, separate challan under the Juvenile

Justice System Ordinance, 2000, was submitted against the appellant/convict for his trial, as such, separate record was maintained by the learned trial Court. Though prosecution had once objected to juvenility of the appellant/convict by submitting an application before the learned trial Court for determination of his age, however, that application was dismissed vide order dated 27.10.2016 which has attained finality as the said order has not been challenged by prosecution. Thus, being a juvenile at the time of the occurrence, the trial of the appellant/convict under the Juvenile Justice System Ordinance, 2000, has been conducted in accordance with law.

7. The next two points with regard to fulfillment or otherwise of the legal formalities by Judicial Magistrate before recording confession of the appellant/convict being a juvenile accused are discussed together. The questionnaire put before the appellant/ convict comprised of as many as seven questions. They relate to the introduction of the Judicial Magistrate; the information that appellant/ convict was not bound to make a confessional statement and, if preferred, to be used against him as evidence; the fact that he had the knowledge of the fact that after recording of confessional statement, he would not be handed back to police and would be sent to judicial lockup; that whether he was subjected to torture or threatened or forced or induced

and promised to make a confession; the time that he spent in police custody and whether his confession should be recorded. He tendered 'yes' replies to the introduction of Judicial Magistrate; that he was not bound to make a confession; that in case of his refusal to confess his guilt he will not be sent back to police custody and that his confession should be recorded. He tendered negative reply to the question pertaining to torture, threat, force, inducement and promise. He tendered "yes" relies to all questions except the one pertaining to torture etc. to which he replied in the negative. No doubt, at the time of recording confession of the appellant, his birth certificate was not before the Judicial Magistrate. However, age of the appellant/ convict had already been mentioned as 16/17 years in his card of arrest. When asked whether he had satisfied himself that the appellant/convict was a juvenile, the Judicial Magistrate replied that:

میں نے ملزم سے اِس کی عمر کے بارے میں پوچھا ہو گا مجھے علم نہ ہے کہ بوقت
قلمبندی بیان ملزم نابالغ تھا یا نہیں۔

The Judicial Magistrate was required to have taken extra care and caution before recording confession of the appellant in view of his juvenility. A student of 9th class, as he was, but also hailing from as far flung and mountainous area of the province cannot be expected to

know the significance of making confession before the Court, therefore, he should have been provided the opportunity of counseling and consultation of a lawyer or guardian. Such an opportunity was declined to him. A close scrutiny of the questionnaire would show that it missed certain other questions of fundamental importance, such, as an opportunity to consult a lawyer and that why he preferred to confess his guilt. It was observed by august Supreme Court in the case of ***"Hashim Qasim and another Vs. The State"*** **(2017 SCMR 986)** that being a juvenile (minor), it was appropriate and desirable that the accused should have been provided counseling/consultation facility of natural guardian or any close blood relative of mature age, having no clash of interest with him. The questionnaire as well certificate of the Judicial Magistrate do not bear any description regarding provision of an opportunity to appellant/convict for counseling and consultation. The purpose behind giving such opportunity to a juvenile accused is that by doing so the Judicial Magistrate could ascertain that whatever the appellant/convict intended to disclose before the Court were his own narrations and that he had not been tutored before recording the confession. Since, the learned Judicial Magistrate has provided no such opportunity to appellant/convict, therefore, the possibility of

his having been tutored before recording the confession cannot be ruled out in the circumstances.

8. When the appellant/convict was arrested on 14.05.2016, he was produced before the Judicial Magistrate on 15.05.2016 with a request for police custody for the purpose of interrogation. The Judicial Magistrate allowed 05 days police custody, directing the I.O to produce him again on 19.05.2016. The I.O produced the appellant/convict before the Judicial Magistrate on 16.05.2016 for recording his confessional statement. Not only the confession was recorded while he still remained in police custody, for two days, but he has also stated in his confessional statement that police had called him time and again for the purpose of interrogation for two months. There is nothing on the record to show that Judicial Magistrate had physically examined the appellant for ascertaining the fact that he was not tortured by police before his production for the purpose of recording his confession. He also admitted that in his certificate he had made no observation to the effect that the appellant/convict was physically and mentally in proper health. The Judicial Magistrate also stated under his cross-examination that:

یہ درست ہے کہ میرے سرٹیفکیٹ میں ملزم کا طبی معائنہ قبل از بیان یا بدوران بیان طبی معائنہ کی نسبت خاموش ہے۔

The certificate the Judicial Magistrate signed on 16.05.2016 shows that the appellant/convict was produced before him at 11:30 hours. The certificate further shows that the proceedings of recording of judicial confession were completed at 02:00 P.M but he was produced before the Medical Officer, the same day (i.e 16.05.2016) for his medical examination who noted the time of his examination as 02:47 P.M, about 47 minutes after recording of his confession. As a natural corollary of this state of affairs, it is absolutely established that the appellant/convict had not been produced before the Medical Officer for his medical examination before his production before the Judicial Magistrate and this fact alone is sufficient to disbelieve the judicial confession made by appellant/convict. Similarly, keeping in view the fact that a school going boy, when police kept calling him to the police station for two months from time to time for the purpose of interrogation in a murder case and thereafter kept him in police station for two days, it cannot be presumed that he had volunteered to utter the whole truth without any pressure, torture, threat, promise or inducement by police.

9. The certificate appended to the confession does not show where the appellant/convict was kept by the Judicial Magistrate during the alleged 60 minutes time given to him for thinking over his choice to make judicial

confession. This is clear from the fact that he was called in the Court at 12:40 P.M. The Judicial Magistrate was examined as PW-26 at the trial. He deposed in his examination-in-chief that he recorded the confessional statement of the appellant/convict in Urdu under his own handwriting while under cross-examination he was asked as to who amongst the police officials had produced the appellant/convict before him and to whom he had handed back the appellant/convict after recording his confessional statement, he replied like this.

ملزم کو SHO عتیق نے ہمراہ دیگر اہلکاران پیش کیا تھا۔ شاید میں نے ان ہی پولیس
اہلکاران کو ملزم بغرض بھیجنے جوڈیشل حوالات حوالہ کیا تھا۔

S.I Sultan Khan (PW-12), the Investigating Officer, when confronted with the same question, plainly admitted it as correct that he had produced the appellant/convict before the Judicial Magistrate for recording his confessional statement whereafter he was handed over back to him for his consignment to judicial lockup. The Judicial Magistrate also could not recollect as to where he had kept the appellant/convict during the time of 60 minutes, he had given to him to freely and voluntarily think over his choice to record his confessional statement. In this respect, his statement is worth perusal.

یہ مجھے صحیح طور پر یاد نہ ہے کہ ملزم کو ایک گھنٹہ سوچنے کا وقت میں نے کمرہ عدالت میں دیا تھا یا ریٹائرنگ روم میں یا عدالت سے باہر۔ از خود کہا کہ ریٹائرنگ روم میں نہیں بٹھایا تھا۔

It is apparent from the above statements of Judicial Magistrate and I.O that the appellant/convict was dealt with carelessly during and after the process of recording his confession. It cannot be ruled out in the mentioned circumstances that appellant/convict had remained in the company of I.O during the mentioned 60 minutes time, as such, it would be highly unsafe to hold that appellant had recorded a true and voluntary confession. In this regard, the august Supreme Court observed in the case of ***"Azeem Khan and another Vs. Mujahid Khan and others"*** reported as **2016 SCMR 274** that during the process of recording confessional statement of an accused, at no occasion he shall be handed over to any police official/officer whether he is a Naib Court, wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused. Looking at the judicial confession of appellant/convict in the present case with the prism of the judgment of the august Supreme Court and attending circumstances of the case, we are of the view that the confession so recorded by appellant/convict is neither true nor voluntary.

10. Now we would come to the points with regard to admissibility of retracted confession in evidence and corroboration thereof by circumstantial evidence on the record. Though there is a judicial view that conviction may be recorded solely on confessional statement even if retracted, as emerging from the case law reported as ***"Nizam-ud-Din Vs. Riaz and another"*** **(2010 SCMR 457)**, ***"Manjeet Singh Vs. The State"*** **(PLD 2006 S.C 30)**, ***"Tariq Hussain Shah Vs. The State"*** **(2003 SCMR 938), and** ***"Muhammad Amjad Vs. The State"*** **(PLD 2008 Lahore 32)**. However, before relying upon a retracted judicial confession, the Court must be satisfied that it is fully established as true, voluntary, cogent, confidence inspiring and corroborated by other circumstantial evidence. We have already held that confession of the appellant/convict was neither true nor voluntary. For resolution of the question whether the confession is cogent, confidence inspiring and gets corroboration from evidence on record, in this regard the evidence brought on record during investigation needs reappraisal. It is the version of the prosecution that the complainant, while searching the deceased who was missing, was informed by Sanaullah (PW-15) through his cell phone that belongings of the deceased i.e boots, coat, mobile phone, registration of vehicle and NIC/domicile were lying in middle of Ghalshat bridge, as such, complainant

went there, collected the articles and took the same to his house. The appellant/convict, in his judicial confession, stated that after hitting the deceased on his head with a stone, he fell on the ground with little bleeding from his wound and after vomiting he died; that after removing his shoes and taking out his mobile and other things from his pocket, he dragged him from his arms, lifted him on his back and threw him into the river. Admittedly, the mentioned articles have not been recovered on pointation of the appellant/convict and except confession, there is no other reliable evidence on the record to establish that the appellant/convict had kept the articles on the bridge. Not only the detail of belongings so found on the bridge does not tally with the articles mentioned in the confession but the PWs also do not support each other in this regard. Sanaullah (PW-15) deposed that he came to the bridge and found the articles. He noticed that mobile phone of the deceased was ringing which he attended and informed the complainant regarding belongings of the deceased accordingly. Statement of this witness suggests that he had approached to the bridge alone as he has not disclosed the name of any other person accompanying him at the relevant time, but PW-19 (Mushtaq Khan) has claimed that he had found the articles while coming to the bridge in the company of PW Sanaullah. Statements of both the PWs do not appear natural

and spontaneous otherwise they would have confirmed presence of each other on the bridge. In this situation, no inference could be drawn other than that the story with regard to articles of the deceased was cooked up and put into the mouth of appellant/ convict which he narrated in his confession, as such, a case was prepared against him that he had done so to make the people believe that deceased had committed suicide. It is in the evidence of PWs that deceased was a stout young person, therefore, his murder by appellant/convict, a school going boy, in the mentioned mode and manner is repellent to reason. Even otherwise, the story emerging from the confessional statement also does not appeal to prudent mind because after committing murder of deceased, it cannot be expected from the appellant/ convict being a juvenile to retain belongings of the deceased in such a tense situation for making a plan for showing the occurrence as suicide instead of homicide. The learned trial Court has also relied upon the statements of PWs especially that of Amir Ali (PW-5) regarding last seen evidence. From scrutiny of the statements of the PWs, it has become clear that the last seen evidence originates from co-accused Saif-ud-Din as, except him, no other witness has claimed to have seen the deceased in the company of appellant/convict. Regarding last seen evidence, it is settled principle of law as held by the august Supreme Court in the case of ***"Altaf***

Hussain Vs. Fakhar Hussain and another" **(2008 SCMR 1103)** that the last seen evidence is a weak type of evidence unless corroborated with some other piece of evidence. In the present case, the last seen evidence by itself is based on hearsay evidence as the PWs who deposed in this regard have categorically stated that they had heard from co-accused Saif-ud-Din that he had left the deceased and appellant/convict together at Karak after accident to the vehicle of deceased while he himself had come to the house of PW Amir Ali for taking the damaged vehicle of the deceased from the spot of accident. Thus, statements of the PWs qua the last seen evidence are nothing more than hearsay evidence and cannot be made basis of a conviction. Reference is made to ***"Sajjan Solangi Vs. The State"*** **(2019 SCMR 872).** It is strange enough that deceased himself took no pain to do something from carrying his own damaged vehicle from the place where they had met the alleged accident rather that trouble was taken by another person on his behalf. It is also astonishing that the deceased and his companion co-accused Saif-ud-Din had the option at the relevant time to call Amir Ali through a phone call from his house but instead Saif-ud-Din preferred to go to his house in person. This conduct is against the normal human behavior because in case of emergency people naturally follow the easier way and not a tough and time consuming one. So far

the statement of co-accused u/s 164, Cr.P.C recorded by co-accused Saif-ud-Din regarding the last seen evidence, is concerned, the said statement is exculpatory in nature and inadmissible in evidence against his co-accused. In this regard we would refer the judgment of the Privy Council in the case of ***"Ghulam Hussain Vs. The King"*** **(1949 Privy Council 326)** wherein it was observed that:

> **(a) Criminal Procedure Code (V of 1898), S. 164-Accused's statement under, not amounting to confession-Held, inadmissible against co-accused though admissible against himself-Evidence Act (I of 1872), Ss. 18 to 21.**
>
> When awaiting trial Fatehsing intimated that he wished to make a confession. Consequently, he was taken before a Magistrate and after the formalities required by section 164 of the Code of Criminal Procedure had been carried out, he made a statement, but it was not a confession. Although incriminating, it was intended to be exculpatory of himself. Its importance was that it constituted an admission by Fatehsing that on the day of the rape Jasoda came to the house and while she was upstairs with the appellant he acted as watchman at the gate. Held, that the statement could not be used in evidence against the appellant (co-accused).

Since, the statement of co-accused does not qualify the criteria of a judicial confession, therefore, it cannot be taken as corroborative evidence against the appellant/ convict. Admittedly, the dead body has not been recovered till date, as such, there is no other evidence on the record to establish that the deceased had died by sustaining injury on his head with a blunt object, as such, the fact emerging from confession with regard to cause of death of the deceased as result of head injury through blow of stone is not corroborated by any evidence on the record. Similarly,

the appellant/convict was charged in the case after almost one year of the occurrence, therefore, neither any blood has been collected from the spot nor is there any evidence to prove any disturbance on the spot which could naturally occur there in view of the mode and manner of the occurrence set forth by prosecution. Thus, confession of the appellant is neither cogent nor confidence inspiring nor corroborated by circumstantial evidence on the record. When so, the retracted confession of the appellant/convict cannot be relied upon for maintaining his conviction. Reference is made to ***"Muhammad Ismail and others Vs. The State"*** **(2017 SCMR 898)**. The law laid down by Hon'ble apex Court in the referred judgment is as under:

> **The only other piece of evidence remaining in the field was a judicial confession allegedly made by Muhammad Iqrar, Khalid Hussain and Shakir Ali appellants before a Magistrate under section 164, Cr.P.C. but admittedly the said judicial confession had been retracted by the appellants 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 appellants' convictions.**

11. Another crucial aspect is that the defense raised the plea that the Judicial Magistrate did not record statement of the appellant/convict in his own handwriting. On this score, the learned defense counsel questioned the Judicial Magistrate but he denied this fact. In support of his plea, the learned defense counsel placed on record a copy of a statement in another criminal case as Mark 'D' recorded in

the handwriting of one Muhammad Shah Bailiff of District Courts Chitrial. He argued that by seeing the handwriting of the confessional statement of the appellant/convict recorded in Urdu in juxtaposition with the statement Mark 'D', both appear to be in the same handwriting. When asked why didn't the defense sought permission of the trial Court to lead specific evidence on this plea, the learned counsel replied that he had moved an application before the learned trial Court for examination of the aforesaid Muhammad Shah, bailiff, as a witness but the same was not allowed. Thus, the defense was left with no option but to simply place on file the earlier statement Mark 'D' allegedly recorded in the same handwriting. Since application of the defense for summoning of Muhammad Shah Bailiff and obtaining his handwriting for its comparison with the handwriting of confession has been turned down by learned trial Court vide order dated 21.09.2021, which has not been challenged by appellant/convict before any forum, as such, that order has attained finality, therefore, further discussion of this Court for deciding whether confession of the appellant/convict had been recorded by Judicial Magistrate in his own handwriting or not, is inconsequential.

12. The case of prosecution against the appellant/ convict is suffering from various glaring inconsistencies creating serious doubts regarding the guilt of appellant while

the confession is neither true and voluntary, nor confidence inspiring nor corroborated by circumstantial evidence on the record, therefore, cannot be safely relied upon for conviction of the appellant. It is settled law that a single doubt is sufficient for acquittal of an accused if found reasonable. Reliance is placed on ***"Tariq Pervez v. The State"*** **(1995 SCMR 1345)**, wherein the august Supreme Court has held that:

> **The concept of benefit of doubt to an accused person is deep-rooted in our country. For giving him benefit of doubt, it is not necessary that there should be many circumstances creating doubts. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right.**

13. As a sequel to our above discussion, this appeal is allowed, the impugned judgment is set aside and appellant Mustansar Ahmad is acquitted of the charge leveled against him by prosecution. He be released forthwith from jail if not required in any other case.

14. Above are the reasons of our short order of the even date.

Announced
Dt: 20.09.2022

JUDGE

JUDGE

DB: Hon'ble Mr. Justice Muhammad Naeem Anwar
Hon'ble Mr. Justice Dr. Khurshid Iqbal

Office W/R