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

Cr.A No. 321-P/2007

JUDGMENT

Date of hearing: **28.10.2015**

Appellant: (Abdul Karim) by
Mr. Arbab Aziz Ahmad, Advocate

Respondent: (Khaliq Jan) by
Mr. Khwaja Salahuddin, Advocate
(State) by Mr. Rafiq Ahmad, A.A.G.

HAIDER ALI KHAN, J.- This single judgment shall dispose of the instant appeal as well as the connected criminal appeal preferred by the State bearing Cr.A No. 343-P/2007, as both the appeals arise from one judgment of acquittal dated 02.5.2007 of the learned Judge Anti-terrorism Court, Malakand Division at Swat, delivered in case FIR No. 139 dated 14.5.2005 under sections 302 PPC r/w Section 7 (A) ATA and case FIR No. 147 dated 17.5.2005 under section 13 A.O r/w Section 7 (A)

ATA, registered at Police Station Lal Qilla, District Dir Lower.

2. Precise and relevant facts of the case as per contents of the FIR are that Azizullah Khan, SHO Police Station Lal Qilla made a report on 14.5.2005 at 11:40 to the effect that on getting telephonic information regarding occurrence of double murder in village Master Abad, he came to Maktab school of the same village where he found the dead body of deceased teacher Shah Zamin son of Abdul Karim. It was disclosed to him that accused Khaliq Jan had committed the murder of Shah Zamin by firing at him with his Kalashnikov and thereafter the accused also committed the murder of his wife Mst. Mumtaz Begum inside his home which might have been witnessed by someone. The accused decamped from the spot after the occurrence.

The report was recorded in shape of Mursila Ex.PA/1 on the basis whereof the above referred FIR (Ex.PA) was registered against the accused Khaliq Jan.

3. The accused was arrested on 17.5.2005 and was produced before the learned Judicial Magistrate (Criminal), Lal Qilla, who recorded his confessional statement on 18.5.2005 wherein motive was mentioned to be honour kiling. After completion of usual investigation, complete challan was submitted in Court of learned Judg, Anti-terrorism Court, Malakand Division at Swat for trial of the accused.

The trial Court indicted the accused for the offence, however, he did not plead guilty thereto and claimed trial. The prosecution produced and examined as many as sixteen (16) witnesses in order to prove its case against the accused whereafter statement of the accused was recorded under section

342 Cr.P.C wherein he retracted from his confessional statement and denied the allegations levelled by the prosecution, however, he neither wished to produce any evidence in his defence nor opted to be examined on oath according to section 340 (2) Cr.P.C. After hearing the arguments, the learned trial Court acquitted the accused of the charges levelled against him vide judgment dated 02.5.2007 which has been challenged by Abdul Karim, father of the deceased, through the instant appeal whereas the State has impugned the same judgment through the connected Cr.A No. 343-P/ 2007 which are being disposed of through the instant appeal.

4. Learned counsel for the appellant contended that although the respondent/accused has confessed his guilt before the competent Court but the trial Court has totally ignored the same in sheer violation of law. He further contended that two

innocent persons have brutally been murdered and the occurrence was duly witnessed by PW-4 who recorded his statement but the trial Court also ignored his statement and acquitted the respondent/accused without any legal justification. The learned counsel added that sufficient material is available on the record in shape of recovery memos, Medico-legal and FSL reports as well as circumstantial evidence coupled with the conduct of the accused pursuant to the occurrence which reasonably connect the respondent with the commission of the offence but the trial Court, while recording acquittal of the respondent/accused, did not appreciate the same evidence as well as the ocular account of the prosecution witnesses. The learned counsel concluded that the impugned judgment of the trial Court is against the law and evidence available on the record besides, the same is

suffering from conjectures and surmises which is not legally sustainable.

5. Learned counsel for the respondent/accused contended that prosecution has badly failed to produce trustworthy and convincing evidence against the respondent/accused and as such could not bring home guilt to him. He further contended that the respondent/accused has retracted from his confessional statement besides the same was not recorded in accordance with law, hence, the respondent/accused cannot be legally convicted on the basis of such defective piece of evidence. He further contended that the impugned judgment of the trial Court is well reasoned which needs no interference by this Court. Learned counsel for the respondent/accused concluded that the evidence produced by the prosecution is suffering from glaring contradictions, therefore, the trial Court has

committed no illegality by acquitting the respondent/accused from the charge.

6. The learned A.A.G. appearing on behalf of the State adopted the arguments advanced by the learned counsel for the appellant and further added that the material available on the record is sufficient for conviction of the respondent/accused but the trial Court has not scrutinized the evidence properly and acquitted the accused through the impugned judgment which is against the law and evidence available on the record.

7. We have heard valuable arguments of learned counsel for the parties and perused the record.

8. In light of arguments, perusal of the record would reveal that the prosecution case mainly hinges on the confessional statement of the respondent/accused, statement of eye witness namely Salimullah (PW-4), medical reports of the

two deceased exhibited as Ex.PW-12/1 and Ex. PW-12/2, recovery memos of weapon of offence, empty shells, blood stained clothes and earth/sand collected from the two spots of occurrence alongwith positive FSL reports available on the record as Ex.PW-13/15 and Ex.PW-13/16.

9. Record shows that the respondent/accused recorded his confessional statement before the Court of learned Judicial Magistrate, Lala Qilla on 18.5.2005 the very next day of his arrest and after three days of the occurrence, which is available on the record as Ex.PW-2/1. The learned Judicial Magistrate who recorded the confessional statement of the respondent/accused also appeared before the trial Court, recorded his statement as PW-2 and duly exhibited the documents and lent support to the voluntariness of the confession made by the accused as Ex.PW-2/1 to Ex.PW-2/3. Perusal of the said

exhibits reveal that the Judicial Magistrate has fulfilled all the legal formalities before recording the confession and after getting the satisfaction regarding willingness and voluntariness of the accused. There is nothing on the record to show that the confessional statement was recorded as a result of duress or threat nor it has been proved that the same statement was illegal or recorded against the procedure laid down in the Code of Criminal Procedure. Besides, the PW-2 has been subjected to lengthy cross-examination but nothing favourable to the accused has been brought on the record to shatter the credence either of the confessional statement or that of the PW-2. Record also shows that the confessional statement gets support from the medical reports, recovery of weapon of offence, statement of PW-4 and the FSL reports available on the record, hence, there is no reason to discredit the same. Learned counsel for the respondent/accused

contended that the confession being retracted one cannot be considered for conviction of the accused, the above contention of the learned counsel carries no weight because conviction of an accused can rightly be based on his retracted confession if the Court is satisfied that the accused voluntarily recorded the same. In this regard guidance can be sought from the judgment of the august Supreme Court of Pakistan reported as **"Muhammad Amin Versus. State" (PLJ 2006 SC 796)** wherein it was held that once confessional statement was found true and voluntary, conviction could be awarded on the basis thereof. The august Supreme Court in the judgment ibid relied on its previous judgment reported as *PLD 1960 SC (Pak.) 313* and also quoted the relevant portion thereof which is reproduced herein below for the sake of convenience.

> "We are unable to support the proposition of law laid down by the learned Judges in this regard. The retraction of a confession is a

circumstance which has no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and on the further question whether it is true. The fact that the maker of the confession later does not adhere to it cannot by itself have any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true, for to withdraw from a self-accusing statement in direct face of the consequences of the accusation, is explicable fully by the proximity of those consequences and need have no connection whatsoever with either its voluntary nature, or the truth of the facts stated. The learned Judges were perfectly right in first deciding theses two questions and the answers being in the affirmative, in declaring that the confession by itself was sufficient, taken with the other facts and circumstances, to support Abdul Majid's conviction. The retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true".

Yet in another judgment reported as **"Manjeet Singh Versus. The State" (PLD 2006**

Supreme Court 30), the august Supreme Court observed that:-

> "This is settled law that a retracted confession either judicial or extra-judicial, if is found truthful and confidence inspiring and also qualifies the test of voluntariness, can be used for conviction without looking for any other sort of corroboration. The petitioner, an Indian citizen and being an illegal immigrant while was working as an agent of RAW (an Indian Intelligence Agency) in Pakistan was arrested as suspect and during the interrogation, disclosed that he was deputed to commit terrorist activities in Pakistan and was involved in the bomb blast cases referred hereinbefore. The petitioner having disclosed his mission in Pakistan, showed his willingness to make a confessional statement, therefore, he was produced before a Magistrate, who after satisfying himself about the willingness and voluntariness of the petitioner to make the confessional statement, recorded his statement wherein he disclosed the manner in which he caused the explosion at Lahore and Faisalabad."

Record shows that the reasons advanced by the trial Court for disbelieving the confessional statement of the accused are strange because he discredited the same mere on the ground that the time shown by the Magistrate for recording the confessional statement of the accused does not coincide with the time shown by the I.O and other witnesses. In fact there is no difference as to the timings of the confession mentioned in Para 5 of the impugned judgment rather the trial Court misunderstood the same as the two I.Os namely Yousaf Ali Khan SHO/SI and Noor Parast Khan S.I conducted the investigation in the main case whereas the investigation of case registered under the Arms Ordinance was conducted by another I.O and as such the trial Court was wrong while findings in Para No.5(6). Keeping in view the observations of the apex Court in the above referred case law and facts and circumstances of the case, it is held that

the respondent/accused voluntarily recorded his confessional statement and there is no reason before this Court to agree with the findings recorded by the learned trial Court regarding the confessional statement, therefore, it is observed that the learned trial Court has fallen in error while discarding the confessional statement for no valid reasons.

10. Coming to the ocular account produced by the prosecution, record shows that Salimullah, who is eye witness of the occurrence, appeared before the trial Court and recorded his statement as PW-4. Although the witness is 9/10 of age but he has fully described the episode of arrival of the respondent/accused at the Maktab school and his demand from the deceased teacher regarding issuance of SLC of his kids namely Amjuman and Ali Hassan. Record shows that the child witness has amply been cross-examined but there is nothing in his statement to show that the answers put forth by

him were not reasonable or rational. The learned trial Court disbelieved the statement of this witness mere on the grounds firstly; that his name was not mentioned in the FIR and site-plan, secondly; the child witness did not report the matter to his elders and statement of none of them was recorded to confirm that the child was present in school at the time and date of occurrence and thirdly; there is no mention regarding the signs of bullets on the tables and chairs of the school. The above reasons shown by the trial Court for disbelieving the evidence of the child witness are not relevant and strong enough to ignore his statement. Statement of this prosecution witness shows that his evidence is confidence inspiring and the fact that the eye witness has not been named in the FIR was not by itself sufficient to discard his testimony especially when his statement was recorded under section 161, Cr.P.C the same very day. Reliance in this regard is

placed on the judgment reported as "Muhammad Basharat Versus. The State and another" (2003 SCMR 554) wherein the august Supreme Court observed that:-

> "Learned counsel has challenged its authenticity and submitted that had the witness been present at the spot, his name would have been disclosed in F.I.R. It is noted that this witness is a son of the complainant and uncle of the deceased and was residing in the same house. His presence at the spot was natural. Mere fact that he was not named in F.I.R was not by itself sufficient to discard his testimony, which otherwise inspires confidence. The testimony of a witness cannot be believed or disbelieved simply for the reason that his name appears or does not appear in FIR. Real test is its own intrinsic value. In our view, High Court was justified to believe him."

Thus in view of the above observations of the apex Court, it is immaterial that the name of the child witness was not mentioned in the F.I.R but the material thing is that what the child has deposed

needs to be properly appreciated and his evidence cannot be disbelieved merely because his name was not mentioned in the FIR especially when his statement is fully corroborated by other circumstantial evidence. So far presence of the child witness on the spot is concerned, record shows that the I.O has taken into custody photocopies of daily attendance register through recovery memo Ex.PW-6/1 which clearly show that the child witness was present in school on the day of occurrence, therefore, his presence on the spot was natural and in our view it is immaterial that statement of an elder of the witness was not recorded to prove his presence in school. Learned counsel for the respondent/accused also vehemently contended that the witness being underage is not competent to appear as a witness. This argument of the learned counsel is also repelled because a child can be a good witness provided he is capable of

understanding and be able to give rational answers to the questions put to him. In the present case, the child witness is competent to depose as there is no evidence on the record to make this Court disbelieve his evidence. Even the august Supreme Court has observed in a case that no matter if the answers given by a child witness are not rational if otherwise statement of the child witness is confidence inspiring depending upon the circumstances of each case. Guidance in this respect is sought from the judgment of the apex Court reported as **"Maqsood Khan Versus. The State" (1982 SCMR 757)**, the relevant portion whereof is reproduced herein below:-

> "In a case of a child witness it is immaterial whether he can understand and answer in a rational manner the questions put to him. No general rule of universal application can be laid down that in no case should the evidence of a child witness be believed. Each case depends upon its particular facts and circumstances. The evidence of a child

> witness, before it is acted upon, should, however, be subjected to a close and careful scrutiny. The mere fact that the evidence of the only eye-witness of a crime is that of a child of 10 years of age is not a ground for not relying upon it especially when the evidence was given without hesitation and without slightest suggestion of tutoring anything of the sort and there is corroboration of the evidence in so far as it narrates the actual facts or the child's subsequent conduct immediately afterwards. The real tests are; how consistent the story is with itself; how it stands the test of cross-examination and how far it fits with the evidence and circumstances of the case."

If evidence of the child witness is scrutinized in view of the above referred judgment of the apex Court, certainly the child witness (PW-4) in the present case is successful in the tests referred to above. Moreover, the trial Court has observed that the child witness is a hired witness by elders of Shah Zamin but there is nothing on the record from which such belief of the trial Court could be ascertained.

Thus, it is held that the trial Court has not appreciated in its true perspectives the evidence of (PW-4).

11. In addition to the above, the medical reports available on the record as Ex.PW-12/1 and Ex.PW-12/2 fully corroborate the prosecution case. The injuries sustained by the deceased Shah Zamin on front side of his body corroborates the statement of the eye-witness (PW-4). Similarly, injuries sustained by the lady deceased on the backside of her body corroborate the site-plan as well as the story depicted in the FIR. Moreso, the FSL report (Ex.PW-13/15) regarding the blood-stained earth/sand collected from the two spots of occurrence and the blood-stained clothes of the two deceased is also in positive which further strengthens the prosecution version. The witnesses of the recovery memos prepared in this regard by the I.O are consistent in their deposition and their

testimony is intact despite lengthy cross-examination.

12. Besides, there is recovery of weapon of the offence on the pointation of the respondent/accused which was handed over to I.O by brother of the respondent accused and taken into possession through recovery memo Ex.PW-8/1. Record also shows that ten empty shells of 7.62 bore were recovered from the spot where the deceased Shah Zamin was done to death whereas four empty shells of the same bore were recovered from the house of the respondent/accused where he committed the murder of his wife Mumtaz Begum. The recovery memos in this regard are available on record as Ex.PW-7/2 and Ex.PW-7/4. Both sets of recovery i.e the Kalashnikov and the empty shells, have been examined through FSL which report is available on the record as Ex.PW-13/16. This report shows that the fourteen empty shells from the two

spots of occurrence have been fired from 7.62 MM bore SMG rifle, which was recovered at the behest of the respondent/accused. The above referred evidence fully supports the prosecution case which should have been considered by the trial Court. The conduct of the accused also did not conform to the ordinary course of nature as in case of the murder of his wife, at whosoever's hand and for whatever reason, he neither lodged FIR nor took his deceased wife to the hospital, hence, that makes it a relevant fact for drawing an adverse inference as well.

13. The upshot of the above discussion is that the prosecution has proved its case beyond any shadow of doubt against the respondent/accused and the learned trial Court has not properly appreciated the evidence available on the record. However, the statement of child witness coupled with the retracted confession, though corroborated on material points, is held to be a mitigating circumstance for not

awarding capital punishment to the respondent accused. Therefore, we allow this appeal, set aside the impugned judgment dated 02.5.2007 of the learned Judge Anti-terrorism Court Malakand Division at Saidu Sharif Swat, delivered in case FIR No.139 dated 14.5.2005, under sections 302 PPC r/w section 7 (A) ATA registered at Police Station Lal Qilla, District Dir Lower and resultantly convict respondent-accused Khaliq Jan son of Kamin Khan under section 302(b) PPC and sentence him to rigorous imprisonment for life on two counts with fine of Rs:5,00,000/- as compensation payable to the legal heirs of the two deceased in equal shares or in default thereof he shall further undergo one year S.I. Similarly, he is also convicted under section 13 A.O and sentenced to three years rigorous imprisonment in case FIR No. 147 dated 17.5.2005 registered at Police Station Lal Qilla. The sentences shall run concurrently. Benefit of section 382-B Cr.P.C. is

extended to him. The respondent-convict present in Court is directed to be taken into custody and be dealt with in accordance with law. The connected Cr.A No. 343-P/2007 has become infructuous, therefore, the same is hereby dismissed as such.

14. Above are the reasons for our short order of the even date announced in the open Court.

Announced.
Dt: 28.10.2015.

JUDGE

JUDGE