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IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MANZOOR AHMAD MALIK
MR. JUSTICE SARDAR TARIQ MASOOD
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL

AFR (D.J.)

Criminal Appeal No.106/2020 and
Criminal Petition No.168/2020

(On appeal from the judgment dated 21.11.2019
passed by the Peshawar High Court, Peshawar in
Crl.A. No.1118-P/19 & Crl.Rev. No.232-P/19)

Muhammad Bilal (in Crl.A. 106/20) ...Appellant
Amjad Ali (in Crl.P. 168/20) ... Petitioner

VERSUS

The State and another (in Crl.A.106/20)
Muhammad Bilal and another (in Crl.P. 168/20) ...Respondents

For the Appellant: Mr. Astaghfirullah, ASC
(in Crl.A. 106/20)

For Complainant:
(in Crl.A. 106/20) &
For Petitioner
(in Crl.P. 168/20): Mr. Shahid Kamal, ASC

For the State: Mr. Arshad Hussain Yousafzai,
State Counsel, KP

Date of hearing: 21.09.2020

JUDGMENT

Mazhar Alam Khan Miankhel, J.-

Criminal Appeal No.106/2020: Muhammad Bilal-
Appellant faced trial in case F.I.R. No.531 dated 31st July, 2016
registered under Section 302, Pakistan Penal Code (P.P.C.), at Police
Station Kalu Khan, District Swabi for the murder of Adil Hussain. On
conclusion of trial, the appellant was convicted under Section 302(c)
P.P.C. and was sentenced to undergo rigorous imprisonment for a
period of ten years, with a direction to pay compensation of
Rs.200,000/- (two hundred thousand) to the legal heirs of the

deceased, in terms of Section 544-A, Code of Criminal Procedure, 1898 (Cr.P.C.), and in default thereof to undergo six months simple imprisonment. The conviction and sentence of the appellant was upheld by the learned Division Bench of the Peshawar High Court by dismissing his appeal. Hence the instant appeal, with the leave of this Court granted on 6th February, 2020 to consider, amongst others, the points noted in the leave granting order.

2. Amjal Ali (the complainant of this case) has also filed Criminal Petition No.168/2020 against the impugned judgment for enhancement of the sentence awarded to the appellant.

3. Amjad Ali, the complainant, reported the matter to the police in the casualty room of the Hospital at Kalu Khan that he after having supper at his home, on the information of his mother, went out for the search of his brother Adil Hussain (the deceased) who had not returned home. During search, he noticed the dead body of Adil Hussain (deceased) lying in the nearby fields. The report was also endorsed by Noor Jamal son of Muhammad Jamal (uncle of deceased). In the initial report, no one was named/charged for the murder of the deceased Adil Hussain. On 2nd August, 2016 the complainant recorded his statement under Section 164 Cr.P.C. and nominated the appellant for the murder of his brother Adil Hussain. Motive for the offence was also introduced that the deceased had friendly terms with Iqbal Hussain, the brother of appellant, and the deceased had informed Iqbal Hussain about the bad character of the appellant. The appellant, due to this grudge and bitterness, killed the deceased.

4. Learned counsel for the parties and the learned State Counsel were heard and record of the case was perused.

5. The prosecution case, against the appellant, hinges upon circumstantial evidence and it is imperative to see whether the chain

link of different pieces of circumstantial evidence produced by the prosecution during trial is wholesome. The prosecution, in order to bring home guilt of the appellant, relied on alleged confession of appellant recorded by a Magistrate on 5th August, 2016 i.e. on last day of police custody, recovery of pistol at his instance, recovery of empty of 30 bore pistol, blood stained clothes and earth supported by the medical evidence.

6. It is established on the record that the appellant was minor at the time of commission of offence. Being a child of impressionable age, he was vulnerably placed and, thus, more susceptible to fear, threat or inducement. He, as per prosecution, remained in police custody from 2nd August, 2016 till 5th August, 2016 but it is the version of the appellant that he remained in police custody for five days and it was so admitted by PW.8 in questionnaire Ex.PW8/1. It has also been admitted by the I.O. and the Judicial Magistrate that the appellant was not medically examined after the completion of three days police custody. In these circumstances, it cannot be said with certainty that the alleged confession was made voluntarily. This has time and again been held by this Court that confession should be voluntary, based on true facts and corroborated by other evidence available on record. If we go through the entire evidence of the prosecution, we will not be able to lay hand on any piece of circumstantial evidence corroborating the confessional statement of appellant. When the appellant admittedly is a minor aged about 12 ½ years at the time of commission of offence then it was the bounden duty of the Judicial Magistrate that he should have taken extra care in this regard. Though the Code of Criminal Procedure and the Juvenile Justice System Act, 2018 do not provide any special procedure or manner for recording the confessional statement of a minor/juvenile but this becomes the prime duty of the

Magistrate recording confession that he should be extra vigilant particularly in a case where the alleged cause of murder is an assault on the person of minor with the intention of gratifying unnatural lust. A three member Bench of this Court in the case of Hashim Qasim and another Vs. The State (2017 SCMR 986) has noted that it was desirable and appropriate that the accused should have been provided counseling/consultation facility of his natural Guardian or any close blood relative. But no such effort or any other extra measures were adopted by the learned Magistrate in this regard. The basic theme behind this is to rule out all kinds of fears from the mind of an accused, especially the juvenile accused, making confession particularly that in case he was not making a confession he would not be handed over to police but here in this case the I.O. (PW.7) has admitted that the appellant was handed over to him after recording confessional statement to take him to judicial lockup and then he took him to jail along with warrant.

7. It has been observed by us that the certificate Ex.PW8/3 of the Judicial Magistrate Abdul Salam Khan Sarkani shows that the accused got recorded his statement in *Pashto* which was translated into *Urdu* by the Steno of the Court Wahid Zaman and was scribed by the recording Magistrate in his own hand writing and the same was read over to the accused. It has come on record that the recording Magistrate was not fully conversant with *Pashto* and the statement of the Steno who translated statement of appellant was not recorded. Even signatures of said Wahid Zaman Steno were not obtained on the statement. Another important aspect of the case is that the appellant had retracted the confession and claimed that he had not made any incriminating statement. Thus, in such a situation, the only evidence to be relied upon is the said retracted confession and no other 'reliable and trustworthy evidence is available with the prosecution.

This further compels the prosecution to establish and prove the confessional statement which we think the prosecution has badly failed to prove beyond any reasonable doubt. It would be highly unsafe to maintain conviction on such a sketchy retracted confession.

8. The place of occurrence as reflected in the site plan (Ex.PB) is almost opposite to the house of complainant, the deceased and the appellant. The investigating officer, I.O. (PW.7) took into possession one empty of 30 bore pistol (P.3) vide memo Ex.PW.4/3 duly witnessed and signed by Shaukat Ali (PW.4). The appellant was nominated for the murder of deceased on 2nd August, 2016 by the complainant in his statement recorded under Section 164 Cr.P.C. and he was arrested the same day along with the pistol (30 bore) bearing No.AF-4143 with four live cartridges by Iftikhar Shah, S.I. (PW.2). The I.O. deposed before the Court that on a disclosure regarding recovery of pistol from his possession at the time of arrest, he requisitioned the pistol lying in the *Malkhana* through *Muharrir* of Police Station and then took it into possession and sealed the same into a parcel on 4th August, 2016 vide memo Ex.PW3/1 in presence of Naz Wali, H.C. (PW.3). Record of the case would further reflect that the pistol was allegedly recovered from the immediate possession of the appellant vide card of arrest Ex.PW2/1 at the time of his arrest by S.I. Iftikhar Shah (PW.2) on 2nd August, 2016 but there is nothing on the record to show that in whose custody it remained from the time of its alleged recovery on 2nd August, 2016 till 4th August, 2016. Naz Wali, H.C. (PW.3) who is the witness to the memo Ex.PW3/1 deposed that the alleged pistol was not recovered from the possession of the accused in his presence and similarly the accused was also not present at the time of its presentation by the *Muharrir* to the I.O. Besides the above, the empty and the pistol were sent together vide

Ex.PW7/6 to Forensic Science Laboratory, Khyber Pakhtunkhwa (FSL) on 8th August, 2016. The report of the Fire Arms Expert is Ex.PK/1. In these circumstances, positive report becomes highly doubtful and can in no way be considered as a piece of corroborative evidence worth reliance.

9. Medical evidence is only supportive in nature and relevant only qua the seat of injuries, weapon used in the occurrence, probable time that elapsed between the injury and the death and duration between death and the post mortem but it would not tell the name of the person who inflicted such injury.

10. In view of what has been discussed above, we are of the considered view that prosecution has failed to prove its case against the appellant beyond reasonable doubt. Resultantly, this appeal is allowed. The conviction and sentence of the appellant Muhammad Bilal awarded by the Courts below are set aside and he is acquitted of the charges leveled against him in this case. As he is behind bars, therefore, is ordered to be released forthwith if not required to be detained in any other case.

Criminal Petition No.168/2020: Since we have acquitted the accused Muhammad Bilal, in the connected Criminal Appeal No.106/2020, therefore, this petition for enhancement of his sentence, having lost its fate, is dismissed and leave refused.

The above are the reasons for our short order of even date which reads as under:-

"Crl. Appeal No.106/2020 For reasons to be recorded later, this appeal is allowed. The conviction and sentence of the appellant Muhammad Bilal awarded by the Courts below are set aside and he is acquitted of the charges leveled against him in this case. As he is behind the bars, therefore, he is

ordered to be released forthwith if not required to be detained in any other case.

Crl.M.A. No.264/2020 in Crl.P.No.168/2020 For reasons set out in the application for condonation of delay, the same is allowed and the delay in filing of the petition is condoned.

Crl. Petition No.168/2020 As the accused has been acquitted of the charge in the connected Criminal Appeal No.106/2020, therefore, this petition for enhancement of his sentence, filed by the complainant, is dismissed and leave declined."

Sd/- J

Sd/- J

Sd/- J

Bench-VI
Islamabad,
21st September, 2020
Nasir Khan/-
'Not approved for reporting'