

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE ATHAR MINALLAH
MR. JUSTICE IRFAN SAADAT KHAN
MR. JUSTICE MALIK SHAHZAD AHMAD KHAN

JAIL PETITION NOS. 14 & 17 OF 2020 AND
CRIMINAL PETITION NOS. 1322 & 1323 OF 2019

(On appeal against the judgment dated 21.10.2019 passed by the High Court of Balochistan, Quetta in Cr. Jail Appeal nos. 52/2018, 54/2018, Cr. Revision No. 44/2018 and Cr. Acquittal Appeal No. 337/2018 and Murder Reference No. 05/2018)

Obaidullah
Zubair Ahmed
Wali Jan
(In JP 14/2020)
(In JP 17/2020)
(In Cr.Ps 1322 & 1323/2019)
...Petitioners

Versus

The State
Obaidullah and another
Zubair Ahmed and another
(In JPs 14 & 17/2020)
(In Cr.P. 1322/2019)
(In Cr.P. 1323/2019)
...Respondent(s)

For the Petitioners: Mr. Qausain Faisal, ASC
(In JPs 14 & 17/2020)
Mr. Akram Sheikh, Sr. ASC
(In Cr.Ps. 1322 & 1323/2019)
For the State: Mr. Baqir Shah, State counsel
Date of Hearing: 02.05.2025
...

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.-

JAIL PETITION NOS. 14 & 17 OF 2020

Obaidullah and Zubair Ahmed, petitioners, along with Rafiullah, co-accused, were tried by the learned Sessions Judge, Pishin pursuant to registration of a case vide FIR No. 28/2018 under Sections 302/34 PPC at Police Station Levies Headquarter, Pishin. The learned Trial Court vide its judgment dated 31.10.2018, while acquitting Rafiullah co-accused, convicted Zubair Ahmed, petitioner, under Section 302(b) PPC and sentenced him to death. The learned Trial Court also convicted Obaidullah,

petitioner, under Section 302(b) PPC and sentenced him to imprisonment for life. Both the petitioners were directed to pay compensation of Rs.600,000/- each to the legal heirs of the deceased or in default thereof to further suffer RI for six months each. Benefit of Section 382-B Cr.P.C. was also extended in favour of the petitioners. Being aggrieved from the judgment passed by the learned Trial Court, the petitioners filed Criminal Jail Appeal Nos. 52 and 54 of 2018 whereas Wali Jan, complainant (PW-1) filed Criminal Revision No. 44/2018 for enhancement of the sentence awarded to the petitioner Obaidullah and Criminal Acquittal Appeal No. 337 of 2018 against the acquittal of Rafiullah (co-accused since acquitted). In appeal, the learned High Court while dismissing the criminal appeals and criminal revision, altered the sentence of death awarded to Zubair Ahmed petitioner into imprisonment for life and upheld the judgment of the learned Trial Court.

2. Arguments heard. Record perused.

3. Since there is no direct evidence and prosecution case hinges on the circumstantial evidence, therefore, utmost care and caution is required for reaching at a just decision of the case. It is settled law that in such like cases every circumstance should be linked with each other and it should form such a continuous chain that its one end touches the dead body and the other to the neck of the accused. But if any link in the chain is missing then its benefit must go to the accused. In this regard, guidance has been sought from the judgments of this Court reported as 'Ch. Barkat Ali vs. Major Karam Elahi Zia and another' (1992 SCMR 1047), 'Sarfraz Khan Vs. The State' (1996 SCMR 188) and 'Asadullah and another

vs. The State' (PLJ 1999 SC 1018). In the case of '**Ch. Barkat Ali**' (supra), this Court observed as under:-

'...Law relating to circumstantial evidence that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See 'Siraj vs. The Crown' (PLD 1956 FC 123). In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused.'

In the case of '**Sarfraz Khan**' (supra), it was held by this Court as under:-

7....It is well settled that circumstantial evidence should be so inter-connected that it forms such a continuous chain that its one end touches the dead body and other neck of the accused thereby excluding all the hypothesis of his innocence.'

Further reliance in this context is placed on the case of Altaf Hussain vs. Fakhar Hussain and another (2008 SCMR 1103) wherein, at page 1105 it was held as under:-

7....Needless to emphasis that all the pieces of evidence should be so linked that it should give the picture of a complete chain, one corner of which should touch the neck of the deceased and other corner to the neck of the accused. Failure of one link will destroy the entire chain.'

Keeping in view the parameters laid down in the above-referred judgments, we proceed to discuss the evidence produced by the prosecution and decide this case.

4. As per brief allegations leveled in the FIR, Wali Jan, complainant (PW-1) alleged that his nephew Abdul Razzaq was missing from his house since 11.06.2018. On 22.06.2018, he lodged the FIR of the instant case Exh.P/10-C with the allegation that on the said date i.e. on 22.06.2018, a dead body was

recovered by the Levies personnels, which was lying in the Civil Hospital, Pishin. On receiving the above-mentioned information, he (complainant) reached at the Civil Hospital, Pishin and identified that the said dead body was of his nephew Abdul Razzaq. The complainant further alleged that he was confident that his nephew was murdered by Rafiullah (co-accused since acquitted) along with other accused (not named in the FIR) and he (Rafiullah co-accused since acquitted) tried to bury the dead body of Abdul Razzaq, deceased, near the rainy drainage of Badilzai, hence, the FIR of this case.

5. It is, therefore, evident that the FIR was lodged against Rafiullah (co-accused since acquitted) whereas Obaidullah and Zubair Ahmed, petitioners, were not nominated therein. Furthermore, Abdul Razzaq, deceased, was missing from his house since 11.06.2018 but the FIR was lodged on 22.06.2018, i.e. with the delay of 11 days from the alleged occurrence. No motive, whatsoever, was alleged in the FIR that as to why the above-mentioned Rafiullah (co-accused since acquitted) and his unknown companions had abducted Abdul Razzaq, deceased, and committed his murder. Both the petitioners were later on implicated in this case on the alleged disclosure of Rafiullah (co-accused since acquitted) before the Investigating Officer wherein it was stated by the said co-accused that the petitioners had committed the murder of Abdul Razzaq, deceased. Both the petitioners were arrested on 28.06.2018 and their judicial confessions were recorded by Anas Gul, Judicial Magistrate (PW-8) on 30.06.2018 wherein they both confessed that they had committed the murder of Abdul Razzaq, deceased, on the instigation of Mst. Moalima Fatima (co-accused

since PO), as she did not want to marry Abdul Razzaq, deceased, rather she wanted to marry with Zubair Ahmed petitioner, therefore, she instigated the petitioners to first commit the murder of Abdul Razzaq, deceased, in order to get rid of him.

6. The prosecution case is based upon retracted judicial confessions of the petitioners, motive, recovery of pistol on the pointing out of Zubair Ahmed petitioner, from the possession of one Khalil-ur-Rehman and positive report of Forensic Science Laboratory.

7. It is true that the conviction and sentence of an accused can be maintained on the basis of a retracted judicial confession provided the said evidence appears to be trustworthy and the same is corroborated by some independent evidence. However, if the retracted judicial confession of an accused is not corroborated by any independent evidence or the same has been recorded in violation of the law on the subject then conviction and sentence of an accused cannot be sustained on the basis of said confession. Reference in this context may be made to the cases of Aala Muhammad Vs. The State (2008 SCMR 649), Muhammad Shafi Vs. Muhammad Raza (2008 SCMR 329), Muhammad Ismail Vs. The State (2017 SCMR 898) and Daniel Boyd Vs. The State (1992 SCMR 196). In the case of '**Aala Muhammad**' (supra), this Court while relying upon the earlier judgments of this Court held as under:-

"The "retracted confession" may be treated to be sufficient to sustain conviction for the offence if the same is found to be voluntary and true but as a rule of prudence, the same should not be acted upon unless corroborated by some other reliable evidence. Reliance in this context can be placed to the cases of Arabistan and others v. The State 1992 SCMR 754 and Ch. Muhammad Yaqoob and others v. The State 1992 SCMR 1983."

In the case of **'Muhammad Shafi'** (supra), it was held as follows:

"There is no cavil to the proposition that a conviction can be based on retracted judicial confession provided it is corroborated by independent circumstantial evidence."

In the case of **'Muhammad Ismail'** supra, the judicial confessions made by the accused/appellants before the Magistrate had been retracted before the Trial Court and this Court while acquitting the accused/appellants held as under:-

"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' convictions."

In the case of **'Daniel Boyd'** (supra), this Court observed as under:-

"Where the confession had been on one hand found inadmissible and on the other hand not voluntary and truthful to coincide with the facts of the case, Court considered it safe to rule out the retracted confession from consideration for Tazir punishment and necessarily it could not be used as circumstantial evidence as against the co-accused."

In respect of retracted judicial confessions of the petitioners, recorded in the instant case, we have noted that as per retracted judicial confession of Zubair Ahmed, petitioner, he committed the murder of Abdul Razzaq, deceased, due to the motive that about one year prior to the occurrence he received a phone call from Mst. Moalima Fatima (co-accused since PO) who wanted to marry with him (Zubair Ahmed petitioner) and informed the said petitioner that she was already engaged with Abdul Razzaq deceased, therefore, the said petitioner should first commit

the murder of Abdul Razzaq, deceased, and then they can marry with each other, whereupon, he (Zubair Ahmed, petitioner) along with Obaidullah, petitioner, committed the murder of Abdul Razzaq, deceased, while taking him out of the village on the pretext of tracing out some article. In his judicial confession, Zubair Ahmed petitioner, further stated that after committing the murder of Abdul Razzaq, deceased, they (accused) dug a grave and put the dead body of Abdul Razzaq, deceased, in the said grave and filled the grave of the deceased, with earth. The judicial confession of Obaidullah, petitioner, was also on the same lines.

Insofar as the motive disclosed in the above-mentioned retracted judicial confessions of the petitioners is concerned, we have already noted that no motive whatsoever was mentioned in the FIR, which was lodged after 11 days of the occurrence. Likewise, Wali Jan, complainant (PW-1), who was paternal uncle of Abdul Razzaq, deceased, and Abdul Kabir (PW-4) who was real brother of the deceased, have not uttered a single word in their statements before the Court that Abdul Razzaq, deceased, was ever engaged with Mst. Moalima Fatima (co-accused since PO) or their marriage was going to be solemnized in the near future. Rather they conceded during their cross-examinations that they (complainant party) had no previous enmity with the accused (petitioners). Relevant parts of their statements in this respect are reproduced hereunder for ready reference:-

Wali Jan, complainant (PW-1)

یہ درست ہے کہ ملزمان حاضر عدالت کے ساتھ ہماری کوئی پرانی رنجش یا دشمنی نہیں تھی۔

Abdul Kabir (PW-4)

یہ درست ہے کہ اس سے قبل زبیر کے ساتھ میری کوئی دشمنی نہ ہے۔

No other witness was produced to prove the above-mentioned alleged motive that Abdul Razzaq, deceased, was ever engaged with the above-mentioned co-accused (since P.O) or his marriage with the said co-accused was planned in the near future.

We have further noted that no motive was put to the petitioners in their statements recorded under Section 342 Cr.P.C. It is by now well settled that if a piece of evidence is not put to an accused in his statement recorded under Section 342 Cr.P.C, in order to provide him a chance to produce his defence against the said evidence then such evidence cannot be used against the accused. Reference in this context may be made to the cases of Haji Nawaz Vs. The State (2020 SCMR 687) and Dr. Waqar Hameed Vs. The State (2020 SCMR 321). In the case of '**Haji Nawaz**' (supra), this Court has held as under:-

"The law is settled by now that if a piece of evidence or a circumstance is not put to an accused person at the time of recording his statement under section 342, Cr.P.C. then the same cannot be considered against him for the purpose of recording his conviction."

In the case of '**Dr. Waqar Hameed**' (supra), this Court laid emphasis as follows:-

"It is by now well settled that a piece of evidence which is not put to an accused while recording his statement under section 342, Code of Criminal Procedure cannot be used against him."

No telephone numbers, SIM numbers, call data record or transcript of the conversation of the accused with each other has been brought on the record. Keeping in view the abovementioned facts, we have come to this conclusion that there is no independent corroboration of retracted judicial confessions of the petitioners with the motive part of the prosecution case.

8. Insofar as the recovery of pistol (P6) is concerned, we have noted that the said pistol was neither recovered from the possession of Zubair Ahmed petitioner nor the same was recovered from the possession of Obaidullah petitioner, rather the same was recovered from the possession of one Khalil-ur-Rehman. The said Khalil-ur-Rehman has not been cited as a witness in this case to establish that the above-referred pistol was ever handed over to him by the petitioners rather he has himself been made an accused in a separate case registered against him under the Arms Ordinance due to the recovery of above-mentioned pistol from his possession. Insofar as the positive report of the Forensic Science Laboratory is concerned, it is noteworthy that no empty was recovered from the spot on 22.06.2018 when the dead body was recovered but the same were recovered after the arrest of the petitioners on 29.06.2018 from the same place wherefrom the dead body was recovered on 22.06.2018. It is not understandable that if the empties were lying at the same spot wherefrom, the dead body was recovered then as to why the prosecution witnesses had not noticed the said empties and recovered the same from the spot on 22.06.2018, when the dead body was recovered. It is, therefore, evident that the empties were not shown to be recovered and the same were not deposited in the office of Forensic Science Laboratory till the arrest of the petitioners and alleged recovery of pistol from the possession of above-mentioned Khalil-ur-Rehman on 29.06.2018. It is, thus, clear that the empties and the pistol were kept together at the Police Station and were deposited together in the office of Forensic Science Laboratory, therefore, the prosecution evidence qua the recovery of pistol and positive report

of Forensic Science Laboratory is not worthy of reliance. Reference in this context may be made to the cases of Daniel Boyd Vs. The State (1992 SCMR 196), Abdul Wahid Vs. The State (2023 SCMR 1278) and Sarfraz Vs. The State (2023 SCMR 670). In the case of **'Daniel Boyd'** (supra), this Court held as follows:-

"Crime empties recovered from the spot on 20-6-1991 and crime weapon allegedly recovered on 7-7-1991 were kept in police station till 10-9-1991 for no rhyme or reason. In the circumstances the recovery of crime weapon and crime empties and the Fire Arms Expert report shall not advance the case of the prosecution."

In the case of **'Abdul Wahid'** (supra), this Court was of the view that *"as the empty of cartridge and the weapon of offence i.e. 12 bore pump action gun were sent together to the Forensic Science Agency, therefore, the recovery is inconsequential."* Similar view was taken by this Court in the case of **'Sarfraz'** (supra). Under the circumstances, it cannot be held that the retracted judicial confessions of the petitioners have been corroborated by the recovery of weapon of offence and positive report of the Forensic Science Laboratory.

9. It is further noteworthy that as per contents of the FIR, the allegation of murder of Abdul Razzaq, deceased, was levelled against Rafiullah (co-accused since acquitted). The said co-accused was acquitted by the Trial Court and the appeal filed by Wali Jan, complainant (PW-1) against his acquittal was dismissed by the learned High Court vide the consolidated impugned judgment and thereafter no appeal against his acquittal has been filed by the complainant before this Court, as such, the acquittal of above-mentioned Rafiullah (co-accused since acquitted) has attained finality. In the contents of the FIR, the complainant alleged that

the above-mentioned Rafiullah (co-accused since acquitted) was trying to bury the dead body of Abdul Razzaq, deceased, near the rainy drainage of Badilzai, whereas, according to the retracted judicial confessions of the petitioners they (petitioners) had buried the dead body of Abdul Razzaq, deceased, after his murder in a grave and filled the said grave with earth. The relevant parts of the FIR and retracted judicial confessions of the petitioners are reproduced hereunder for ready reference:-

FIR

مجھے یقین ہے کہ میرے بھتیجے عبدالرزاق کو ملزم رفیع اللہ دیگر نامعلوم الاسم ملزمان کے ساتھ ملکر میرے بھتیجے عبدالرزاق کو قتل کر کے برساتی نالہ بادلزی کے قریب دفن کر رہا تھا۔

Zubair Ahmed, petitioner

رزاق مرچکا تھا۔ ہم نے اسے پہلے سے کھودے ہوئے قبر میں ڈال دیا اور اس کے اوپر ایک چھوٹا رومال اوڑھا اور مٹی ڈال دی اور قبر کو مٹی سے بھر دیا۔

Obaidullah, petitioner

زبیر رزاق کے پیچھے تھا اور اس نے موقع کا فائدہ اٹھا کے اسے پیچھے سے گولیاں ماری ایک سر میں گولی ماری 3/2 گولیاں پیچھے کمر پر لگی ہم نے رزاق کو وہی چھوڑا اور اپنے گھروں کی طرف آگئے اور پھر ایک گھنٹے بعد آئے تو وہ مرچکا تھا۔ میں نے اور زبیر نے اس پہلے سے تیار کردہ قبر میں ڈال دیا۔

(Bold and underlining is supplied for emphasis.)

It is, therefore, evident that there are glaring contradictions in the prosecution case because on the one hand it is alleged by the complainant in the contents of the FIR that it was Rafiullah (co-accused since acquitted) who was trying to bury the dead body of Abdul Razzaq, deceased, near the rainy drainage of Badilzai, which means that the said co-accused only attempted to bury the dead body of Abdul Razzaq, deceased (however, the same was recovered by the Levies personnels), whereas on the other hand according to the retracted judicial confessions of the

petitioners, the dead body of Abdul Razzaq, deceased, was buried by them in a grave and the said grave was filled with earth. The complainant did not allege in the FIR that the present petitioners tried to bury the dead body of the deceased and the said allegation was levelled against Rafiullah (co-accused since acquitted) whereas according to the retracted judicial confessions of the petitioners, they (petitioners) not only successfully buried the dead body of the deceased in a grave but thereafter they also filled the said grave with earth.

It is further noteworthy that even in his statement recorded by the learned Trial Court the complainant neither named the petitioners nor attributed any role to them. He categorically stated that in his application for registration of FIR (Ex.P/1-A) he named Rafiullah (co-accused since acquitted) and some other accused. Relevant part of his statement is reproduced hereunder for ready reference:-

میں نے اپنی درخواست میں رفیع اللہ حاضر عدالت و دیگر کے نام لکھے۔ میں درخواست Ex.P/1-A پیش کرتا ہوں۔

Moreover, the retracted judicial confessions of the petitioners regarding burial of the dead body of Abdul Razzaq, deceased, in a grave and filling the said grave with earth has not been supported by the medical evidence because Dr. Ali Mardan (PW-2) in his postmortem report or in his evidence recorded by the learned Trial Court has not mentioned that he noticed any soil/earth on any part of the body of Abdul Razzaq, deceased or on his last worn clothes and, as such, the retracted judicial confessions of the petitioners are also not supported by the medical evidence.

It is further noteworthy that if the dead body of Abdul Razzaq, deceased, was buried in a grave by the petitioners and the said grave was filled with earth by them then it is not understandable that as to how the Levies personnels discovered and recovered the said dead body. In the contents of the FIR, it was not stated that the Levies personnels recovered the dead body of Abdul Razzaq, deceased, after digging out any grave and it was only alleged therein that Rafiuallah (co-accused since acquitted) attempted to bury the dead body of Abdul Razzaq, deceased near the rainy drainage of Badilzai. Although, Hadayatullah, Levis Khasadar (PW-3) has stated that Levies personnel received an information that a dead body covered with earth was lying near the stream of 'Bure Shah' and its feet were visible, whereupon the Levies personnel recovered the said dead body but in the retracted judicial confessions of the petitioners it was stated that the dead body of the deceased was put in a grave after digging it and the said grave was filled with the earth. It was not mentioned therein that any part of the dead body remained uncovered. No hoe (*kassi*), spade or any other article, which can be used to dig a grave has been recovered from the possession of the petitioners during the investigation of this case. Under the circumstances, the retracted judicial confessions of the petitioners have not been corroborated by any independent evidence, rather the story narrated in the said confessions is contradicted by the remaining prosecution evidence, therefore, it is not safe to rely upon the said confessions.

We have also noted that neither any charge was framed against the petitioners for offences under sections 201/511 PPC, that they tried to disappear the evidence of the offence (by burying

the dead-body of the deceased in a grave) nor they have been awarded any conviction and sentence for the said offences.

10. It is further noteworthy that although Anas Gul, learned Judicial Magistrate while appearing before the Trial Court as PW-8 has stated that he unlocked the handcuffs of the petitioners and also sent the police out of his chamber when he recorded the judicial confessions of the petitioners but no such facts were mentioned in his reports Ex.P/8-B and Ex.P/8-F. Moreover, in his statement before the Court or in his reports, he has not mentioned that as to how much time was given to the petitioners to think over before making their judicial confessions and after how much time they were again called and he (PW-8) satisfied himself that the petitioners were making their judicial confessions with their free will and without any pressure or coercion. It is, therefore, evident that judicial confessions of the petitioners were not recorded in accordance with the law and as mentioned earlier even otherwise, there is no independent corroboration of the said judicial confessions. The same have also not been supported by the medical evidence, therefore, the convictions and sentences of the petitioners cannot be maintained on the basis of said retracted judicial confessions.

11. Keeping in view all the aforementioned facts, we have come to this irresistible conclusion that the prosecution has failed to prove its case against the petitioners beyond the shadow of doubt. It is by now well settled that if there is a single circumstance, which creates doubt in the prosecution case then the same is sufficient to acquit the accused, whereas the instant case is replete with number of circumstances, which have created

serious doubts in the prosecution story. Reference in this context may be made to the judgments reported as Tariq Pervez Vs The State (1995 SCMR 1345) and Muhammad Akram Vs The State (2009 SCMR 230). Consequently, these petitions are converted into appeals and are allowed. The impugned judgment is set aside. Obaidullah and Zubair Ahmed, petitioners, are acquitted of the charges while giving them the benefit of doubt. They shall be released from the jail forthwith unless required to be detained in any other case.

CRIMINAL PETITION NOS. 1322 & 1323 OF 2019

12. In view of the judgment passed in the connected Jail Petition Nos. 14 & 17 of 2020 wherein it is observed that the prosecution evidence is not worthy of reliance and the prosecution has failed to prove its case beyond the shadow of doubt, these petitions seeking enhancement of the sentence awarded to Obaidullah and Zubair Ahmed, respondents, have become infructuous. Even otherwise, these petitions are without any merits, hence, the same are hereby dismissed.

Islamabad, the
2nd of May, 2025
Approved For Reporting
Khuram