JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH
(Judicial Department)

Cr.A.No.25-D/2012

Allah Wasaya and another

Versus

The State and another

JUDGMENT

Date of hearing: **03.4.2018.**

Appellants: **(Appellant Allah Wasaya by) Mr. Ghulam Hur Khan Baloch Advocate.**

Respondents: **(State by) Mr. Kamran Hayat Miankhel, Addl: A.G. and (respondent No.2 by) Mr. Saif-ur-Rahman Khan Advocate.**

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ISHTIAQ IBRAHIM, J.- Through this single judgment we propose to decide this appeal i.e Cr.A.No.25-D/2012 (Allah Wasaya and another Vs. The State and another) and Cr.R.No.11-D/2012 (Zulfiqar Vs. Allah Wasaya and 02 others) being the outcome of one and the same judgment dated 15.5.2012, rendered by learned Additional Sessions Judge-V, D.I.Khan in case FIR No.240 dated 10.11.2010 registered under Sections 302/34 PPC at

Police Station Paroa, District D.I.Khan, whereby the appellants Allah Wasaya and Ehsanullah were convicted and sentenced as under:-

> *"Under Section 302(b) read with Section 34 PPC to life imprisonment and to pay Rs.1,00,000/- (Rupees one lac) each as compensation to the legal heirs of the deceased under Section 544-A Cr.PC, failing which to undergo further six months Rigorous Imprisonment. However, benefit of Section 382-B Cr.PC was extended to them."*

2. The appellants have filed Cr.A.No.25-D/2012 for setting aside their conviction and sentence while complainant/ respondent No.2 has filed Cr.R.No.11-D/2012 for enhancement of sentence awarded to the appellants.

3. The prosecution case as set forth in the FIR (Ex.PA) is that on 10.11.2010 at 09:30 a.m. complainant Zulfiqar (PW-5) reported the matter to the police at Kacha path leading towards Middle School Khana Sharif near the house of Amanullah that his brother Hafizullah alias Fidu, employed as Peon in Middle School Male, as usual was on his way to the

school alongwith handcart having plastic drums for taking water while on the same way PW-5 was coming from his house to the village. It was about 07:45 a.m. when Hafizullah reached near the house of Amanullah where accused Allah Wasaya, Sanaullah sons of Yasin duly armed with Kalashnikovs and accused Ehsanullah son of Koro armed with pistol were present and when brother of the complainant reached near them, all the three accused started firing at him with their respective weapons, as a result he got hit and fell on the ground. After the occurrence the accused decamped from the spot. The complainant attended his brother who succumbed to his injuries. Besides complainant, the occurrence is stated to be witnessed by Khalil-ur-Rahman, Asmatullah (PW-6) and Jehangir. Motive for the occurrence is stated to be previous blood feud. The report of the complainant was reduced in shape of murasila Ex.PA/1 on the basis of which FIR (Ex.PA) was registered.

4. After completion of investigation complete challan was submitted against the accused in the learned trial Court. Charge was framed against the appellants to which they did not plead guilty and claimed trial. In support of its case the prosecution

produced as many as 08 PWs. Complainant Zulfiqar and Asmatullah furnished their ocular account PW-5 and PW-6 respectively while Dr. Abdul Rauf SMO RHC Paroa was examined as PW-2 who conducted postmortem examination on the dead body of the deceased. Thereafter statements of appellants were recorded under Section 342 Cr.PC, wherein they professed innocence and false implication in the case. They did not wish to be examined on Oath as required under Section 340(2) Cr.PC. However, they produced one Inayatullah as DW-1 in their defence. On conclusion of trial, vide judgment dated 15.5.2012, the learned Additional Sessions Judge-V, D.I.Khan convicted and sentenced the appellant as referred above, hence, the appeal and the revision.

5. During pendency of this appeal, on 29.7.2013 a group of miscreants attacked Central Jail, D.I.Khan and the appellant Ehsanullah escaped/taken away from the jail and till date his whereabouts are not known. In this respect statement of Binyamin Khan, Superintendent Central Jail, D.I.Khan was recorded on 30.10.2013. In such view of the matter, this appeal is adjourned sine die to the extent of appellant Ehsanullah

which shall be relisted after his arrest on the application of either side.

6. Learned counsel for the appellant submitted that the complainant is a chance witness. He has not established his presence at the spot at relevant time. The occurrence took place at 07:45 a.m. while the report was lodged at 09:30 a.m. to the police, that's too at the spot which shows that the preliminary investigation was conducted and the complainant and eyewitnesses were procured by the police. He submitted that complainant (PW-5) is the brother of deceased, why he was spared when there was enmity between the parties. The appellant was not medically examined before confessional statement and his confessional statement is neither voluntary not true. The Magistrate who recorded confessional statement of the appellant was not conversant with Sairaiki as he hails from Mardan. According to Investigating Officer he took the appellant to the Judicial lock-ups after confessional statement. FSL report is positive to the extent of 02 empties while 04 empties have been recovered from the place of occurrence. Moreso, the Expert stated that two 7.62 MM bore empties were fired from 44 bore weapon which is also misconception

and it appears to be manipulated on the part of Investigating Officer,

7. On the other hand, learned Addl: A.G. assisted by learned counsel for the complainant submitted that after his arrest the appellant confessed his guilt and his confessional statement was recorded PW-7 Akbar Ali, Judicial Magistrate, D.I.Khan on the very second day of his arrest i.e. 27.11.2010 which is true and voluntary and the same alone can be made basis for conviction; that the appellant is directly charged in a promptly lodged with specific role of firing; that the weapon of offence was recovered from the spot and the FSL report regarding empties and weapon of offence is in positive; that the prosecution has proved its case through independent and confidence inspiring ocular as well as circumstantial evidence; that the learned trial Court has rightly appreciated the material brought on record but erred in awarding lesser punishment of life imprisonment to the appellant and prayed for enhancement of normal penalty of death.

8. In this case occurrence took place on 10.11.2010 at 07:45 a.m. while the report was lodged at the spot by the complainant Zulfiqar (PW-5), brother of the deceased at 09:30 a.m. The report was delayed for

almost 01 hour and 45 minutes. During this period no effort was made by the complainant or other witnesses to shift the dead body to the hospital or to the police station, which is situated at a distance which can be travelled within half an hour from the spot. Had the complainant (PW-5) and Asmatullah (PW-6) been present on the spot and seen the occurrence they would have immediately shifted the dead body to the hospital or the concerned police station. Likewise, in column No.3 of inquest report (ExPW-4/2), the time of occurrence is mentioned as 10.11.2010 while no specific time of the occurrence has been written and it was left blank. When the case of the prosecution rests on such FIR, which shows that it was lodged after preliminary inquiry/investigation, it not only reacts on the genuineness of the prosecution story but at the same time creates doubts with regard to the presence of the complainant and eyewitness at the time of occurrence. Reliance is placed on the case of **Musarat Bibi and another Vs. The State (1992 P Cr.LJ 158,** wherein it was held as under:-

> *"For the reasons stated above the case is not free from doubt and from circumstances it is clear that the case was registered after*

deliberation and consultation and investigation has not been done honestly. I, accept the appeal and acquit the appellants. They are in custody. They shall be released forthwith if not required in any other case. In, view of acquittal the notice for enhancement of sentence stands vacated."

9. Coming to the ocular account furnished by complainant Zulfiqar (PW-5) and Asmatullah (PW-6). Keeping in view the above mentioned background of the registration of the FIR their testimonies are to be looked into with great care and caution being interested and inimical witnesses. It is in the statement of the complainant that ***"deceased was employed as Peon in Middle School of village Khana Sharif. On 10.11.2010 at 07:45 he was coming from his house having a wheel barrow. Accused Allah Wasaya and Sanaullah armed with Kalashnikovs while accused Ehsanullah who was armed with pistol were standing beside the house of Amanullah barber. I was also accompanying my brother and was by that time on the eastern side of the Middle School. The accused started firing at my brother. As a result of the firing, Hafizullah got hit and fell down.*** It is not believable

and the same is also belied by the site plan Ex.PB. If the complainant was present on the spot then having equal degree of enmity with the accused party, how he was spared. In addition to above, it has been elicited from the mouth of this witness that he has not given the purpose of his presence at the time of occurrence. Likewise, he has also admitted in his cross-exanimation that ***"I had not stated in my report Ex.PA/1 the purpose of my being out of my house and accompanying the deceased at the time of occurrence. Similarly I had also not mentioned in my report Ex.PA/1 as to where I was proceeding to at that time."*** It is also important to note that in site plan neither the house of the deceased nor that of the complainant has been mentioned. We assume for a while that the complainant was accompanying the deceased at the time of occurrence, then in site plan he has been shown at point No.2 while the deceased has been shown at point No.1 and he was accompanying his brother towards Middle School then according to the site plan he has already crossed the accused and was at a distance of 50 paces from the deceased when the occurrence took place. It is the bounden duty of the prosecution and most particularly in cases of inimical

witnesses that they have to prove the presence of the PWs on the spot beyond the shadow of any reasonable doubt and from the conduct of the complainant and PWs and report at the spot led us to irresistible conclusion that it was an unseen occurrence and the witnesses were not present at that particular time. PW-6 Asmatullah has not named the complainant in his Court statement. Moreso, in cross-examination he has also denied his examination by the police under Section 161 Cr.PC. In above circumstances both the PWs have failed to prove their presence at the place of occurrence beyond shadow of reasonable doubt. Reliance is placed on the case of **State through Advocate General, N.W.F.P Peshawar and another Vs. Shah Jehan and another (PLJ 2003 SC 399.**

10. According to prosecution the appellant Allah Wasaya and the absconding appellant Ehsanullah confessed their guilt and their confessional statements were recorded by PW-7 Akbar Ali, Judicial Magistrate, D.I.Khan on 27.11.2010. The emphasis of the learned counsel for the complainant and that of the learned Addl: A.G. was mainly on the ground that the confessional statement of the appellant was recorded on the very second day of the arrest of the appellant, the

confession is true and voluntary and the same alone can be made basis for conviction.

11. True that confessional statement of the appellant was recorded on 27.11.2010 by PW-7 but it is also in the statement of PW-7 that ***"It is correct that before producing the accused in my Court, the accused were not medically examined. Volunteered; the accused were produced at the expiry of their 24 hours statutory police custody. I did not direct the medical examination of the accused nor did I examine their body."*** The Investigating Officer (PW-08) has admitted in his cross examination that ***"it is correct that after producing both the accused before the judicial Magistrate, their handcuffs were removed on his direction and I was also sent out of the Court room.*** From this assertion of PW-8 it is manifest that confessional of one accused was recorded in the presence of other. It is also admitted by PW-8 Kifayat Hussain I.O that ***"The Court had thereafter handed over to me the accused U/S 13 Arms Ordinance after one and half hour. I took the jail warrants to the jail."***

In case of **Ghani Bakhsh Vs. The State (PLD 1975 Supreme Court 187),** the apex Court held as under:-

"*8. Taking first the judicial confession, it is well settled that although a retracted judicial confession is seldom made the basis of conviction without being materially corroborated, yet the position though very rare is not wholly inconceivable depending upon the facts and circumstances of each case as held in this Court's judgment in State v. Minhun alias Gul Hassan P L D 1964 S C 813.* ***In the instant case, however we find that the mode and method of recording the confession of one accused in the presence of the other casts serious doubt on its voluntariness which in the basic requirement of law as also for its appeal to the judicial conscience. The whole object of legal and judicial insistence on the meticulous observance of all the necessary formalities and precautions laid down with minute particularity is to ensure that the confessional statement should be absolutely free from the slightest tinge oil taint of extraneous influence such as threat, promise or inducement and the Courts are***

placed under an obligation to affirmatively satisfy themselves that it is free and voluntary. *It was observed by Denman, J. in Reg, v. Rosa Rue (1876) 13 Cox. C C 209: "It is not merely a question as to whom the confession is made or when it is made; but it is a matter in which you have to get at the mind of the prisoner, and see whether or not it is probable that the confession was made voluntarily, in the proper sense of the word." I am afraid, the way the confessional statement of Dhani Bakhsh appellant was recorded right in view of his co-accused at a distance of about 30 feet from him possible within his ear-shot which possibility was of course denied by the Magistrate and at a time when the confessional statement of the acquitted accused had already been recorded in the admitted presence of Dhani Bakhsh who was made to stand in a corner of the Court Room, it is difficult to infer that the appellant remained altogether uninfluenced by the conduct of his co-accused in the matter of his own*

> *confessional statement. It is not difficult to appreciate the psychological influence on the mind of the appellant or may be even his guilty conscience, of what had already transpired in Court in his view and within his ear-shot. The preceding confession of his co-accused must necessarily have exercised some persuasive if not compelling force on his mind to follow suit. In that view of the matter, the confessional statement of the appellant cannot be characterised as free and voluntary having been made in an absolutely free and uninhibited manner."*

Reliance is also placed on the case of **Muhammad Ismail Vs. The State (2017 SCMR 713),** wherein the Honourable Supreme Court of Pakistan has given important factors and required standards of confession.

12. It is also discernable from the record that the appellant had given his confessional statement in Sairaiki which was translated into Urdu by the learned Judicial Magistrate. In cross-examination the Judicial Magistrate (PW-7) stated that ***"I had made the accused***

understand the definitions of words "approver" and "subjected to" in Urdu and had satisfied myself. I do not however remember the exact translation used at that time." It pricks the mind of this Court over the understanding of the learned Judicial Magistrate of his command from the Sairaiki language. In addition to above, the questionnaire and the certificate all are on printed proformas which practice has also deprecated by the Superior Courts from time to time.

13. In his statement under Section 342 Cr.PC the appellant while answering question No.7 stated that:-

> *"The alleged confession is the result of police torture. It is not voluntary. Moreover, the confessional statement is not in accordance with the settled principle of law and dictum laid down by the apex Court. At one occasion, even copies of alleged confessional statement were handed over to the I.O before any alleged thumb impression which is evident from the copy of questionnaire available on judicial file. I was produced to the local police by one Inayat Khan son of Bahawal Khan r/o Kunda*

Sharif on 23.11.2010 and I was retained in the P.S. without any legal and lawful jurisdiction."

In this regard the appellant also produced the said Inayatullah as DW-1 who stated that on 23.11.2010 the appellant came and asked to him to surrender him before the local police and on the same day he took the appellant to the P.S. and surrendered him before the police. In such view of the matter the confessional statement of the appellant cannot be relied upon.

14. Vide recovery memo Ex.PW-1/2 six empties of 7.62 bore and one empty of 30 bore were recovered from the spot and vide recovery memo Ex.PW-1/3 one Kalashnikov and one 30 bore pistol were recovered from the possession of accused Allah Wasaya and Ehsanullah respectively. The empties were recovered on the day of occurrence i.e. 10.11.2010 while the alleged weapon of offence were recovered from the possession of the accused on 26.11.2010 and thereafter on 04.12.2010 all those articles were sent together to the FSL which in our view is not a safe course and it smacks of some foul play on the part of Investigating Agency that till date of recovery of the

weapon the empties remained in their custody in police station. In Addition to above, it is also strange that weapon of 7.62 bore was recovered while empties of .44 bore matched with the alleged crime weapon. Therefore, the recovery of weapon of offence from the possession of appellant seems to be doubtful and cannot be relied upon.

In a case titled **Ghulam Akbar and another Vs. The State (2008 SCMR-1064,** it was observed by their Lordships that law requires that empty recovered from the spot should be sent to the laboratory without any delay, failing which such recovery evidence was not free from doubt and could not be used against the accused.

Again in the case of **Jehangir Vs. Nazer Farid and another (2002 SCMR-1986),** the receipt of crime empties in the Forensic Science Laboratory after seven days has been condemned and, as such, it was considered of no assistance to the prosecution or for that matter against the accused. Reliance is also placed on a case law titled **Muhammad Younus Khan Vs. The State (1992 SCMR-545).**

It was also observed in the case of **Attaullah and others Vs. The State (PLD 1990**

Peshawar-10), that the crime empties should be immediately dispatched to Arms Expert and should not be kept by the Investigating Officer because in that case objection regarding manipulation of recovery will hold good.

15. There is no second opinion that criminal justice always lays emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of innocent persons alongwith guilty one by the prosecution, otherwise, the golden principle of justice would come into play that even a single doubt if found reasonable would be sufficient to acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required to extend the legal benefit to the accused. In this regard, reliance is placed on a view held by the Hon'ble Supreme Court in the case of **"Riaz Masih alias Mithoo Vs. State (NLR 1995 Cr.SC 694).**

16. Regarding the golden principle of benefit of doubt, reference can be made to the celebrated judgment of the apex Court title **"Muhammad Luqman Vs. The State (1970 S.C.-10)**, where the Hon'ble Bench have observed that:-

> *"It may be said that a finding of guilt against an accused person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case where to be decided merely on high probabilities regarding the existence of non-existence of a fact to prove the guilt of a person, the golden rule of "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the superior Courts, will be reduced to a naught".*

The dicta laid down in the above precedent has been re-enforced by the august Supreme Court in the cases of **Tariq Parvez Vs. The State (1995 SCMR-1345), Muhammad Khan and another Vs. The State (1999 SCMR-1220) and Muhammad Akram Vs. The State (2009 SCMR-230).**

17. In view of the above, we do not hesitate to hold that the prosecution has failed to prove its case against the appellant Allah Wasaya. Accordingly, we accept the appeal to the extent of appellant Allah Wasay, set aside the conviction and sentence recorded by the learned trial Court and acquit him from the charges levelled against him in the present case. He shall be released forthwith, if not required in any other case.

18. Criminal Revision No.11-D/2012 for enhancement of sentence stands dismissed for having become infructuous to the extent of appellant Allah Wasaya and the same is adjourned sine die to the extent of appellant Ehsanullah which shall be relisted after his arrest on the application of either side.

Announced.
Dt:03.4.2018.

JUDGE

JUDGE