

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, J.
Ghulam Mustafa Mughal, J.

1. Cri. Appeal No. 4 of 2017
(Filed on 21.3.2017)

1. Muhammad Khalid s/o Roshan, caste Mangral r/o Sere Mang, Tehsil Bagh, presently in judicial lockup Bagh.
2. Ai Pasha s/o Anwar Kamal Pasha, caste Maldial r/o Dhully, presently in judicial lockup Bagh.

.... APPELLANTS

VERSUS

1. State through Advocate General, Muzaffarabad.
2. Muhammad Javed s/o Sardar Shahmeer Khan, caste Maldiyal r/o Nar-Shar-Ali-Khan, District and Tehsil Bagh.

..... RESPONDENTS

(On appeal from the judgment of the Shariat Court dated 22.2.2017 in criminal appeals No. 4 & 15 of 2015)

FOR THE APPELLANTS: Raja Sajjad Ahmed Khan,
Advocate.

FOR THE RESPONDENTS: Mr. Raza Ali Khan,
Advocate General and
Sardar Karam Dad
Khan, Advocate.

2. Cri. Revision No. 5 of 2017
(Filed on 22.4.2017)

Muhammad Javed Khan
.... PETITIONER

VERSUS

Ali Pasha and another.
..... RESPONDENTS

(Revision petition against the judgment of the
Shariat Court dated 22.2.2017 in criminal appeals
No. 4 & 15 of 2015)

FOR THE PETITIONER: Sardar Karam Dad Khan,
Advocate.

FOR THE RESPONDENTS: Mr. Raza Ali Khan,
Advocate General and
Raja Sajjad Ahmed Khan,
Advocate.

Date of hearing: 4.12.2017.

JUDGMENT:

Ghulam Mustafa Mughal, J— The captioned appeal has been filed by Muhammad Khalid and another under section 25(1) of the Azad Jammu & Kashmir Islamic Penal (Laws) Enforcement Act, 1974 against the judgment dated 22.2.2017 passed by the Azad Jammu & Kashmir Shariat Court in criminal appeals No. 4 and 15 of 2015, whereby the conviction and sentence awarded to the appellants, herein, by the District Court of Criminal Jurisdiction, Bagh, has been maintained.

Criminal Revision No. 5 of 2017 has been filed against the same judgment by Muhammad Javed Khan, complainant, for enhancement of the sentence. As both the appeal and revision arise out of the same F.I.R. and the consolidated judgment passed by the learned Shariat Court, hence, were heard together and are decided as such.

2. The facts of the prosecution case in brief are that Muhammad Javed son of Sardar Shahmeer Khan, complainant, made a written

application before the S.H.O., Police Station Bagh narrating therein that he is a resident of village Nar-Shair-Ali-Khan. It was stated that his brother Pervaiz son of Shahmeer drives Coaster No.0686/L.W.O. belonging to Gul Azam son of Muhammad Azam, from Dhalli to Lahore and one Zafeer son of Muhammad Siddique, caste Maldiyal, resident of Khalli-Darman Abbaspur, is a conductor with him. On the fateful day, Pervaiz along with Zafeer, conductor after parking the vehicle at Dhalli went to sleep in the residential room of the upper storey of the hotel of Gul Azam. At about 10:00 p.m some unknown person/persons having intention to murder my brother, fired at him with a pistol, which hit on right side of his chest. It was further stated that he cannot speak and I have doubt that Gul Azam son of Muhammad Azam, Zafeer son of Siddique, Zulfiqar son of Rasheed and Kamran son of Zulfiqar have committed the offence. My brother had some cash with him. Upon this report, F.I.R. No. 56/2011 in the

offences under sections 324 and 337(F), A.P.C. was registered at Police Station Bagh on 27th March, 2011 at 11.00 p.m. Muhammad Pervaiz, injured was referred to Rawaplindi for treatment, but succumbed to injuries on his way to Rawalpindi, whereupon offence under section 302, A.P.C. was added. The Investigating office went on spot, secured the blood stained articles from the place of occurrence, got conducted the postpartum of the deceased and recorded the statements of P.Ws. under section 161, Cr.P.C. The accused nominated by the complainant were arrested. During the investigation, it transpired that Ali Pasha and Muhammad Khalid have committed the offence. They were accordingly arrested on 3.4.2011 and 4.4.2011 respectively. On the pointation of Muhammad Khalid, convict, a Kalashnikov was recovered. Sections 34, A.P.C. and 13/20/65, Arms Act, were further added in view of recovery of Kalashnikov. After necessary proceedings, the challan in the offences under sections 302, 34, A.P.C. and

13/20/65, Arms Act was submitted before the District Court of Criminal Jurisdiction against Muhammad Khalid and Ali Pasha, convicts-appellant on 3.5.2011. The other nominated accused in the F.I.R. were released under section 169, Cr.P.C. The statement of the accused under section 265-B, Cr.P.C. was recorded on 3.6.2011. They pleaded not guilty, whereupon the prosecution was asked to lead evidence in support of the charge. The prosecution examined 23 out of 29 witnesses. After recording the evidence, the salient feature of the prosecution evidence were put to the convicts, appellants, herein, on 8.3.2014 under section 342, Cr.P.C. The convicts again claimed their innocence. They also led defence evidence. After hearing the parties, the learned District Court of Criminal Jurisdiction, Bagh vide judgment dated 12.1.2015 found guilty Muhammad Khalid and Ali Pasha of committing murder of Muhammad Pervaiz, deceased and awarded them sentence of life imprisonment

under sections 302(c) and 34, P.C. along with compensation of Rs.100,000/- each under section 544/A, Cr.P.C., which if received shall be paid to the legal heirs of the deceased. In case of non-payment of the compensation, the convicts shall have to undergo 6 months each simple imprisonment. Muhammad Khalid was further sentenced to 6 months simple imprisonment with fine of Rs.10,000/- for committing the offence under section 13/20/65, Arms Act and in default of payment of fine, he has to undergo one month simple imprisonment. The benefit of section 382-B, Cr.P.C. was extended to the appellants, herein. The appellants challenged the legality and correctness of the judgment passed by the District Court of Criminal Jurisdiction, Bagh on 16.1.2015 by way of appeal before the Azad Jammu & Kashmir Shariat Court, whereas, Muhammad Javaid, complainant, also filed an appeal before Shariat Court for enhancement of the sentences of the convicts. The learned Shariat Court of Azad

Jammu & Kashmir has dismissed both the appeals through the impugned judgment dated 22.2.2017 while partially modifying the convictions of the appellants recorded under section 302(c) into section 302 (b), A.P.C.

3. Raja Sajjad Ahmed Khan, the learned Advocate appearing for the appellants, vehemently argued that the learned Shariat Court while handing down the impugned judgment has placed reliance on the police diaries, which cannot be relied upon for recording the conviction against an accused, hence, the judgment is erroneous, capricious and illegal. The learned Advocate further argued that the all the PWs. have improved their statements in the Court and the whole case has been built up on the basis of supplementary statements and the same are not recognized by any provision of criminal procedure/code. He argued that the case has been built up on the statement of Javed and Tahir Sarfraz, which was recorded at belated stage without any

explanation on the part of PWs. or Investigating officer. The learned Advocate argued that no doubt that conviction can be recorded on the basis of circumstantial evidence but the same should be up to the mark and no chain should be missing in order to bring the guilt to home of the accused, otherwise, in criminal justice system, the conviction cannot be awarded on the basis of suspicion, surmises and conjectures. The learned Advocate argued that the statement of PWs. have been recorded after a considerable delay of five days without any explanation, which indicates that the prosecution has consumed the time for deliberation and concoction of the case against the accused, appellants, herein. The learned Advocate argued that the motive alleged by the prosecution has not been proved but the trial Court as well as the learned Shariat Court has relied upon joint extra judicial confession, which was not admissible in evidence and even otherwise contradiction, which cannot be relied upon for

regarding the conviction. The learned Advocate maintained that the learned trial Court has also based his judgment on the ground that the defence has not led any evidence in support of the plea taken by him. The learned Advocate argued that this approach is also faulty because it is the basic duty of the prosecution to prove the case beyond any shadow of doubt against an accused. He added that the role of the Investigating officer in investigating the matter was highly doubtful and he has made every attempt to involve the accused in the offence. The statement of the Investigating officer, who has motive to involve the accused in the case, is highly objectionable and his statement cannot be relied upon at all. The learned Advocate in support of his submission placed reliance on the following cases:-

1. *Javaid Akhtar vs. Muhammad Zubair & 3 others* (2015 SCR 533),
2. *Zaffar Hussain Malik vs. Abdul Salam & 5 others* (2015 SCR 1090)
3. *Abdul Rasheed Gresta and another vs. The State through Advocate General, Azad Jammu & Kashmir Muzaffarabad and others* (2013 PSC (Cr1) 732)

4. *Arshad Mehmood vs. Raja Muhammad Asghar & another* (2008 SCR 345)
5. *Muhammad Rafique and other vs. The State and others* (2010 SCMR 385)
6. *Akhtar Ali and others vs. The State* (2008 SCMR 6)
7. *Khalid Javed and another vs. The State* (2003 SCMR 1419)
8. *Lal Muhammad vs. State* (PLJ 2012 Cr. C (Quetta) 574 (DB))
9. *Shahzad Khan vs. State* (PLJ 2008 Cr.C (Lahore) 942)
10. *Muhammad Iqbal alias Kali and another vs. State* (PLJ 2004 Cr.C (Lahore) 871)
11. *Muhammad Basharat vs. Syed Saqib Shah & others* (PLJ 2014 SC (AJK) 92)
12. *Muhammad Yaqoob and others vs. The State* (2007 YLR 534)
13. *Shahid Iqbal vs. The State* (2016 MLD 230)
14. *Muhammad Nadeem vs. The State* (2016 YLR 572)
14. *Muhammad Arshad and others vs. The State* (PLD 2011 Supreme Court 350).
15. *Muhammad Akram vs. The State* (1999 P Cr.L J 496).

4. Conversely, Sardar Karam Dad Khan, the learned Advocate appearing for the complainant and Mr. Raza Ali Khan, the learned Advocate General argued that despite believing the prosecution evidence, the learned trial Court as well as the Shariat Court has not awarded normal sentence i.e. death to the appellants, herein, for committing the murder of the deceased. The learned Advocates argued that the

prosecution has straight-forwardedly lodged the F.I.R and has not nominated anybody except the inmates of the hotel, which was natural. However, on the investigation, when they found innocent, were released under section 169, Cr.P.C. They argued that after receiving the information from Tahir and other about the involvement of the present convicts, the supplementary statement was recorded by the police, which was necessary, hence, the case was proved beyond any shadow of doubt on the basis of the statement of the PWs. as well as the extra judicial confession, which has not been retracted by the convicts. The learned Advocates argued that the prosecution has also proved the motive, therefore, it was enjoined upon the Shariat Court to award maximum punishment to the convicts. They further argued that as the convicts have failed to get their statement recorded under section 340(2)Cr.P.C., therefore, an adverse inference is liable to be drawn against them. The learned Advocates argued

that the appellants have committed the offence while sharing common intention and the life of a young man has been taken in a brutal manner over a petty matter, therefore, they do not deserve any leniency in the punishment. The learned Advocates argued that when recovery was believed and the motive was proved, the sentence was liable to be enhanced, hence, while accepting the appeal the sentence of death may be awarded to the convicts-appellants. In support of his submission, the learned Advocate placed reliance on the following cases.

1. *Sh. Muhammad Abdi vs. State* (PLJ 2011 SC 941)
2. *Ali Sher alias Muhammad Sher through Ali Muhammad vs. The State* (2011 P Cr. L J 1261)
3. *Muhammad Arshad and 2 others vs. The State* (PLD 1996 Supreme Court 122)
4. *Khizar Hayat vs. The State* (2011 SCMR 429).
5. *Faisal Mehmood and another vs. The State and another* (2010 SCMR 1025)
6. *Mst. Shamim Akhtar vs. Fiaz Akhtar and two others* (PLD 1992 SC 211)
7. *Mir Muhammad vs. State* (PLJ 1995 SC 356).
8. *Muhammad Babar vs. State through Advocate General* (2014 SCR 1585)
9. *Muhammad Ashiq vs. The State* (1998 P Cr L J 996)

10. *Sahib Khan vs. The State* (2008 SCMR 1049)
11. *Muhammad Imran vs. The State*. 2008 YLR 508
12. *Bahawal Bakhsh vs. The State* (2002 P Cr. L J 1902)
13. *Hamid Nadeem vs. The State* (2011 SCMR 1233)
14. *Khalid Javed and others vs. The State* (2001 P Cr. L J 1968)
15. *Munawar Shah vs. The State* (2004 MLD 200)

5. The facts of the prosecution case have been listed hereinabove, hence, the same need not to be reiterated for the sake of brevity. Suffice it to observe that the unfortunate incident which claimed the life of Pervaiz, deceased, took place on 27.3.2011, and the same was reported on the same day at 11:15 p.m. by Muhammad Javed, complainant, herein. It may be stated that the prosecution has cited 29 witnesses in support of the challan but out of them 23 witnesses have been examined. Besides the oral evidence, the prosecution has also relied upon documentary evidence, extra judicial confession, postmortem report, F.I.R. Exh. "PA", "PB" and "PG". As per record of the case, the occurrence has taken place on 27.3.2011 in a

hotel, which was being managed by Gul Azam. As per statement of Gul Azam, on the fateful day, Pervaiz and Zafeer, his conductor, were sleeping in the upper storey of the hotel. Two other conductors namely Kamran and Zulfiqar were also sleeping in a separate room, when the Pervaiz was gun downed, these witnesses ran towards him. He along with Zafeer took Pervaiz to the hospital. He has no knowledge of the occurrence directly except that he was present on spot but has seen nobody. Though, he has deposed that there was an altercation between Ali Pasha, convict and Pervaiz, deceased, few days ago. On demand, Ali Pasha refused to return the money to Pervaiz, deceased, which Pervaiz has borrowed few days before, all this has been heard by him. Under law, hearsay evidence is not admissible. It may be stated that reappraisal of evidence is not the function of this Court until and unless some glaring misreading or non-reading of the record resulting in miscarriage of justice has been pointed out. As

the matter is of abundant conscious, we have perused the entire evidence led by the persecution in the case in hand. As stated earlier, the occurrence took place in *Bismillah* Hotel at 10:00 a.m. when Muhammad Pervaiz, deceased was murdered. Soon after the murder, Gul Azam, the owner of the hotel, Muhammad Zafeer, Zulfiqar and Kamran were attracted to the place of occurrence. Admittedly, they have not seen anybody running away from the spot. Gul Azam has taken the deceased on a vehicle to the local hospital, however, it is stated by him that while going to the hospital, he has seen Khalid and Ali Pasha sitting in *Veranda* of some shops. In his statement, he has also stated that there was a dispute between Ali Pasha and the deceased regarding the return of money, but all his evidence is hearsay, which is inadmissible under law.

6. So far as prosecution witness Muhammad Zafeer is concerned, he was a conductor of the bus, which was used to drive

from Dully to Lahore. He was sleeping with the deceased in the hall of the upper storey of the hotel. He has also not seen anybody while firing on the deceased. Muhammad Javed, complainant, the brother of the deceased also was not an eye witness of the incident, however, he has received some information from Muhammad Tahir. The whole case has been built up on the statement of Muhammad Tahir.

7. The prosecution has tried to build up his case on the basis of the motive on the ground that some amount was taken from the deceased by Ali Pasha, convict and on his demand, some altercation took place between them and finally Ali Pasha refused to return the amount. Upon his refusal the deceased threatened Ali Pasha to bring to light all his activities. In response, Ali Pasha also threatened him that he would not be able to bring to light his activities, because he will be killed by then. This motive has not been proved by the prosecution at trial. It is well settled principle of

law that the prosecution is not bound to allege the motive for bringing the guilt to home of the accused but once the motive is set up by the prosecution then it is the duty of the prosecution to prove the same through concrete evidence. In the case in hand, the trial Court has disbelieved the motive, which was very important because the whole case rests on the circumstantial evidence. In such cases the motive is alleged then it is the duty of the prosecution to prove the same as one of the important chain of the events, which link the convict with the commission of the offence.

8. The second important evidence, which has been relied upon by the prosecution is the extra judicial concession, which allegedly has been made before Muhammad Idrees, Shoukat Hayat and Sardar Khalil. These persons are well known arbitrators of the area but the fact remains that after the commission of heinous offence which fact motivated the culprits to approach the above mentioned notables of the

area for settlement of the case. In such circumstances, extra judicial confession, which has been made jointly, cannot be relied upon for the purpose of recording the conviction. It is the duty of the Court to pass proper conviction if cogent evidence has been led by the prosecution, but conviction cannot be based on the evidence which is neither admissible nor confidence inspiring. The witnesses who have taken the deceased to the hospital were arrested by the police. Their statements under section 161, Cr.P.C. were recorded in which they have not mentioned about the alleged motive or altercation between the deceased and the convicts. It is celebrated principle of law that conviction on the basis of circumstantial evidence can be passed but such evidence should be free from doubt, confidence inspiring and based upon such pieces which form a chain of unbroken events. In the case reported as *Javaid Akhtar vs. Muhammad Zubair & 3 others* (2015 SCR 533), this Court while considering

the proposition at page 542 of the report has opined as under:-

“8. There is no direct evidence in the case. The case is based upon circumstantial evidence. An accused may be convicted on the basis of circumstantial evidence provided that such evidence is confidence inspiring and is based upon such pieces which form a chain of unbroken events and every link in the chain is connected with each other so that no link in the chain is missing and one end of the chain touches the dead body and the other to the neck of the accused and from such evidence that no other inference except the guilt of the accused is drawn. If any link is missing and chain of events is broken then an accused cannot be convicted on the basis of such circumstantial evidence.”

Similarly, in another case reported as *Abdul Rasheed Gresta and another vs. The State through Advocate General, Azad Jammu & Kashmir, Muzaffarabad and others* (2013 PSC

(CrI.) 732), the same principle was reiterated and followed by this Court while observing as under:-

“13. Before proceeding further, we may observe that in the case of circumstantial evidence, the pieces of evidence shall form the chain of the events. All the links in the chain shall be fully connected and interlinked. If any link of the chain is missing then the whole case falls. In a case resting on the circumstantial evidence, no link in the chain should be missing and all the circumstances must lead to the guilt of the accused. If a single link of the chain is missing, in such circumstances the circumstantial evidence cannot be relied upon. Every link in such a case should be proved by cogent evidence and if not, then no conviction could be maintained or awarded to an accused. In a case of circumstantial evidence, an accused cannot be held guilty on the basis of circumstantial evidence until and unless the facts proved are incompatible with his innocence and are incapable of explanation upon any reasonable hypothesis that that of his guilt.”

In the referred case, there was no direct evidence of the occurrence but the other circumstantial evidence was not confidence inspiring, hence, was not believed by this Court. The convicts therein were acquitted although they were sentenced to death by the trial Court and their sentences were maintained by the Shariat Court of the Azad Jammu & Kashmir. In another case reported as *Hamid Nadeem vs. The State* (2011 SCMR 1233), a larger bench of the apex Court of Pakistan has observed at page 1237 in paragraph No. 13 of the report as under:-

“13. We are well-conscious of the fact that conviction can be based on extra judicial confession when it is corroborated by other reliable evidence. However, extra judicial confession being regarded as a weak type of evidence by itself, utmost care and caution has to be exercised in placing reliance on such confession. Recovery of crime weapon and blood-stained clothes of appellant could have supported the prosecution case but in

the instant case that too are not beyond doubt as would be clear from the subsequent discussion.”

9. While perusing the impugned judgment passed by the learned Shariat Court, we have noticed that the learned Court has mostly relied upon the police diaries for recording the conviction and has also reproduced the same. We are of the considered view that this is not proper to pass conviction on the opinion given by the police in police diaries because the same is not a substantive piece of evidence. Neither any acquittal nor conviction can be based on such diaries. Reference can be made to the case reported as *Akhtar Pervaiz Qurshi vs. The State* (PLD 2012 Sindh 313), wherein at page 323 of the report, it has been observed as under:-

“...Any criminal Court may send for the police diaries under inquiry or trial in such court and may use such diaries not as evidence in the case but to aid it in such inquiry or trial before the court. While deciding the bail application by the learned ADJ,

neither any inquiry was pending nor any trial in his court and before confirmation of bail, charge sheet was already submitted in the competent court which shows that the said police-diary either inadvertently or due to some bona fide mistake which did not cause any prejudice to the Trial nor it misguided the court nor accused was granted bail on the basis of that police-diary. The acquittal or conviction cannot be based on police diary but it depends upon the outcome of trial on merits...”

Same view has been reiterated by Peshawar High Court in the case reported as *Shakil Ahmed vs. Muhammad Rafique and another* (1999 P Cr. L J 1137), wherein at page 1140 of the report it was observed that no finding can be recorded on the basis of police diaries which are mere opinion cannot be made a basis for finding of the Court. The relevant portion of the referred judgment is reproduced as under:-

“...We are also constrained to record that the learned lower Courts in general and the Court of learned

Additional Session Judge, Haripur who has passed the instant order in particular shall refrain in future to go by the case diaries of the police which are based on no evidence and are mere opinions. No findings shall be based on such case diaries.”

10. It may be stated that Sardar Karam Dad Khan, the learned Advocate for the complainant has referred to and relied upon various judgment from the apex Court of Pakistan and Azad Jammu & Kashmir jurisdiction in support of his submission that if a case is proved by cogent evidence then the normal penalty of death is to be awarded to an accused and if the same is not awarded by the Court then sound reasons should have been recorded. We have no quarrel with the proposition laid down in the authorities referred to and relied upon by the learned Advocate for the complainant, but the facts of these cases are totally different and the apex Court of Pakistan has rightly observed in those cases as has been argued by Sardar Karam Dad Khan, the learned

Advocate for the complainant. So far as the applicability of the precedents in the criminal cases is concerned, it may be stated that each case is to be judged in view of the circumstances of that case. The case law, strictly speaking applies to the case in which it is enunciated. Normally, the statement of law in one case; and particularly in a criminal case, no doubt provides the guide lines in such like cases but it would not apply; rather it cannot be applied in its entirety to the facts of the other case, because each case is to be decided on its own facts.

11. On the basis of above discussion, we have reached the conclusion that the prosecution has miserably failed to prove his case beyond any shadow of doubt. Therefore, appeal No. 4 of 2017 filed by the convicts is hereby accepted and they shall be released forthwith provided they are not required in any other case. Resultantly, the revision petition No.5 of 2017 filed by Muhammad Javed Khan,

one of the legal heirs of the deceased is hereby
dismissed.

JUDGE
Muzaffarabad.
12.2017.

JUDGE

Date of announcement: 15-12-2017

