

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

**1. Cr.A No. 397-M/2018  
With M.R No. 24-M/2018**

Ali Rehman s/o Yasin R/O Dunkacha, Chowga, Tehsil Puran, District Shangla.

*Versus*

The State through Additional Advocate General and 03 others.

**Present:**

Mr. Bakhtyar Khan, Advocate for  
the appellant/convict.

Mr. Razauddin, A.A.G. for State.

Hafiz Ashfaq Ahmad, Advocate for Respondents  
No. 3 & 4.

**2. Cr.A No. 05-M/2019**

Rozi Gul s/o Said Rahman R/O Chori, Dunkacah, Tehsil Puran,  
District Shangla.

*Versus*

- 1) Afzal Rehman (2) Muhammad Waseem sons of Yaseen residents  
of Dunkacha Chowga, Tehsil Puran, District Shangla.
- 3) The State through Additional Advocate General, Darul Qaza,  
Swat.

**Present:**

Hafiz Ashfaq Ahmad, Advocate for  
the appellant/convict.

Mr. Razauddin, A.A.G. for State.

Mr. Bakhtyar Khan, Advocate for Respondents/  
accused.

Date of hearing: 14.10.2020

Date of announcement: 15.10.2020

**JUDGMENT**

**ISHTIAQ IBRAHIM, J.-** The present appellant/  
convict Ali Rehman and his acquitted co-accused  
Afzal Rehman and Muhammad Wasim, his brothers,  
were tried for the offences u/s 302, 311, 109/34  
P.P.C read with section 15 A.A before the Court of  
learned Sessions Judge/Zilla Qazi, Shangla, Camp

Court at Swat on the charge of committing murders of Mst. Zarguna, their sister, alongwith Zia-ul-Haq son of Rozi Gul on the pretext of honour which was reported vide case F.I.R No. 74 dated 08.05.2017 registered at Police Station *Chowga*, District Shangla wherein the trial Court vide judgment dated 19.12.2018 convicted the present appellant u/s 302 (b) P.P.C and sentenced him to death on two counts with payment of Rs.500,000/- each as compensation to legal heirs of both the deceased. He was further convicted u/s 15 A.A. and sentenced to undergo three years S.I with fine of Rs.5000/- or to further undergo one month S.I in case of non-payment of fine. All the sentences were ordered to run concurrently and benefit u/s 382-B, Cr.P.C was extended to the appellant.

His co-accused were acquitted by trial Court by extending to them the benefit of doubt against which the connected Cr.A No. 05-M/2019 has been filed by Rozi Gul, father of deceased Zia-ul-Haq. Both the appeals, emanating from the same judgment, are decided through this single judgment.

2. S.H.O Usman Munir (PW-5) who is complainant in this case, on receiving information regarding dual murders in village *Dunkacha*, rushed

to the place of occurrence in the company of police escort where he found the dead body of young girl inside a room of the *Hujra* of one Yaseen situated in village *Tiraj Dunkacha* whereas the corpse of a young boy was also lying at door of the room. Both the dead bodies were laying in pool of blood. On query, name of the girl became known as Mst. Zarghna daughter of Yaseen Khan (father of the present appellant and acquitted co-accused) and the other deceased was identified as Zia-ul-Haq son of Rozi Gul (PW-1) who had been done to death by the present appellant on the pretext of honour. At that time no one came forward to charge the appellant due to fear. The I.O prepared injury sheets and inquest reports of both the deceased and sent the dead bodies to *Puran* hospital for postmortem.

3. External postmortem of the dead body of deceased Zia-ul-Haq aged about 20 years was conducted by Dr. Rashid Ali M.O (PW-3). His report in this regard is Ex.PW-3/1 which carries the following opinion.

Supine position on bed. Look pale clothes white colour with blood stained. Nose blood stained, pupil dilated. No gag reflex. No pulse, no respiration, no any vital signs found.

Rigor Mortis: *developed.*

Postmortem lividity: *appeared.*

**Description of injuries.**

(1) Posterior superior aspect of left side chest medial to the scapula, approximately 2-3 cm in diameter, oozing blood.

(2) Entry wound: above left side nipple approximately 0.5-1 cm.

Exit wound: Posterior aspect of chest below scapula approximately 2-3 cm, bleeding actively.

(3) Entry wound below the umbilicus approximately 0.5 cm in diameter.

Exit wound: left side of buttock approximately 2-4 cm.

(4) Entry wound: right side supra pubic region approximately 0.5-1 cm in diameter.

Exit wound: right side of buttock 2-3 cm in diameter.

(5) Bruise on left forearm.

**Cause of Death:** Cardio pulmonary arrest (severe blood loss) due to firearm injury (gunshots).

Similarly, postmortem on the dead body of deceased Mst. Zarghuna was conducted by Lady Dr. Najma Begum WMO (PW-11). Her report Ex.PW-11/1 is as under:

**External Appearance:**

Clothed: Blood stained and teared up at sides of wounds. Multiple entries exit wounds seen on body, detail is given in figure.

Deep lacerated wounds seen on right thigh and right upper limb shown in figure. Bruise marks seen on left breast.

Thorax and abdomen intact. Per abdominal examination having no sign of pregnancy.

**Muscles, Bones, Joints:**

1. Entry wounds on left upper limb just above and below elbow joint. Left humerus bone fractured at lower 1/3<sup>rd</sup> Compound fracture.
2. Burst exit wound on left arm on ulna side. Fractured left ulna upper 1/3<sup>rd</sup> part.
3. Lacerated wounds on right thigh and right arm.
4. Entry and exit wound on left lower leg, pelvic bone left back side comminuted fracture.

5. Entry wound on supra pubic region. Exit wound above left buttock on back side.

External postmortem done and found multiple entry and exit wounds on various sides of body. Vaginal swab is taken and handed over to police.

Probable time between injury and death: *sudden*

Probable time between death and postmortem: 8-9 hours.

The lady doctor also endorsed Ex.PW-11/2 to the questionnaire on the inquest report, which is as under:

Ans: (1) She has crossed the age of puberty and also able to do intercourse.

Ans: (2) There is no clear drops etc. of semen on her vagina. Vaginal swab for laboratory examination is taken.

Ans: (3) 4/5 hours

4. The Investigating Officer (PW-14) on arrival to the spot prepared site plan, recovered blood through cotton from the points of both the deceased and four empty shells of 7.62 bore with two spent bullets from the spot. He also recovered a blood-stained mobile phone from the place of deceased Mst. Zarghuna and secured mobile recovered by S.H.O from deceased Zia-ul-Haq. The present appellant was arrested on the same day i.e 08.05.2017 whereas his acquitted co-accused were arrested on 10.05.2017. As per prosecution version, the appellant led the I.O to the fields from where the crime weapon 7.62 bore rifle was recovered on his

pointation. He also recorded his confessional statement Ex.PW-15/2 before the Judicial Magistrate (PW-15) on 11.05.2017.

5. After completion of investigation, challan was submitted before the trial Court. On commencement of trial, the accused were formally indicted for the offence to which they did not plead guilty and opted to face the trial. The prosecution, in order to further substantiate its case against the appellant and his co-accused, produced as many as sixteen PWs whereas I.O Aslam Khan was re-examined as APW-1 who exhibited F.S.L reports regarding blood-stained garments of the deceased and crime weapon with empties as Ex.PK and Ex.PZ respectively. When examined u/s 342, Cr.P.C, the accused professed innocence whereas the present appellant/convict also retracted his judicial confession, however, they neither examined their statements on oath in terms of section 340 (2), Cr.P.C nor produced and witness in their defence. On conclusion of trial, the learned trial Court found the appellant guilty of the charge, hence, sentenced him to death on two counts with compensation vide judgment dated 19.12.2018 whereas his co-accused Afzal Rehman and Muhammad Waseem were

acquitted. Hence, this appeal with the connected murder reference as well as the connected Cr.A No. 05-M/2019 against acquittal of the co-accused.

6. We have heard the arguments of learned counsel for the parties including the learned A.A.G. on behalf of State and perused the record with their able assistance.

7. Perusal of the record shows that the occurrence is unseen because it took place at unknown time during night of 08.05.2017 which was reported at 05:00 A.M. The prosecution has mainly relied on the confessional statement recorded by the present appellant on 11.05.2017 before the Judicial Magistrate. We deem it appropriate to reproduce the confessional statement for the sake of convenience.

مورخہ 07.05.2017 بروز اتوار میرے بھائی افضل رحمان نے لاہور سے مجھے فون کر کے بتایا کہ اُسکو معلوم ہوا ہے کہ ہمیشہ ام مسماۃ زر غونہ نے بذریعہ موبائل فون کسی کو آج رات ملاقات کے لیے ٹائم دیا ہے۔ آپ نگرانی کرو اور معلوم کرو کہ کون ہمیشہ ام کے ساتھ ناجائز تعلقات کے لیے آتا ہے اور جو بھی آئے اُسے زندہ مت چھوڑو۔ میں نے تمام حالات اپنے چھوٹے بھائی وسیم سے ڈسکس کر کے منصوبہ بنایا۔ رات تقریباً 11 بجے برادر ام محمد وسیم نے آکر مجھے بتایا کہ ایک شخص آیا ہے اور ہمیشہ ام مسماۃ زر غونہ کے ساتھ حجرہ کے کمرے میں داخل ہوا ہے۔ میں اور وسیم حجرہ آکر کمرہ کے دروازہ کو بند پایا۔ وسیم کو میں نے کہا کہ کلاشکوف لاؤ۔ وسیم نے کلاشکوف لایا اور میں نے بند کھڑکی پر ایک فائر کیا جس سے مقتول ضیاء الحق زخمی ہو کر دروازہ کھولا میں نے 2/3 فائر کر کے مذکورہ کو جان بحق کر دیا۔ بعد میں ہمیشہ زر غونہ کو کمرہ کے اندر پا کر اُس پر بھی 3/4 فائر کر کے قتل کی۔ بعد از وقوعہ میں موقع سے فرار ہو گیا اور کلاشکوف گھر کے نزدیک فصل گندم میں چھپا دی جو بعد میں SHO صاحب نے میری نشاندہی پر

برآمدگی۔ میں نے جو بھی کیا اپنی عزت کے لیے کیا اور اس پر پشیمان نہیں ہوں  
کیونکہ میں پشتون ہوں اور یہ غیرت کا تقاضا تھا۔ یہی میرا بیان ہے۔

8. The learned Judicial Magistrate (PW-15) has endorsed certificate Ex.PW-15/3 wherein he has noted that statement of the appellant was translated to him in Urdu. When appeared in the witness box, the Judicial Magistrate stated in his examination-in-chief that:

*The accused made his statement in Pashto language. The Reader of the Court namely Najm-ul-Islam translated the same into Urdu to me. I accordingly reduced the same into writing through my own hand.*

In cross-examination the Judicial Magistrate admitted that he is Urdu speaking whereas the appellant was Pashto speaking, however, he did not ask him about his educational background. He further admitted that he had not administered oath to the Reader before utilizing his services as a translator. The moot question before this Court is whether confession of the appellant recorded in the above mentioned mode and manner was authentic and reliable enough to provide a valid foundation for conviction of the appellant on capital charge. In this regard the august Supreme Court of Pakistan in the case of Azeem Khan and another Vs. Mujahid Khan and others reported as 2016 SCMR



274 has given guideline for Courts before recording confession of accused which is replicated below for ready reference.

Keeping in view the High Court Rules, laying down a binding procedure for taking required precautions and observing the requirements of the provision of section 364 read with section 164, Cr.P.C. by now it has become a trite law that before recording confession and that too in crimes entailing capital punishment, the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that, all signs of fear inculcated by the Investigating Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person is willing to confess, then all required questions formulated by the High Court Rules should be put to him and the answers given, be recorded in the words spoken by him. The statement of accused be recorded by the Magistrate with his own hand and in case there is a genuine compelling reason then, a special note is to be given that the same was dictated to a responsible official of the Court like Stenographer or Reader and oath shall also be administered to such official that he would correctly type or write the true and correct version, the accused stated and dictated by the Magistrate. In case, the

accused is illiterate, the confession he makes, if recorded in another language i.e. Urdu or English then, after its completion, the same be read-over and explained to him in the language, the accused fully understand and thereafter a certificate, as required under section 364, Cr.P.C. with regard to these proceedings be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official/officer whether he is Naib Court wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.

*(Emphasis supplied)*

9. Admittedly, both the Judicial Magistrate and the present appellant did not know the languages of each other and Reader of the Court had acted as an interpreter/translator between them while recording the confessional statement. The best and legal course for the Judicial Magistrate in the mentioned situation was to administer oath to the Reader before recording confession for getting the satisfaction that what the Judicial Magistrate had recorded in his handwriting was the actual utterance of the appellant and was translated word by word by the Reader without any alteration. Even the prosecution has not produced the said Reader of the Court as prosecution witness. While facing such situation in the case of Mst. Bakht Saba and another


*Vs. The State through Additional Advocate-General and another (2014 MLD 942 Peshawar)*, this Court discarded the confessional statement of the accused by observing that:

Secondly, the appellants were speaking Pashto while the Magistrate, who recorded the confession, was of Urdu speaking. Adil Mir, Judicial Magistrate (PW-5) in the first line of his cross-examination stated that he was not understanding Pashto and requested learned counsel for appellants to ask questions from him in Urdu. He further stated that he had not examined the accused to ascertain as to whether they were maltreated or not. He further stated in his cross-examination that accused were not knowing Urdu while he was not understanding Pashto; therefore, he recorded the confessions through his Steno, namely, Sheraz. He admitted that he has not mentioned this fact in the confessional statements. As there was complete disorder in verbal communication between the Magistrate concerned and the appellants and even the said Sheraz has not been produced, therefore, it cannot be said with certainty that the said Magistrate satisfied himself regarding voluntariness of the confessional statements.

The Judicial Magistrate has also not clarified in his statement that in what manner he had asked the questions mentioned in memorandum of inquiry through his Reader and how he read over the confession to appellant/convict, therefore, it cannot be ascertained from the available record that the appellant understood the nature and significance of the questions put to him by Judicial Magistrate

before recording his confession. Though the Judicial Magistrate has stated that he had handed over the appellant to Naib Court, however, the I.O has admitted in his cross-examination that the appellant was handed over to him at 13:00 hours. The relevant portion of his statement is reproduced below:

*I did not remember the exact time when the accused was produced before the Court for recording of confession, self-stated that I left with the accused from PS at 0930 hours. The accused was handed over to me after at 13:00 hours. The other two accused were outside the court room with me at that time.*



Thus, neither the relevant procedure was adopted in letter and spirit before recording the confession nor the Judicial Magistrate has taken the precautions for ascertaining that the appellant was recording his true and voluntary statement u/s 364 read with section 164, Cr.P.C. Hence, the so-called confession in the present case, being unreliable and untrustworthy, is kept out of consideration in the circumstances.

10. So far circumstantial evidence in the present case is concerned, according to the site plan Ex.PB, the place of occurrence is a *Hujra*, which, as per prosecution version, is owned by Yaseen, father of the appellant. Admittedly, *Hujra* in *Pashtoon* customs and culture is a place commonly used for

guests and is seldom accessed by women folk. There is no evidence on record that the *Hujra* was the sole ownership of the present appellant rather there was father and other brothers/acquitted co-accused of the appellant who all shared the same building with the appellant. Presence of the lady deceased with the male at such like place having no boundary wall pricks our mind and so is the question regarding the sole alleged nexus of the present appellant with the occurrence in the mentioned circumstances. According to the alleged confession, a conspiracy was hatched by appellant with his co-accused to make surveillance of the paramour of their sister who per prior information was approaching to their house at that night, but it is astonishing that they did not notice the departure of their sister Mst. Zarghuna from the house to *Hujra*. Thereafter, according to prosecution, deceased Zia-ul-Haq came to the *Hujra* and entered a room alongwith Mst. Zarghuna but at that time the accused, though on guard, did not take any abrupt action and let the male deceased to jollify with his sister inside the room of *Hujra*. Even the appellant and co-accused Wasim, as per confession, initially went to the said *Hujra* unarmed and when found the door closed from inside, the appellant

asked his brother to bring Kalashnikov and thereafter he committed the murders. The mentioned conduct of the accused as put forth by prosecution does not fit in the given grave and stressed situation. In the case of "Mst. Shamim and 2 others Vs. The State and another" (2003 SCMR 1466) the august Supreme Court of Pakistan, in view of the doubtful status of the prosecution story, observed that:


**"The prosecution story being the foundation on which edifice of the prosecution case is raised occupies a pivotal position in a criminal case. It should, therefore, stand to reason and must be natural, convincing and free from any inherent improbability. It is neither safe to believe a prosecution story which does not meet these requirements nor a prosecution case based on an improbable prosecution story can sustain conviction".**

11. As regards medical evidence, according to post mortem report Ex.PW-3/1 prepared by Dr. Rashid Ali (PW-3), deceased Zia-ul-Haq sustained four entry wounds on his body i.e one wound was of 01 cm in size, two wounds were of 0.5-1 cm and one wound was of 0.5 cm whereas the dimension of the entry wounds on the body of deceased Mst. Zarghuna have not been mentioned by Lady Dr. Najma Begum (PW-11) in her report. The wounds of different dimensions on the

body of deceased Zia-ul-Haq suggest the use of different weapons which indicates involvement of several persons in the occurrence. This aspect of the case is in direct conflict with the confession wherein the appellant has attributed the role of firing only to himself. It is also strange that both the deceased have sustained eight entry wounds on their persons but only four crime empties have been recovered from the spot though the place of occurrence is a plain area without any plants or bushes to escape the sight of I.O from the remaining crime empties. The mentioned fact is sufficient to create a reasonable doubt in a prudent mind regarding the mode and manner of the occurrence.

12. The record further shows that the four crime empties recovered from the spot were sent to F.S.L alongwith the crime weapon after 62 days of the occurrence. Prosecution has not explained with reasons that why the crime weapon and empties were not sent to F.S.L in time. This lethargic conduct of I.O has vitiated the authenticity of F.S.L report Ex.PZ. Reliance is placed on Jehangir Vs. Nazar Farid and another (2002 SCMR 1986) wherein it was held that:

Report of the Forensic Science Laboratory whereby the three crime empties allegedly found at the place of occurrence were found to have been fired from a 7-MM rifle allegedly recovered at the instance of Nazar Farid accused was offered by the prosecution as a piece of evidence corroborating the ocular testimony. The occurrence had taken place on 21-1-1996. Nazar Farid accused was arrested on 1-2-1996. The rifle in question had been allegedly recovered from him on 12-2-1995 and it was at least seven days thereafter i.e on 19-2-1996 that the crime empties in question had been received in the Forensic Science Laboratory. In the circumstances this piece of evidence is not credible and is of no assistance to the prosecution as against Nazar Farid accused.



As per prosecution version, the appellant was arrested on 08.05.2017; he made pointation of the place of occurrence on 10.05.2017 during which he led the I.O to the place where he had concealed the crime weapon which was taken into possession vide recovery memo Ex.PW-13/7. Constable Sultan Ali (PW-13), who is marginal witness of the recovery memos including the aforesaid Ex.PW-13/7 regarding the recovery of crime weapon and accompanied the I.O during spot inspection, though claims to have witnessed the recovery of crime weapon on pointation of the appellant but made narrations in his cross-



examination which are self-contradictory. He stated that:

*We reached back to the PS at about 1100 or 1200 hours..... other than the day on 08.05.2017 I did not go to the spot again..... the pointation of the spot was made by the accused on the 3<sup>rd</sup> day of his arrest.....The photographs were taken at Asar time. On 10.05.2017 we came to the Police Station at about Maghrib prayer time.*

This PW on the one hand admits his visit to the spot only on 08.05.2017 but on the other hand he asserts to be eye witness of recovery of crime weapon which was allegedly effected on 10.05.2017. Likewise he has stated to have returned to P.S with I.O at 1100 hours or 1200 hours but testifies the pointation by appellant, the photographs whereof were taken at *Asar* time. In view of the above statement of PW-13, the recovery of crime weapon is not free from doubt. Since, various links of the circumstantial evidence in the present case are missing, therefore, the present appellant and their co-accused cannot be convicted on such unreliable circumstantial evidence. Wisdom is drawn from *Hashim Qasim and another Vs. The State (2017 SCMR 986)* wherein the former view was re-affirmed in the following words.

Keeping in view the above, the case of the prosecution appears to have been based entirely on circumstantial evidence. Placing reliance on circumstantial evidence, in cases involving capital punishment, the superior Courts since long have laid down stringent principles for accepting the same. It has been the consistent view that such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. Any missing link in the chain would destroy the whole and would render the same unreliable for recording a conviction on a capital charge.

13. Moving on to the connected Cr.A No. 05-M/2019 against acquittal of co-accused Afzal Rehman and Muhammad Wasim, the case against them is purely based on circumstantial evidence which has already been discarded by this Court, therefore, the evidence on record to their extent does not need further appreciation.

14. In view of the above stated position of the prosecution case, neither conviction and sentence of the appellant could be sustained in the circumstances nor the same evidence can be relied upon against his acquitted co-accused. Resultantly, this appeal is allowed, the impugned judgment dated 19.12.2018 rendered by learned trial Court is set aside and the appellant-convict Ali Rehman son of Yasin is acquitted of the charge leveled against him by prosecution. Murder Reference No. 24-M/2018 is

answered in *negative*. He be released forthwith from jail if not required in any other case. The connected Cr.A No. 05-M/2019, being bereft of merits, is accordingly dismissed.

15. Before parting with this judgment, in order to avoid complications of the like nature which cropped up in the present case, we deem it appropriate to direct that in future when an accused is produced for recording his confession before a Magistrate who is not conversant with the language of the accused most particularly when the accused is illiterate, the Magistrate shall send the case to concerned Sessions Judge for entrusting the same to another Magistrate who is well conversant and understands the language of the confessing accused. Office is directed to send copy of this judgment to Additional Registrar (Judicial) of the principal seat for circulation amongst all the learned Sessions Judges/Judicial Magistrates with permission of the Hon'ble Chief Justice.

Announced.  
Dt: 15.10.2020

JUDGE

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Office  
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