

**IN THE LAHORE HIGH COURT,
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT**

1. Criminal Appeal No.6-J of 2014
(Ashfaq Ahmad Vs. The State)

&

2. Murder Reference No.7 of 2014
(The State Vs. Ashfaq Ahmad)

Date of hearing: 28.03.2017
Appellant by: Ms. Fauzia Nazir, Advocate/Defence Counsel.
Complainant by: Mr. Zishan Munir Paracha, Advocate.
State by: Mirza Muhammad Usman, DPG with Sheraz,
S.I.

QAZI MUHAMMAD AMIN AHMED, J:-. Zeeshan, 6, hereinafter referred to as the deceased, went outside his home along with his minor brothers, namely, Kamran and Faizan to play on 21-03-2013; as he did not accompany them back home at 10:00 a.m, the family set out in his search; he was finally found lying dead on 23-3-2010 at 11:00 p.m. within the area of British Home, situating 2-Kilometers from Police Station Naseerabad, District Rawalpindi; incident was reported to the police by his father Shah Rehman (PW-6) through statement (Ex.PF) recorded by Muhammad Nawaz, SI (PW-12) 1:00 a.m. on 23-3-2013 at the spot wherein he laid suspicion against the appellant as according to him, the child was last seen in appellant's company by Muhammad Asif (PW-8) on 21-3-2013.

Dr. Waqas Afzal (PW-3) conducted autopsy at 3:00 a.m. on 23-3-2013 and noted five wounds of different dimensions on the neck below right & left mandible; both upper thighs; toe and the back; external compression of neck correlating with other injuries resulted into respiratory compromise leading towards cardio pulmonary arrest, opined as cause of death. Probable time between injuries and death was less than 15 to 20 minutes whereas between the death and

postmortem it was estimated as 24 to 36 hours. The appellant was arrested on 2-4-2013 and after completion of investigation, indicted by learned a Additional Sessions Judge at Rawalpindi on 12-4-2013 when he claimed trial, pursuant whereto, prosecution in order to bring home the charge produced as many as twelve witnesses. As there was no direct evidence, the prosecution relied upon various pieces of circumstantial evidence comprising of *res gestae*, extrajudicial confession, admission of guilt before the trial Court and recoveries, confronted by the appellant with a denial. The learned trial Judge vide impugned judgment dated 20.12.2013 convicted the appellant under Section 302 (b) of the Pakistan Penal Code, 1860 and sentenced him to death along with compensation in the sum of Rs.200,000/- or to undergo six months simple imprisonment in the event of default, vires whereof, are being assailed through Crl. Appeal No.6-J f 2014 whereas the State seeks confirmation of death penalty vide Murder Reference No.7 of 2014; these are being decided through this single judgment.

2. Learned counsel for the appellant contends that entire edifice of the prosecution case is structured upon a misconceived and misplaced suspicion; that there is no legal evidence which may possibly frame the appellant with the charge; that the witnesses were stage managed subsequently in support of a dishonest investigation; the bottom-line is that prosecution miserably failed to establish the charge. Contrarily, the learned Law Officer assisted by learned counsel for the complainant has defended the impugned judgment on the ground that with the help of various pieces of circumstantial evidence, prosecution successfully drove home the charge beyond reasonable doubt against the appellant, closely related both with the deceased as well as with the complainant and rest of the witnesses; it is argued that every hypothesis of appellant's innocence stands excluded and as he has brutally murdered an innocent child, he deserved no leniency in terms of quantum of sentence.

3. Heard. Record perused.

4. Calamity that befell upon the child is grievously shocking and the pain and anguish suffered by the family abiding by all means. Appellant is no other than a first cousin of the deceased, witnesses produced by the prosecution are related with him in close degree, however, what is to be seen is whether various pieces of evidence relied upon by the prosecution constitute a nexus between the appellant and the crime and with such a certainty that excludes every hypothesis of his innocence. Shah Rehman (PW-6) is the first who laid suspicion against the appellant soon after the dead body of his son was found in a *Nulla*; he mentioned Muhammad Asif (PW-8) as the one, who last saw the deceased in appellant's company. The child left home on 21-3-2010 before 10:00 a.m. Muhammad Asif (PW-8) has not given any time as to when he last saw the deceased in appellant's company on the said date; his case is that after he saw the deceased in appellant's company, he went to *Shankiari* to visit his ailing maternal grandmother and returned on the following day to learn about child's disappearance; he also accompanied the complainant to the place of recovery of dead body on 23rd of March. Though closely related with the appellant as well as with the complainant, his statement warrants a careful scrutiny. According to medical evidence furnished by Dr. Waqas Afzal (PW-3), time between injuries and death was less than 15 to 20 minutes whereas in inquest report (Ex.PC) time of death is given as 11:00 p.m. on 22-3-2013. Autopsy was conducted on 23-3-2013 at 3:00 a.m; duration between death and postmortem was estimated as between 24 to 36 hours. Since no point of time is given by Muhammad Asif (PW-8) as to when he last saw the deceased with the appellant, the only timeframe is to be possibly inferred from complaint Ex.PF wherein the other two brothers returned home at 10:00 a.m. on 21-3-2011 to find their brother missing from the scene; in this backdrop, statement of Muhammad Asif (PW-8) does not fit within the ambit of proximity in time as well as space; his explanation that after having last seen the deceased in the company of the appellant, he went to village *Shankiari* to attend his ailing

grandmother just to return the following day also requires a pinch of salt. Next piece of evidence is extrajudicial confession dated 1-4-2013 before Muhammad Yousaf (PW-5), another close relative; the witness was accompanied by his brother Muhammad Akhlaq when the appellant statedly visited his home; by that time both of them knew the tragedy that befell upon the family wherein the appellant was named as the accused; despite this background not only they permitted the appellant to enter the house and stay with them so as to share details of his crime, they also let him go scot-free; it is mind boggling as to why the appellant would visit this witness to furnish with him all the relevant details required for his prosecution merely to retract therefrom subsequently; evidence of extrajudicial confession is universally regarded as a weak piece of evidence; before it is acted upon, it has to be independently corroborated in material details; the requirement cannot be satisfied by putting reliance upon another weak piece of evidence. Yet another strange coincidence is that the appellant is taken into custody on the following day i.e. 2-4-2013 after he made his breast clean; equidistant witnesses between the appellant and the complainant, by itself, are no proof of truth, as it is a family sharply divided. Prosecution's next reliance is upon confessional statement dated 25-3-2013 whereby the appellant confessed as under:-

“It is stated on oath that on 21-3-2010 I had took my six years old Bhatija Zeeshan and strangulated him to death and threw the dead body in the nulla. I had murdered the deceased getting aggrieved of the harsh attitude of the father of the deceased. I am repentful of my act.”

According to interim orders dated 25-3-2013, the appellant appeared in custody along with his learned counsel Raheel Muhammad Musa Khan Advocate when he took the learned trial Judge into confidence. The learned Law Officer assisted by learned counsel for the complainant has vehemently relied upon this piece of “evidence” for confirmation of death penalty. Though seemingly all the formalities were fulfilled, it is mind boggling as to what prompted the appellant in

the midst of his trial to take this step; we were also intrigued by the presence of his counsel when the appellant offered his neck. We were appalled after perusal of record to see the name of the learned counsel for the complainant alongside Raheel Muhammad Musa Khan Advocate whom he admitted as one of his associates. When confronted with his “confession”, he replied, “*Yes. I was frustrated with trial proceedings*”. Even by a most liberal construction, the statement cannot be construed as being voluntary and thus is liable to be excluded from consideration. While answering the next query, the appellant replied, “*the complainant party has enmity with me that’s why they have deposed against me.*” In this backdrop, the so called confessional statement cannot be received as a piece of evidence against the appellant without jeopardizing the principle of safe administration of criminal justice as well as grievously impinging upon the concept of fair trial. Yet another reason to exclude the statement is its having been recorded on oath. Suspicions are after all suspicions and cannot substitute positive proof nor can moral satisfaction justify a conviction in the absence of evidential basis, therefore, while extending benefit of doubt to the appellant, **Crl. Appeal No. 6-J of 2014** is **allowed**; impugned judgment dated 20.12.2013 is set-aside; he is acquitted from the charge and shall be released forthwith, if not required in any other case. **Murder Reference No.7 of 2014** is answered in the **NEGATIVE** and death sentence is **NOT CONFIRMED**.

(Raja Shahid Mehmood Abbasi) (Qazi Muhammad Amin Ahmed)
Judge **Judge**

Approved for Reporting