

**IN THE SUPREME APPELLATE COURT GILGIT-BALTISTAN AT
GILGIT**

JAIL PETITION No. 01/2010

**Before: Mr. Justice Muhammad Nawaz Abbasi, (Chief Judge)
Mr. Justice Muhammad Yaqoob, (Judge)**

Mir Ahmad s/o Muladad presently in District Jail Gilgit.

Petitioner

Versus

The State

Respondent

OFFENCE UNDER SECTION 302/34 PPC.

**JAIL APPEAL AGAINST THE ORDER OF CHIEF COURT
GILGIT-BALTISTAN DATED 21-09-2010 WHEREBY
ACCEPTING REVISION PETITION OF STATE,
SENTENCE OF APPELLANT HAS BEEN ENHANCED TO
DEATH, ILLEGALLY AND WITHOUT JUSTIFICATION**

Present: Mailk Haq Nawaz, Senior Advocate for the petitioner.
Haji Jamal Khan, Advocate on record.
Advocate General Gilgit-Baltistan.

Date of hearing: 07.03.2011.

JUDGMENT

Mhammad Yaqoob.....J, This petition for leave to appeal has been preferred by the condemned prisoner Mir Ahmad s/o Muladad presently confined in district jail Gilgit, through Superintendent Jail, vide their letter No. DLG-2/1361/2009 dated 27th September, 2009, against the impugned judgment/Order dated 21-09-2010 passed by the learned Division Bench Chief Court, Gilgit-Baltistan, whereby the learned Division Bench has allowed the revision petition filed by the state, by enhancing the sentence into death penalty, hence this petition for leave to appeal.

Precisely stated the facts of the case as disclosed in FIR Esh.25/A that two Czechoslovakian, citizens namely Mr. Peter

Polasek and Miss.Gobrilla who while traveling in Northern Areas, reached in the suburb of Gupis, Tehsil Headquarter, District Ghizer. The Couple opted to stay for night camping at the bank of Ghizer River. At about 8:00 am on the following morning of the fateful night i.e. 27-04-2001, when Mr. wali Rahmat S/o Khush Madad reached police station Gupis with a verbal report that he and the other people of Gupis were working on the road, where from, they saw some thing struck in the water nearby river. The said Wali Rehmat went near the bank of river and found that a thing struck into the water of river was a dead body of lady. The said man brought the dead body out of the water which was identified a dead body of foreigner lady, dressed in the track suit. There were injuries on the head and face of the said deceased lady. On this report the incharge Police Station Gupis lodged FIR. No.06/2001; against some unknown culprits under 302/34 and 392 PPC vide FIR No. 06/2001.

The state machinery started to investigate the mysterious murder of above named two deceased, after a long time exhibit PW-14/A vide which a traveling Cheque was recovered from Shehzada Khan, which leads a reasonable clue to find out the actual culprits. The said recovery opened the door of actual story to the murder of above two deceased.

On the fateful night of 26th and 27th April, 2001, present petitioner Mir Ahmad and absconder accused Doulat Shah, went to the tent of deceased, where they were trying to robbed them but on resistance on behalf of deceased couple, accused brutally murdered both of them and robbed all value able belonging including wrist watch and a camera, accused threw the dead bodies of the deceased in to the Ghizer river. The dead body of deceased Mrs. Goberilla surfaced a few hundred yards away from the scene of occurrence, while the dead body of Mr. Peter Polasek was found many miles away from the spot of occurrence, long after the unfortunate incident.

Police arrested the resent petitioner and one Fida Hussain, after investigation, challan of the case under section 173 Cr.P.C.

was submitted before the trial court against the condemned prisoner and his co-accused Fida Hussain. Whereas, main accused Daulat Shah declared as absconder.

During the trial of the case accused Fida Hussain was acquitted under section 265-K, Cr.P.C. while the present petitioner/accused Mir Ahmed was initially charged for the offences under section 302/34 PPC vide order sheet date 16-12-2001, but they do not plead guilty and claimed trial.

The prosecution in order to prove its case produced 29 witnesses and also tendered documentary evidence Exh.P_1 to Exh.P-X to strengthen its case.

The learned trial court after conclusion of trial convicted the present petitioner under section 302/34/392 P.P.C and sentenced to undergo imprisonment for 25 years, twice for murder of both the deceased persons namely Mr. Peter Polasek and Miss Gobrilla and also convicted under section 392 P.P.C and awarded ten years rigorous imprisonment to the present petitioner. Petitioner was a very poor person and he could not engage a counsel to defend his case in Chief Court, resultantly, due to the lack of financial expenses petitioner could not challenged the impugned judgment/order dated 16-12-2004, passed by the trial court.

On the other hand, the state machinery preferred a revision petition against the impugned judgment/order dated 16-12-2004, passed by the trial court for enhancement of the sentence, which has been allowed and converted the sentence of 25 years into death penalty.

Since the condemned prisoner was unable to sustain the legal expenses, therefore, this Division Bench provided the services of Malik Haq Nawaz, Advocate and Haji Jamal Khan, AOR to the petitioner vide shot order dated 5-10-210 leaved was granted by this court vide order dated 8-6-2010, which is reproduced blow for ready reference.

“The contention of learned counsel for the petitioner that even if the case could not fall within the ambit of

section 302 (c) PPC for the purpose of sentence, still it was not a case of capital punishment requires consideration. Leave is accordingly granted in the petition and notice is issued to the state through Advocate general Gilgit-Baltistan”.

We have heard the arguments at length from either side and perused record of the case with due care and caution. The learned counsel for the petitioner/convict vehemently argued that the trial court has committed illegality and gross irregularity to frame the charge under section 392 PPC on the date, when the impugned judgment/Order dated 16-12-2004, was passed. The trial court did not provide any chance to face the legal consequences of section 392 PPC, as such without affording a chance to the condemned prisoner, the learned trial court has awarded ten years rigorous imprisonment under section 392 PPC, which has no value at all in the eyes of law. Therefore, this single point is sufficient to decide the whole trial of the case without jurisdiction. The learned counsel for the petitioner/convict further submits that the learned division bench of Chief Court has hopelessly failed to discuss oral as well as documentary evidence produced by the prosecution during trial of the case and no justification has put forward by the Division Bench of Chief Court in its judgment, that under what circumstances, sentence of twenty five years altered into death penalty, even the learned division bench did not pin point those reasonable ground, on account of which, punishment/sentence has been enhanced. As such the impugned judgment/order of the learned division bench of Chief Court, Gilgit-Baltistan, is based on flimsy grounds, against the evidence available on record, therefore, not maintainable.

He also strongly pressed that there is no ocular evidence available in this case which directly connect the petitioner with the murder of both the deceased, even the circumstantial evidence did not prove the guilt of the petitioner. Whereas, both the learned lower courts have wrongly convicted the petitioner on the ground of recovery of wrist watch and camera, although it is still thrust in the instant case, i.e. **“whether the recovered wristwatch and camera actually belong to the deceased or not”** the marginal witnesses

PW 5, namely Maqsad Jan, and PW 11 namely Nazir Hussain, only identified, the said watch, admitting to have sold the same to the said vendee, but a pivotal question arises here, is that, whether both the PW's had seen the recovered watch in the wrist of either of the deceased before their death, if the answer is positive, then it can safely be relied on the statements of PW-11. But if the answer is in negative, it could not be considered a ground for conviction. In this regard prosecution has totally failed to collect the evidence during the investigation as well as in trial. Therefore, conviction of the condemned prisoner on the ground of recovery is illegal, without evidence, hence not maintainable. Therefore, the conviction orders are liable to be set aside. The learned counsel further submits that this petition for leave to appeal may be accepted and set aside both the impugned judgments/orders passed by the learned lower courts to meet the ends of justice.

On the other hand the learned Advocate General refuted the arguments put forward by the learned counsel for the petitioner/convict, and contended that it is a fit case for capital punishment, the veracity of the statements of the PW.5 and PW.11 is a very natural, inspiring and independent, as such defence counsel could not shatter the veracity of the same, therefore, the conviction orders passed by both the learned lower court are liable to be upheld. He further submits that the present petitioner has committed brutal murder alongwith absconded accused (Doulat Shah), therefore the learned lower courts have rightly convicted and sentenced him under section 302/34 P.P.C.

We have carefully examined the respective contentions as agitated on behalf of appellant and for state in the light of provisions of law and record of the case. We have scanned the entire evidence with eminent assistance of learned counsel. We have also perused the judgment dated 16-12-2016 passed by the learned Additional Sessions Judge as well as impugned judgment. We find that the evidence of PW-5 Maqsad Jan s/o Gul Bahar Shah and PW-11 Nazir Hussain Malik s/o Khuda Yar r/o Rawalpindi is truthful, real, inspiring and trustworthy to the extent of wrist watch

and camera recovered by the investigating team on pointation of present petitioner/convict in different occasions. However, for ready reference we reproduce hereunder the examination in Chief, part of the statement of PW-5.

Maqsad Jan s/o Gulbahar Shah r/o Jandrote Gupis age about 57 years.

“He states that I am marginal witness to the recovery Memo.Ex.PW-4/A vide which wrist watch of the deceased foreigner peter polosiac was handed over by PW Mehdi to police in the presence of the accused at police station Gahkuch. The other marginal witness Khush Muhammad Chairman, Municipal Commettee Gahkuch. Ghizer. The PW Mehdi stated to the plice in my presence as well as in the presence of the accused that he had purchased the said watch from the accused present in court.”

We would also like to reproduce the contents of the statement of PW-11 which is as under:

PW-11. Nazir Hussain Malik s/o Khudayar age about r/O AA 1120, Gulshanabad, Rawalpindi

“He states that I am running a shop of camera at Bara market Rawalpindi. During the year 2001 in the month of June/July the accused present in the court whose name day know as Mir Ahmed came to my shop holding a camera with the request that he wants to sell his camera that he is a tourist guide by profession, his vehicle has become disorder and he wants to get repair by selling the same camera for the reason that he has no money for repair of his vehicle. He handed over me the camera and I paid him Rs.15, 500/- as cost of camera. After lapse of one year the police taken me to police station Rawalpindi and demanded for return of the camera. I told that the camera was sold/handed over to some body by my son who was at Italy on those days. The police directed me that I should arrange return of camera within 15 days. Upon contact with my son who was out side of Pakistan, named the person to whom the camera was delivered and I should contact the referred person. In this respect my statement under section 164 Cr.P.C. was recorded before the Magistrate City Rawalpindi, Ex.PW-11/A vide which I promised to handing over the camera to the police. The referred person was r/o Lahore, upon direction of my son I contacted the referred person and brought the camera from him and I contacted the police at Gilgit that I had received the alleged camera.

After 4/5 days in police inspector form Gilgit came to me, he tailed the camera No. with his information already received and stated that it was the correct camera which was alleged in the case. Then he took me before the Magistrate a Rawalpindi where my statement under section 164 Cr.P.C. was recorded vide Exh.PW-11/B regarding handing over of the alleged camera to the police of Gilgit. The recovery memo.Exh.PW-11/C also contains my signature vide which camera No.NECON-N-905-B-2113295 was handed over to the police by me. The documents Exh.PW-11/A, 11/B and 11/C bears my signature and are correct, the camera produced today in Court is the same which the accused sold me and I returned it to the police on their demand.”

Police recovered camera of male deceased on pointation of present petitioner/convict (Mir Ahmd). In this connection statement of PW-11 is elaboratry and truth inspiring; PW-11 is resident of Rawalpindi and is running a camera shop in Bara market. In this regard Exh.PW-1 t PW-X are also relevant. Exh.P-1 to Exh.P-X are the documents that have been prepared, through correspondence with the real brother of male deceased. But for further authentication of the documents, statement of brother of deceased is not recorded during the trial of the case. We are astonishing to note her, that the prosecution even did not bother to examine the translator, who translated the correspondence, took place during the investigation of the inspite of the we have minutely examined the Exh.P/V containing the number of camera of male deceased which is fully telling with number of camera recovered vide Exh.PW-11/A to Exh.PW-11/C read with Exh.PW-29/B and Ex.pW-29/C. the prosecution dispatched photo and number of recovered camera for identification to the real brother of deceased through Czechoslovakian, Embassy at Islamabad. Where from the same was verified to be the camera of male deceased through a statement of real brother of male deceased that was recorded before a District Court in Czechoslovakia. We would like to reproduce contents of the statement recorded in Czechoslovakia for further clarification of the point raised by the learned counsel for petitioner/convict.

“He states camera in the photograph agrees with type of Camera that my brother owned. If it was obvious from the photograph, and it is not, what camera lens there is, I would be able to identify the camera. I enclose warranty of camera, camera lens and flashlight. If there is given a serial number of camera 2113295 in the request from Pakistan then this number agrees with serial number given at warranty of camera. When my brother was leaving for Pakistan it was a new camera, there were not any scratches or stickers on it by which it would be possible to identify it unambiguously. If the camera has serial number corresponding to date given in warrant then it is my brother’s camera. I do not have more to mention concerning this matter finished and signed at 13.25 signatures illegible.”

Sd/xxxxxx

Sealed Mgr.Ivana plokove.

Marginal witnesses to Ex.PW-29 and Ex.PW-29/C along-with statement of PW-11 (Nazir Hussain Malik) has fully corroboratory and truth inspiring. So we relied on.

Another strong piece of evidence connecting accused with commission of the offence is the recovery of wrist watch of male deceased in the presence of impartial marginal witnesses to Exh.PW-4/A and Exh.PW-29/A. All the PW’s are way although subject to a lengthy cross examination. We are, therefore, relied upon prosecution evidence and held the same sufficient to record the conviction of accused for the offences of murder of deceased Peter Polasek and Miss Gobrilla.

As regard circumstantial evidence the court is to keep in mind the location of incident. If the place of incident is a place where no witnesses were available and the accused had the exclusive knowledge about the incident. **The simplicitor denial on the part of accused will not be sufficient to nullify the circumstantial evidence of the nature which directly connects him with the commission of the offence charged with, but be should raised a plea of the nature which on being tested on the touch stone of probabilities warrants a reasonable hypothesis of his innocence.**

We may further observe that in Criminal cases though the courts are supposed to follow the well settled Principles of **“Criminal jurisprudence” namely that an accused person is presumed to the innocent, that the prosecution is to prove a criminal case against an accused person beyond reasonable doubt and in case two views are possible the view which favours the accused person, should be preferred; and that all benefit of doubts should be extended to the accused** but , at the same, the court should also present days; even in cases where eye witnesses are available they refuse to appear as witnesses in support of the prosecution case; **either because of fear or on account of being won over by the accused party. The Court’s approach, while appraising the evidence, should be dynamic and not static; it should keep in view all the facts and circumstances of the case and if it is satisfied that factually the person charged with the offence has committed the same, it should record the conviction though there might have been some technical lapses on the part of the investigating agency/prosecution, provided the same have not prejudiced the accused in the fair trial. The people are losing faith in the criminal judicial system for the reason that in most of the criminal cases the criminals get away without being punished on technicalities.**

We are of the opinion that the learned Division Bench of Chief Court has adopted the wrong standard in appraising the prosecution evidence without any real effort to ad-judge the credibility of witnesses. Moreover, the learned Division Bench Chief Court Gilgit-Baltistan has also failed to discuss each and every crucial issue regarding the enhancement of the sentence awarded by the learned trial court vide its judgment dated 16-12-2004.

So for as the quantum of sentence is concern, we are of the view that according to the prosecution’s own case, it was not Mir Ahmed alone who remained involved in the murder of innocent person. Whether he alone is responsible and his companion)Daulat Shah) also contributed in the murder remains in dark. **In such a situation benefit of lesser sentence is given to convict (Mir**

Ahmed). We, therefore, consider that instead of extreme penalty of death, appellant may be awarded lesser penalty for life.

In the light of what has been stated herein above, we are of the considered view, that it is a fit case for alteration of sentence. Therefore, this criminal Jail petition for leave to appeal is converted into appeal and is partially allowed, with the reduction of sentence of death in to imprisonment for life, under section 302302-(b) P.P.C. under section 392 P.P.C, is hereby set aside as the learned lower courts did not provide fair chance to the petitioner/convict to face the legal consequence of section 392 P.P.C amount of the Rs. 20,000 will be deposited into Govt. Treasury, in case of default in the payment of fine, the petitioner/(Convict) will further undergo rigorous imprisonment for six months. Benefit of section 382-B Cr.P.C. is not extended in favour of petitioner/convict, as the petitioner has committed the murder of innocent person in a merciless, callous and brutal manner, hence the question of further leniency dose not arise. Petition for leave to appeal is converted into appeal and allowed.

Announced.

Chief Judge
Judge