

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Crl. Appeal No.906-P/2018
with Murder Reference No.19 of 2018.

Muhammad Qadeer son of Nazeer Muhammad,
r/o Togh Sarai, District Hangu.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant:-	<u>Mr. Jalal ud Din Akbar-e-Azam Gara,</u> <u>Advocate.</u>
For State :-	<u>Mr. Rab Nawaz Khan AAG.</u>
For respondent No.2:-	<u>Mr. Zahid Latif Advocate Junior of</u> <u>Mr. Kabir Imama Advocate along with</u> <u>Khurshid Ahmad brother of the Rizwan</u> <u>Ahmad, deceased.</u>
Date of hearing:	<u>26.11.2019</u>

JUDGMENT

ROOH-UL-AMIN KHAN, J:- At a trial held by learned trial Court/Sessions Judge, Hangu, accused (1) Muhammad Qadeer and (2) Mst. Robina Ashraf, having been found guilty of committing *Qatl-e-Amd* of Rizwan Ahmad deceased, have been convicted under section 302(b) PPC, resultantly, the former has been sentenced to death to be hanged by his neck till he is dead, while the latter has been sentenced to undergo imprisonment for life. Each one of them shall also pay Rs.5,00,000/- to legal heirs of the deceased in terms of section 544-A Cr.P.C., and in default thereof to undergo 06 months simple imprisonment (S.I.), each. Accused Muhammad Qadeer, has been further

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convicted and sentenced under section 15 Khyber Pakhtunkhwa Arms Act, 2013 to undergo imprisonment for three years and to pay a fine of Rs.50,000/- or in default thereof to undergo 02 months S.I. in case FIR No.222 dated 12.07.2017, under sections 302/34 PPC and section 15 KP Arms Act 2013, Police Station Saddar, District Hangu, vide judgment dated 15.10.2018. Benefit of section 382-B Cr.P.C. has been extended to them.

2. The instant and connected **Cr.A. No.908-P/2018**, have filed by Muhammad Qadeer and Mst. Robina Ashraf, the appellants, against their conviction and sentences, whereas, the learned trial Court has sent **Murder Reference No.19 of 2018**, in terms of section 374 Cr.P.C., for confirmation of death sentence of convict Muhammad Qadeer.

3. Since, all the matters are emanating from one and the same judgment of the learned trial Court dated 15.10.2018, therefore, we propose to decide the same through this consolidated judgment.

4. Rizwan Ahmad deceased was the first cousin of appellant Mst. Robina Ashraf as well as her fiancé, whereas, appellant Muhammad Qadeer is the maternal cousin of appellant Mst. Robina Ashraf. According to First Information Report (FIR), on 12.07.2017, complainant Umat Kareem (PW.5), on receipt of information about causing injuries to his cousin Rizwan Ahmad by someone

Robina Ashraf

in Mohallah Karzon Banda Togh Sarai, he reached the spot and found his cousin in injured and unconscious condition, who was shifted to Shaheed Farid Khan civil hospital Hangu, where he (complainant) made a report to Niamat Ullah Khan SI (PW.13), wherein he charged unknown culprit(s) for commission of the offence and alleged that on satisfaction he will charge the actual culprit(s). His report was recorded in the shape of Murasila Exh.PA/1 on the basis of which FIR (Exh.PA) was registered against unknown culprit(s). After preparation of injury sheet by Niamat Ullah Khan SI, he referred the injured to medical Officer for examination and treatment.

5. Dr. Mubarak Shah (PW.11) examined the injured on 12.07.2017 and noticed a firearm entry wound on his right side head occipital region with exit on forehead frontal region. The patient was unconscious. After administering first medical aid, the injured was referred to neuro surgical department Peshawar. On 15.07.2017, injured expired and Dr. Sami Ullah (PW.12) conducted autopsy on his dead body in Tertiary Care Hospital Peshawar and opined his death as a result of the aforesaid firearm injury.

6. On 24.07.2017, complainant Umat Kareem (PW.5), Khurshed Ahmad, brother of the deceased (PW.9) and Mst. Robina Ashraf (the appellant), recorded their statements under section 164 Cr.P.C. before the learned

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Judicial Magistrate, wherein they charged appellant Muhammad Qadeer for murder of the deceased and advanced a motive that appellant Muhammad Qadeer wanted to marry Mst. Robina Ashraf who was already betrothed to the deceased and their *Rukhsati* was scheduled to be held on 15.07.2017. Mst. Robina Ashraf (the appellant) in her statement under section 164 Cr.P.C. deposed that appellant Muhammad Qadeer had informed her on mobile Phone No.336-2575489 and 0332-3049091 that he has done the deceased to death.

7. Niamat Ullah SI (PW.13) conducted investigation in the case, who proceeded to the spot and prepared site plan Exh.PB. During spot inspection, he secured blood through cotton from the place of the deceased then injured and a .30 bore empty Exh.P.1, vide recovery memo Exh.PC, in presence of witnesses. On 14.07.2017, vide recovery memo Exh.PC/1, he took into possession the last worn bloodstained shirt of the deceased then injured and his mobile set "Samsung white colour" with SIM No.0347-9382476, produced by complainant Umat Kareem. In the mobile set of the deceased, the I.O. noticed some doubtful SMSs/text messages sent from mobile No.0312-8139371, therefore, he obtained CDR data of the above mentioned mobile numbers Exh.PW.13/4, which revealed connection/contacts between the two numbers. On the same day, Khursheed, brother of the deceased produced

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cell phone having SIM No.0336-2575489, belonging to Mst. Robina Ashraf (lady appellant). On 19.07.2017, the I.O. obtained CDR data of the aforesaid mobile phone number, which was brought on record and marked as Exh.PW.13/5. He also obtained print record of text of SMSs from mobile of deceased from the Kiosk of Abdul Rehman Photo-state situated at main Bazaar Hangu, being run by one Hayat Ullah, which have marked as Exh.PW.10/1 to Exh.PW.10/4. He also recorded statement of said Hayat Ullah under section 161 Cr.P.C. On 20.07.2017, the I.O. received CDR data of mobile SIM of Mst. Robina Ashraf i.e. 0336-2575489, which was registered in the name of her father. From CDR data it revealed that mobile number of Mst. Robina Ashraf was having contacts with SIM No.0332-3049091 (mobile number of appellant Muhammad Qadeer). CDR data of both the aforesaid number is Exh.PW.13/6. The CDR data further revealed that both the numbers were in contact with each other on 12.07.2017 at 21.26 hours to 21.43 hours (the night of occurrence) and mobile number of Mst. Robina Ashraf with the mobile number of the deceased then injured at 22.06 hours to 22.26 hours. The I.O. contacted with Khursheed Ahmad and told him to produce mobile set along with SIM of Mst. Robina Ashraf, who accordingly produced the same which was taken into possession by the I.O. through recovery memo

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Exh.PW.2/1. During the investigation the I.O. also came to know that SIM No.0344-1121682 was also in use of appellant Mst. Robina Ashraf, therefore, on 21.07.2017, he applied for obtaining CDR data of the said SIM Exh.Pw.13/8. Vide recovery memo Exh.PC/2, the I.O. took into possession mobile set Motorola touch screen having SIM No.0344-1121682 Exh.P.1, belonging to Mst. Robina Ashraf, produced by Khursheed Ahmad, brother of the deceased. He recorded statements of the PWs under section 161 Cr.P.C. including Ashraf Karim, father of Mst. Robina Ashraf, who alleged that the mobile numbers were registered on his name, however, were in the use of Mst. Robina Ashraf his daughter since long. On 26.07.2017, in light of the CDR data of mobile numbers of the deceased, appellant Muhammad Qadeer and Mst. Robina Ashraf, the I.O. also arrayed Mst. Robina Ashraf as accused in the case, resultantly, section 34 PPC was also added. On 29.07.2017, the I.O. arrested appellant Mst. Robina Ashraf vide arrest card Exh.PW.13/2. She confessed her guilt before the I.O. therefore, she was produced before the learned Judicial Magistrate, where her confessional statement was recorded. He initiated proceedings under sections 204 and 87 Cr.P.C. against appellant Muhammad Qadeer. On 04.08.2017, appellant Muhammad Qadeer was arrested, who during interrogation disclosed that pistol used by him in the commission of offence was taken from

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one Muhammad Suleman. The I.O. summoned said Suleman on 06.08.2018 to Police Station, who accordingly appeared and produced the said pistol which was taken into possession by the I.O. vide recovery memo Exh.PW.3/1. He added section 15 KP Arms Act in the case. On 07.08.2017, he produced appellant Muhammad Qadeer before the learned Judicial Magistrate, where he recorded his confessional statement. He sent the 30 bore pistol along with 30 bore crime empty to the FSL on 08.08.2018, report whereof Exh.PW.13/8 is in positive. He also sent the bloodstained articles to the FSL, report whereof is Exh.PW.13/19. On completion of investigation, he handed over case file to SHO, who submitted challan against the appellants.

8. On receipt of challan by the learned trial Court, the appellants were formally charge sheeted to which he pleaded not guilty and claimed trial. To prove its case the prosecution examined as many as fifteen witnesses. After closure of the prosecution evidence, statements of the appellants were recorded under section 342 Cr.P.C., wherein they denied the prosecution allegations and professed innocence. They, however, declined to be examined on oath or to produce evidence in defence. On conclusion of trial, the learned trial Court, after hearing both the sides convicted and sentenced the appellants as

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mentioned above, hence, these appeals and murder Reference.

9. We have heard the exhaustive arguments of learned counsel for the parties and perused the record with their able assistance.

10. Before advertng to merits of the case and reappraisal of the available evidence, we deem it appropriate to met legal objection raised by the learned counsel for the appellants to the effect that in statements of the appellant recorded under section 342 Cr.P.C., question **“what is your statement and why are you charge?”** has not been put to the appellants, therefore, the appellants have been condemned unheard. In this view of the matter, he requested for remand of the case to the learned trial Court.

11. To determine the legal consequence of the objection raised by the learned counsel for the appellants, it would be appropriate and advantageous to reproduced section i.e. 342 Cr.P.C., which deals with recording statement of the accused, below:-

342. Power to examine the accused. (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have

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been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the Court [...] may draw such inference from such refusal or answer as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

[(4) Except as provided by subsection (2) of S. 340 no oath shall be administered to the accused.]

Bare perusal of section 342 Cr.P.C. reveals that it relates to the statement of accused that is taken to trial. Its object is to see whether accused can give explanation of the incriminating evidence put against him. Its further object is to give accused an opportunity of explaining of evidence put against him. Provisions of section 342 Cr.P.C. have been enacted to safeguard the interest of the accused. The intention of the provision is the furtherance of the ends of justice and to enable the court to decide the question of guilt of the accused. The whole object of enacting this section is that attention of the accused should be drawn to the specific points in the evidence on which the prosecution claims that the case is made out against the accused, so that he may be able to give such explanation as he desires to give.

12. In this case, statements of the appellants reveal that each and every incriminating piece of evidence, relied

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upon by the prosecution, has been put to them by putting specific questions. Sufficient and proper opportunity of giving replies to these questions has been given to the appellants, which they have availed. The negative response of the appellants to question; Do you want to produce defence evidence? Do you wish to be examined on oath as your own witness? are sufficient for drawing conclusion that the appellants have been given ample opportunity to give such explanation as they may consider necessary in regard to the salient points made against them. Section 342 Cr.P.C. does not provide a specific pattern of questions to be asked from the accused. The essence of section (ibid) is that the court is bound to place before the accused every circumstance appearing in evidence against the accused. In other words, it is an unalienable right of accused to be heard and to be given ample chance to offer explanation qua every bit of incriminating evidence or circumstance brought on record during the course of trial. In the case in hand, the learned Trial Court has put a comprehensive question to the appellants in the language that:-

Q. No.19. "Do you want to add something else in your above statement".

Ans: "No I am innocent and falsely implicated".

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As observed above, section (ibid) does not provide a specific style or direction to be followed in using particular words of specific characters in question or to formulate a specific questionnaire for asking particular questions. The

above quoted question No.19 is more comprehensive and exhaustive than question proposed by the counsel for the appellants. In view of the above discourse, even if the appellants have not been put a question as to "what were their statements and why they were charged", shall not cause any prejudice to them because in response to question No.19, they respectively have answered in negative with explanation that he/she is innocent and has been falsely implicated. By putting the above mentioned question, sufficient opportunity was provided to the appellants for putting forth their versions but they have replied the same in the Negative. In this view of the matter, the objection raised by learned counsel for the appellants being not prejudicial to the appellants, is repelled.

13. Before advertent to merits of the case, we shall at the threshold like to point out that there is no direct/ocular evidence in this case. The entire case of the prosecution has been built upon the circumstantial evidence coupled with confessional statements of the appellants. It appears from record that initially nobody was charged by complainant Umat Kareem in his report dated 12.07.2017. During investigation, the I.O. took into possession cell phone of the deceased having SIM No.0347-9382476. He also noticed some doubtful text messages in the cell phone of the deceased, sent from cell phone No.0312-81393701 and No.0336-2575489. On getting CDR data of the above two

Learned Counsel

cellular numbers, it transpired that the former was in the use of appellant Muhammad Qadeer and the latter was registered in the name of one Ashraf Kareem, but was found to be in the use of Robina Ashraf (daughter of said Ashraf Kareem), hence, for the first time, Mst. Robina Ashraf, revealed the secret and unravel the crime by recording her statement under section 164 Cr.P.C. She was found hand in glove with appellant Muhammad Qadeer, thus she was arrested on 29.07.2017, produced before the Judicial Magistrate on the same day and date, where she unhesitatingly got recorded her confessional statement. Later on, Muhammad Qadeer appellant was also arrested who reiterated his love story with Mst. Robina and confessed the guilt by making confessional statement on 07.08.2017 before the learned Judicial Magistrate. Before dilating upon the voluntariness of confessional statements of the appellants and its corroboration from other independent circumstances coupled with the fact that whether these have been recorded in accordance with law, we, would like to reproduce the confessional statements one by one below:-

“Confessional statement of Mst. Robina Ashraf:-

Stated that Rizwan Ahmad son of Hazrat Karim, resident of Togh Sarai Hangu was my cousin and I was engaged with him some two years prior to the occurrence. As my engagement with him was against my will, therefore, I had complained to my parents, that I do not like Rizwan Ahmad, but they refused. I

wanted to marry with my maternal cousin Muhammad Qadeer son of Nazir Muhammad and he loves me too. My and Rizwan Ahmad's wedding date was scheduled on 15.07.2017. On 10.07.2017 I along with my family members came to village Togh Sarai Hangu. On 10.07.2017, before my arrival to Hangu Muhammad Qadeer had told me that either he will kill himself or Rizwan. I forbade him from doing so, but he did not agree. Muhammad Qadeer had reached Togh Sarai before our arrival. On 12.07.2017, Muhammad Qadeer phoned me to call Rizwan outside the home on some pretext. I called Rizwan that I wanted to meet you. So you have to come down the street in back of house. Rizwan and me were talking on the phone, when in the meantime, I heard fire shot and our call disconnected. In the meantime, kids came inside home and told that Rizwan has been shot dead. Muhammad Qadeer then phoned me and told that he shot the deceased in the head".

“Confessional Statement of Muhammad Qadeer:-
 Stated that Mst. Robina Ashraf daughter of Ashraf Kareem resident of Bangash Colony Paposh Nagar Nazim Abad No.5 Karachi, presently Hangu is the daughter of my paternal aunt. We both fall in love with each other one year prior to the occurrence. We used to chat and send messages to each other on mobile phones. In the meantime, Mst. Robina was engaged with his first cousin Rizwan Ahmad. She was not happy on her engagement as she wanted to marry me. I too wanted to marry her. The date of Rukhsati of Mst. Robina with Rizwan Ahmad was scheduled. Mst. Robina Ashraf told me on phone to remove Rizwan Ahmad from the way as there is no other way. She told me to kill Rizwan, however, she started scolding me that I am faitless (Bewafa) and shameless (Beghairat). Mst. Robina Ashraf was brought to Togh Sarai by her family, while I had come to Togh Sarai prior to them. On 11.12.2017 at night time I was present with my friends in the Baithak situated in Togh Sarai when in the meantime, Mst. Robina Ashraf called me on my

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phone and told me to come towards the Baithak of Rizwan Ahmad to kill him. I took the pistol and went towards the Baithak of Rizwan Ahmad. Mst. Robina was present in the door of the Baithak. We both met and in the meantime, Rizwan Ahmad came there. Mst. Robina Ashraf told me to fire Rizwan Ahmad. I opened fire at Rizwan Ahmad, as a result, he got hit on his head and fell down. Mst. Robina Ashraf went inside her house and I left for my Baithak. This is my statement”.

14. The learned Judicial Magistrate who has recorded confessional statements of the appellants appeared as PW.6. He deposed that on 29.07.2017, Mst. Robina Ashraf appellant was produced before him for recording her confessional statement. He directed all the police officials including Naib Court and APP to leave the Court room so as to relax her from any sort of fear and pressure. She was given sufficient time thrice for pondering over her statement, he disclosed his identity to her and told her that she is not bound to make a confession and if she does so it will be used against her as evidence. She was also explained about the consequences of her confessional statement. After due satisfaction, the learned Judicial Magistrate recorded her confessional statement, which was read over to her and she after admitting it correct signed/thumb impressed the same. He (PW.6) exhibited confessional statement of the appellant as Exh.PW.6/2.

Similarly, on 07.08.2017, the learned Judicial Magistrate, also recorded confessional statement of

For the Court

appellant Muhammad Qadeer, after observing the above mentioned legal formalities, which is marked as Exh.PW.6/5. The same was read over to the appellant Muhammad Qadeer, who after admitting it correct signed the same. The learned Judicial Magistrate (PW.6) was subjected to lengthy and taxing cross-examination by the defence but nothing has been brought from his mouth that confessional statements of the appellants were the result of torture, force, coercion or promise. The relevant questions with regard to making of confession on the basis of force, coercion, torture, promise and inducement have been replied by both the appellants in the negative. Appellant Mst. Robina Ashraf had been arrested on 29.07.2017 and on the same date without any physical remand she has confessed her guilt before the learned Judicial Magistrate, therefore, the same by no stretch of imagination can be termed as a result of any pressure or torture. Similarly, an iota of evidence has not been brought on record to show remotely the confessional statement of appellant Muhammad Qadeer to be result of any coercion and torture. In view of the statement of learned Judicial Magistrate (PW.6), coupled with the confessional statements of the appellant, we are firm in our view to hold that confessional statements of the appellants are voluntary and free from any sort of force, pressure, torture, inducement and promise.

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15. The confessional statement of the appellants find corroboration from other circumstances of the case, like medical evidence in the shape of autopsy report of the deceased and statements of medical Officers who examined the deceased then injured Rizwan Ahmad and autopsy on his dead body. In confessional statements, both the appellants have stated that Rizwan Ahmad deceased was shot on his head. Dr. Mubarak Shah (PW.11), examined who examined the deceased then injured found firearm entrance wound on right side head, occipital region with corresponding exit on frontal region of his head. PW.12 Dr. Sami Ullah, who conducted postmortem of the deceased, has also affirmed the firearm wound on occipital region with its corresponding exit on frontal region of head of the deceased. The motive advanced by complainant Umat Khan and PW Khursheed, brother of the deceased that Mst. Robina Ashraf was engaged with the deceased and their marriage was going to be solemnized on 15.07.2017, has been admitted by both the appellants in their confessional statements. The occurrence has taken place on 12.07.2017 i.e. two days prior to *Rukhsati* of , appellant Mst. Robina Ashraf. Mobile set Samsung white colour bearing SIM No.0347-9382476 Exh.P.2 belonging to deceased was taken into possession by the I.O. Record of the threatening text messages received on mobile number of the deceased from mobile No.0312-8139371,

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registered in the name of Appellant Muhammad Qadeer has also been obtained which are Exh.PW.10/1 to Exh.PW.10/4. Mobile Nos.0336-2575489 and Mobile No.0332-30349091, have been registered in the name of father of appellant Mst. Robina Ashraf. CDR data of the mobile numbers of both the appellants and that of the deceased has been brought and exhibited by the I.O. during his statement, perusal of which reveals that the two appellants and the deceased were in contact with each other on the night of occurrence till the time of occurrence. Similarly, the pre and post occurrence contacts of the two appellants on their mobile numbers with each other further strengthens the prosecution case and corroborates their confessional statements. As per FSL report the crime empty of 30 bore recovered from the spot has been fired from the 30 bore pistol shown recovered from the appellant Muhammad Qadeer. Muhammad Sulman from whom the appellant had taken the crime pistol has been examined as PW.3. He deposed that the said pistol was taken from him on 13.07.2017 by Appellant Muhammad Qadeer on the pretext of making firing in marriage ceremony of Rizwan Ahmad deceased, which was later on returned to him by the appellant. He deposed that on 06.08.2017, the local police summoned him to PS for production of the said pistol. He visited the PS, handed over the pistol to the appellant inside the Police Station and from his possession

Muhammad Sulman

the same was recovered by the I.O. in his presence. The above mentioned pieces of circumstantial evidence fully corroborate the confessional statements of the appellants.

16. Though, the appellants have retracted their confessional statements in their statements under section 342 Cr.P.C., but it is settled law that conviction of an accused can be recorded on the basis of retracted judicial confessional if the same was proved voluntary, true and corroborated by other strong circumstances of the case. Mere denial of accused in statement under section 342 Cr.P.C. that confessional statement was not voluntary or that he/she has not made such statement would not make his/her confessional statement inadmissible. As per ratio of judgment of the Hon'ble Supreme Court in case titled, **"Manjeet Singh Vs the State" (PLD 2006 Supreme Court 30)**, retracted confession either judicial or extra-judicial, if found truthful and confidence inspiring as well as qualified the test of voluntariness, can be used for conviction without looking for any other sort of corroboration. In the judgment supra the Hon'ble Supreme Court while dilating upon the evidentiary value of the retracted confession held that no rule of criminal administration of justice existed to the effect that the court having found the retracted confession voluntary and true must look for the corroboration and that in absence of corroborative evidence, conviction cannot be maintained.

Justice Saini

Retraction of a Judicial or extra-judicial confession itself is not an infirmity to be considered sufficient to withhold the conviction, because evidentiary value of a confession is not to be diminished by the mere fact that it was retracted by the maker at the trial. Even an independent corroboration thereof from other sources direct or circumstantial, cannot be insisted in every case as a mandatory rule, rather the rule of corroboration is applied by way of abundant caution and in a case depending entirely on the confessional statement of a person or only on the circumstantial evidence, and this rule is applied more cautiously. Deriving wisdom from the judgment (supra) of the august Supreme court, we entertain no amount of doubt in mind to hold that the confessional statements of the appellants being voluntary is fully corroborated by strong circumstances discussed above and has rightly been based by the learned trial Court for holding the appellants guilty of the offence to which no exception can be taken.

17. Coming to the question of quantum of sentence, from the confessional statements of the appellants it has been proved up to the hilt that they have committed murder of the deceased with premeditation so as to remove him from the way being hurdle in their marriage. The active role in committing murder of the deceased has been played by appellant Muhammad Qadeer therefore, he has rightly

Muhammad Qadeer

been awarded death sentence. As the lady appellant has not physically participated in the crime, therefore, punishment of imprisonment for life as awarded to her by the learned trial Court is appropriate and just.

18. For what has been discussed above, the instant as well as connected Cr.A. No.908-P/2018, filed by Muhammad Qadeer and Mst. Robina Ashraf, being meritless are hereby dismissed.

19. **Murder Reference No.19 of 2018**, sent by the learned trial Court for confirmation of death sentence of appellant Muhammad Qadeer is answered in the **"Affirmative"**.

Announced:

26.11.2019

M.Siraj Afridi PS

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JUDGE

JUDGE

**DB of Hon'ble Mr. Justice Rooh ul Amin Khan; and
Hon'ble Mr. Justice Ishtiaq Ibrahim .**