

**IN THE FEDERAL SHARIAT COURT**  
(CRIMINAL APPELLATE JURISDICTION)

**PRESENT**

**MR. JUSTICE MEHMOOD MAQBOOL BAJWA**  
**MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH**  
**MR. JUSTICE SHAUKAT ALI RAKHSHANI**

**APPEAL NO. 03-P OF 2017**

1. SANGEEN KHAN S/O ALI JAN, RESIDENT OF GHAZI BABA, ODIGRAM, PRESENTLY AT KHAWAJA ABAD, MINGORA, SWAT.
2. ILYAS S/O KHURSHID ANWAR, RESIDENT OF HAFIZ ABAD, ODIGRAM, SWAT.

APPELLANTS

**VERSUS**

1. THE STATE.
2. AMJAD ALI S/O MUHAMMAD GUL, RESIDENT OF AFSAR ABAD, SAIDU SHARIF, DISTRICT SWAT.

RESPONDENTS

**MURDER REFERENCE NO.01-P OF 2017**

THE STATE.

**VERSUS**

SANGEEN KHAN S/O ALI JAN, RESIDENT OF GHAZI BABA, ODIGRAM, PRESENTLY AT KHAWAJA ABAD, MINGORA, SWAT.

CONVICT

**MURDER REFERENCE NO.02-P OF 2017**

THE STATE

**VERSUS**

ILYAS S/O KHURSHID ANWAR, RESIDENT OF HAFIZ ABAD, ODIGRAM, SWAT.

CONVICT

COUNSEL FOR THE APPELLANTS	...	SHER MUHAMMAD KHAN, ADVOCATE
COUNSEL FOR THE COMPLAINANT	...	NAVEED AKHTAR, ADVOCATE
COUNSEL FOR THE STATE	...	WALAYAT KHAN, ASSISTANT ADVOCATE GENERAL, KPK.
FIR NO. AND POLICE STATION	...	NO.13 OF 2014 KABAL, DISTRICT SWAT.
DATE OF JUDGMENT OF TRIAL COURT	...	23.02.2016
DATE OF PREFERENCE OF APPEAL AND MURDER REFERENCES	...	14.12.2017.
DATE OF HEARING	...	19.09.2018
DATE OF DECISION	...	19.09.2018

**MEHMOOD MAQBOOL BAJWA, J:** Through this judgment, we intend to dispose of Criminal Appeal No.3-P of 2017 titled “SANGEEN KHAN, ETC. VS. THE STATE, ETC.,” Murder Reference No.1-P of 2017 titled “THE STATE VS. SANGEEN KHAN” and 2-P of 2017 titled “THE STATE VS. ILYAS”, arising out from the judgment dated 23<sup>rd</sup> February, 2016, handed down by a learned Additional Sessions Judge/Izafi Zilla Qazi Kabal, Swat, whereby after conclusion of trial in Crime-Report bearing No.13 of 2014, concluding about the guilt of both the appellants under Section 302, 392 read with Section 34 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called Act XLV of 1860) awarded them sentence of death, compensation to the tune of Three Hundred Thousand Rupees (Rs.3,00,000/-) each, eight year rigorous imprisonment each with fine of Rupees Fifty Thousand each and in default of payment of fine to further undergo three months simple imprisonment each, respectively. Holding each appellant guilty under Section 13 of The Arms Act, 1965, read with Section 34 of Act XLV of 1860, sentence

of one year rigorous imprisonment was awarded. The sentences were directed to run concurrently.

2. Amjad Ali (P.W.3), son of Gul Muhammad (deceased) on 9<sup>th</sup> January, 2014, after getting information about the un-natural death of his father went to Kabal Hospital, got recorded his statement to Muhammad Iqbal Khan, Inspector (P.W.5) implicating both the appellants as assailants with the stance that they engaged his father, Taxi Driver of Car No.PSSS-0101, for Kabal and after snatching the vehicle committed his murder. As per contents, intimation of occurrence was received by him at 5:30 p.m.

3. Charge under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called The Ordinance) and Section 13 of The Arms Act, 1965 (Hereinafter called The Act) read with Section 34 of The Act XLV of 1860 was framed against the appellants, requiring to produce its evidence resulting in production of 19 witnesses besides documentary evidence followed by statements of appellants under Section 342 of The Code of Criminal Procedure 1898 (Act V of 1898) (Hereinafter called The Code), leading no evidence in defence with denial to appear as a witness.

4. Appraising evidence in the light of submissions advanced, the learned Trial Court though did not record conviction under different heads of charge but concluding about the guilt of appellants under the offences referred to in para (1) of the judgment recorded conviction and awarded sentences accordingly.

5. Heard adversaries at length and re-appraised the evidence.

6. Learned counsel for the appellants while making reference to the evidence adduced by prosecution contended that it is an un-seen occurrence.

Story was concocted to implicate the appellants falsely as the real culprits were not traceable.

Elaborating the arguments, referring to the statement of Amjad Ali, complainant (P.W.3), it was submitted that he in cross-examination frankly admitted that the appellants were not known to him prior to the occurrence. Also added that complainant knitted the story that he was present at the site when appellants hired the taxi.

Dealing with the aspect of pointation of places of hiring taxi and occurrence, it was submitted that since it is joint pointation, therefore, no reliance can be placed upon it. Reference was made to the dictum laid down in “MUHAMMAD MUSHTAQ v. MUSTANSAR HUSSAIN and others” (2016 SCMR 2123) and “Mst. ASKARJAN and others v. MUHAMMAD DAUD and others” (2010 SCMR 1604).

Referring to the judicial confessions statedly made by the appellants, evidentiary value was called in question on multiple grounds adding that both the appellants were not given assurance by learned Recording Magistrate (P.W.19) that in case of non-recording of confessional statements, their custody will not be handed over to the police as is evident from reply given by Sultan Hussain Khan, Judicial Magistrate (P.W.19) and memorandum of inquiries (Ex.P.W.19-1 and 4). Further submitted that confessional statements (Ex.P.W.19-2-5) were neither voluntarily nor true. Drawing our attention to the statement of Musharaf Khan, S.I-I.O (P.W.18), it was contended that the witness in cross-examination admitted that after recording confessional statements, “Qasid” of the court handed over custody of makers (appellants) to him.

Further submitted that retraction by appellants further makes the story doubtful. To strengthen contentions, help was sought from the dictum laid down in “MUHAMMAD ISMAIL and others v. The STATE” (2017 SCMR 898) and “AZEEM KHAN and another v. MUJAHID KHAN and others” (2016 SCMR 274).

Criticizing the conclusion of learned Trial Court with reference to arrest of appellants in the taxi at Gota Gat Check Post as is evident from card of arrest (Ex.P.W5-5), it was submitted that according to the entries, appellants were arrested at 23:45, which was contradicted not only by complainant (P.W.3) but also by Dr. Iqbal Ahmed (P.W.7). Argued that complainant (P.W.3), stated in cross-examination that information about arrest of the accused was received in the hospital, which was further clarified by Medical Officer (P.W.7) stating in cross-examination that during the conduct of post-mortem, information was received regarding recovery of pistol at the time of arrest of accused (appellants).

Submitting arguments on the factum of recovery of pistol, it was contended that recovery was not effected from any of the appellants which was carried out from the house of one Suleman as is evident from the statement of Muhammad Ishaq, H.C (P.W.15) and recovery memo (Ex.P.W.15/2). Argued that in the circumstances, no implicit reliance can be placed upon factum of recovery and positive report of Forensic Science Laboratory (Ex.P.W18-21).

7. Controverting the arguments, defending the impugned judgment, learned counsel for the complainant submitted that F.I.R. was lodged with promptness leaving no room of deliberation and consultation, implicating

the appellants with specific allegation of hiring taxi in the presence of Amjad Ali (P.W.3) from whom, being son of the deceased cannot be expected to implicate the appellants falsely. Referring to his deposition, it was argued that his statement is natural, straightforward and inspires confidence who in his direct statement categorically added that appellants hired taxi in his presence. Referring to trend of cross-examination, it was added that no extraneous consideration was ever attributed to him to suggest bias or malice.

Admitting that it is a case of circumstantial evidence, further argued that evidence led by prosecution complete the chain in all respect ending to the neck of appellant and as such no exception can be taken to the conclusion assailed. Help was sought from the dictum laid down in “MUHAMMAD ISHAQ v. THE STATE” (2009 SCMR 135).

Drawing our attention to different type of evidence led by prosecution, great stress was laid down upon the judicial confession made by appellants (Ex.P.W.19-2 and 5) and statement of Sultan Khan, Judicial Magistrate (P.W.19), contending that there is nothing on record to suggest that confessional statements are result of any extraneous consideration. Referring to memorandums of inquiry (Ex.P.W.19-1, Ex.P.W.19-4), it was submitted that learned Recording Magistrate acted upon all the requirements of Sections 164 of The Code prior to recording confessions and as such, delay, if any, as argued by adversary, is of little help to the appellants. Replying the contention with reference to retraction of statements, it was argued that since the confessions are true, voluntarily,

finding corroboration from other evidence on record, therefore, no other evidence was required to record conviction. Reliance was placed upon the Ratio expounded in “Miss NAJIBA and 2 others vs. AHMED SULTAN alias SATTAR and 2 others” (PLJ 2001 S.C. 572), “MUSLIM SHAH vs. THE STATE” (2005 SD 112), “ABDUL GHAYAS vs. THE STATE” (2007 SD 1057) and “RASOOL BAKHSH vs. THE STATE” (2000 SCMR 731).

Continuing arguments, laying great stress upon the statement of Hazrat Bilal (P.W.13), it was contended that his statement explaining the factum of arrival of appellants in his house, accompanying them till Saido Chowk, offer by appellants to associate with them in the occurrence of snatching car by hiring it, provides corroboration to the case of prosecution.

Arrest of the appellants while boarded in the taxi of deceased at gota-gat chowk post as is evident from arrest card (Ex.P.5-5) finding support from the statement of Muhammad Iqbal, S.H.O. (P.W.5) was also referred to as corroborative evidence to complete the chain.

Pointation of place of taxi stand vide memo (Ex.P.1-1), statement of Syed Wahid (P.W.1) (in whose presence pointation was made), site plan without scale pointing out place of occurrence and different points (Ex.P.W.18-3), pointation of place of occurrence through memo (Ex.P.W.9-1) duly proved by Ayub Khan (P.W.9), statement of Musharf Khan, S.I.-I.O. (P.W.18), deposition of Sher Zamin (Photographer) (P.W.16), who took photographs at the time of pointation of different

places referred earlier, preparation of CD taken into custody vide memo (Ex.P.W.16-1) is another set of evidence, relied upon by learned counsel for the complainant to suggest corroboration to the confession.

Factum of recovery of motor-car at the time of arrest of the appellants, recovery of 30 bore pistol from the house of Suleman on the disclosure of Ilyas (appellant) duly proved by Muhammad Ishaq, H.C. (P.W.15) and positive Report of FSL (Ex.P.W.18-21) was also relied upon to prove culpability of appellants.

**8.** Learned law officer while adopting arguments of learned counsel for the complainant again drew our attention to the statement of Hazrat Bilal (P.W.13) suggesting the conduct of appellants deposing about their design to commit murder. In his opinion, evidence of the witness is sufficient to presume guilt of appellants. Further contended that there is nothing on record to suggest compelling circumstances prompting Amjad Ali, complainant (P.W.3), real son of the deceased to implicate the appellants falsely.

**9.** It is an un-witnessed occurrence. Prosecution case is based on circumstantial evidence. In order to prove an occurrence by way of circumstantial evidence, evidence of un-impeachable character, proving guilt of accused excluding every possible hypothesis except the guilt should be produced. Chain of circumstances must be complete, un-broken, touching the crime, simultaneously leading to the neck of the accused.



**10.** Evidence led by prosecution for the purpose of re-appraisal can be classified as under:

- i) Statement of Amjad Ali, complainant (P.W.3).
- ii) Pointation of different places including place of occurrence by the appellants.
- iii) Arrest of the appellants while boarded in the taxi owned by Gul Muhammad (deceased).
- iv) Judicial Confession.
- v) Design and Intention of the appellants.
- vi) Extra judicial confession.
- vii) Recovery of 30 bore pistol, empty and positive Report of FSL.
- viii) Medical evidence.

**11.** In the opinion of learned counsel for the complainant as well as learned law officer, in view of the statement of complainant, case of prosecution can also be said to be a case of “direct evidence” to some extent, which appears to be based on misconception.

In a case of “direct evidence” an occurrence is seen by the witnesses. Presence of the witnesses at the place of occurrence at the time of occurrence must be shown who are in a position to depose categorically that they witnessed the occurrence, committed by the person to whom it is attributed.

**12.** Contents of the F.I.R. (Ex.PA) by no stretch of imagination even suggest presence of the complainant at the time when the appellants statedly hired the taxi of deceased. The sentence

when read in

context clearly demonstrates that it is the father of the complainant (deceased) who was present at the pointed place.

**13.** Direct statement of the complainant, Amjad Ali (P.W.3) by no stretch of imagination can suggest his presence at the time of hiring taxi. We are conscious that suggestion was put to the complainant questioning his presence at that particular time, which was denied but putting of suggestion as laid and framed by itself would not be sufficient even to presume his presence at that time. We are also not un-mindful of the volunteer portion of his statement in cross-examination adding that his father told him verbally before departure that he alongwith both appellants is going to “kabal”. We are unable to understand, how this sentence can substantiate the version of prosecution.

Even otherwise, it is not the case of prosecution that complainant was present at the spot. Intimation by deceased to the complainant, even if taken as gospel truth would not make it a case of “last seen”

It is worth-mentioning that complainant admitted in cross-examination that both the appellants were not known to him previously.

Viewed from whichever angle, stance of prosecution is an unsuccessful attempt.

**14.** Pointation of place by the appellants from where they engaged deceased vide memo (Ex.P.W.1-1), pointation of Nagwa Chowk through memo (Ex.P.W.15-1) (this is the place where appellants statedly snatched car from deceased and handed over pistol to Shamshad, (brother of Ilyas

appellant), site plan (Ex.P.W.18-3) prepared on the pointation of appellants specifying different points including place of firing upon the deceased, memo of pointation of place of occurrence (Ex.P.W.9-1) and statements of Syed Wahid (P.W.1), Ayub Khan (P.W.9), Muhammad Ishaq, H.C. (P.W.15) and Musharf Khan, S.I. (I.O.) (P.W.18) disclosing pointation of places by appellant cannot be said to be admissible evidence in view of Section 40 of The Qanun-e-Shahadat Order, 1984 (President Order No.10 of 1984) because in view of disclosures referred to, nothing was recovered.

Even otherwise, place of occurrence was already in the knowledge of Musharf Khan, S.I. I.O. (P.W.18), who prior to pointation visited place of occurrence.

Rule of law expounded in “Mst. ASKAR JAN and others v. MUHAMMAD DAUD and others” (2010 SCMR 1604) relied upon by learned counsel for the appellants is fully attracted to the facts of the case.

Since nothing was recovered in consequence of disclosure information furnished by appellants, therefore, pointation of different places in fact is inadmissible evidence, which cannot be taken into consideration. (See: ZIAUL REHMAN vs. THE STATE” (2000 SCMR 528).

**15.** In the opinion of learned counsel for complainant and learned law officers, arrest of the appellants while boarded in the taxi hired as is evident from “card of arrest” (Ex.P.W.5-5) is strong circumstance to

prove their culpability. Further stated that vehicle No.PSSS-0101 was taken into custody vide recovery memo (Ex.P.W.5-7).

As per "Arrest Card" (Ex.P.W.5-5), the appellants were arrested at 23:45 (11:45 PM) on 09.01.2014 (date of occurrence). However, the prosecution itself contradicted the time of arrest.

The complainant (P.W.3) in cross-examination stated that information about arrest of accused was received through wireless when he was in hospital. In cross-examination, he further stated that he left hospital at 9:00 p.m. Replying another question, clarification was made by him stating that information about arrest of accused was received between 6:00 p.m. to 9:00 p.m.

Dr. Iqbal Ahmed (P.W.7) who conducted autopsy in cross-examination stated that during post-mortem examination, information was received regarding recovery of pistol from the accused under arrest. He further stated that postmortem was conducted at 7:30 p.m.

In the circumstances, documents referred to suggesting time of arrest and deposition of Mumtaz Khalil, Constable (P.W.10) disclosing time of arrest cannot be believed.

When the prosecution failed to prove time of arrest of appellants, how the story of their arrest while boarded in the hired taxi can be acted upon?

**16.** Judicial confession of the appellants recorded on 15<sup>th</sup> January, 2014, by Sultan Hussain, Judicial Magistrate Kabal (P.W.19) is the

foundation of case of prosecution relied upon with full zeal, also subject to criticism with similar force. The learned Judicial Magistrate in his statement deposed regarding the compliance of all the necessary precautions.

Memorandum of inquiry from Sangeen Khan, appellant is Ex.P.W.19-1 while his statement is Ex.P.W.19-2. Inquiry conducted from Ilyas (appellant) is Ex.P.W.19-4 while E.P.W.19-5 is his confessional statement.

Delay in recording statements was though subject to heavy criticism but we endorse the contention of learned counsel for the complainant keeping in view Rule of law cited at bar incorporated in the judgment that delay would not be sufficient to brush aside the confession, if the confession is true and voluntarily.

Procedure for recording confession has been explained by the Apex Court in detail in "AZEEM KHAN and another vs. MUJAHID KHAN and others" (2015 SCMR 274). Respective contentions are to be appreciated keeping in view those parameters while examining memorandums of inquiry (Ex.P.W.19-1-P.W.19-4), statements alongwith certificates (Ex.P.W.19-2-3, Ex.P.W.19-5-6) and deposition of learned Judicial Magistrate (P.W.19).

Perusal of memorandums of inquiry (Ex.P.W.19-1 and Ex.P.W.19-4) reveals that learned Magistrate (P.W.19) did not put question to both the appellants to the effect that in case of their refusal or otherwise to make confession, their custody shall not be handed over to police. The omission was frankly admitted by him in cross-examination. Volunteer

part of his statement that in his order direction was given to send them to judicial lock up is not sufficient to cure the omission.

Matter does not end here. Mushraf Khan, S.I.-I.O. (P.W.18) in cross-examination admitted that custody of appellants was handed over to him by Qasid of the Court and he admitted them in jail. Frank admission gives another fatal blow to the case of prosecution.

**17.** Examination of both the confessions reveals that makers with one voice narrated the occurrence. However, they in earlier part of the confessions threw the responsibility upon their associate adding that it was he who persuaded him to snatch the car by abducting the driver. This aspect cannot be reconciled.

Sufficient time was required to be given to both the appellants in order to think over the consequences of making confessions. Perusal of memorandums of inquiry apparently substantiate this compulsion but when comparison is made with statements, it becomes crystal clear that what is written in this regard is not the whole truth.

Sangeen Khan (appellant) was produced at 8:30 a.m. and as per memorandum of inquiry (EX.P.W.19-1-(second page), he was given time from 8:35 a.m. to 9:05 a.m. and after 30 minutes, after calling him, three questions (9 to 11) were put to him and then his statement was recorded. However, according to note on statement (Ex.P.W.19-2) proceedings were commenced at 9-10 a.m. and statement was complete at 9:30. Same is the position with the time of commencement of writing statement of Ilyas at 10:20 a.m., completed at 10:40 a.m. though according to memorandum of

inquiry (P.W.19-4), first opportunity given to him was from 9:40 a.m. to 10:10 a.m., then after 30 minutes interval, again he was put certain questions and then his statement was recorded.

Perusal of certificates (Ex.P.19-3 and 6) appended reveals that statements were recorded in Urdu but were read over, interpreted in “Pushto”. We are unable to understand the wisdom of reading over the statements to their makers in “Pushto”, if it were written in “Urdu” on the dictate of appellants. The only conclusion which can be drawn is that the makers were only conversant with Pushto language which prompted the learned Magistrate to translate it in the language which the makers understand.

In the certificate or in the proceedings or during the trial, the learned Magistrate did not utter even a single word that he was fully acquainted with the language in which statements were read over to the appellants.

Presumption as argued with vehemence cannot be inferred because only those presumption can be acted upon which the law provides.

It is further to be noted that there is nothing on record to suggest that handcuffs of the appellants were removed prior to recording their statements.

**18.** Violations dealt with offends the command of dictum laid down in “AZEEM KHAN and another v. MUJAHID KHAN and others” (2016 SCMR 274) “MUHAMMAD ISMAIL and others vs. THE STATE” (2017 SCMR 898) and “HASHIM QASIM and another vs. THE STATE”

(2017 SCMR 986) and as such no implicit reliance can be placed upon the confessions.

In the circumstances, retraction of confessions cannot be lightly ignored.

**19.** Drawing our attention to the statement of Hazrat Bilal (P.W.13) deposing the intention of the appellants to engage a car by hiring in order to snatch it, persuading the witness to be their associate and in view of his refusal to submit to their design, handing over motorcycle by Ilyas (appellant) to drop at his house, it was contended that just after few hours, the appellants made practical demonstration by committing occurrence.

Admittedly the appellants did not hire any taxi in his presence. He also did not see them after that from the place where they were departed.

Story told by the witness does not appeal to the reason. Both the appellants are fairly grown up, 20 to 22 years old. One cannot expect from a person to publicize his intention, if any. Episode in our considered view has been submitted to strengthen case of prosecution but it remained unsuccessful attempt.

Even otherwise, intention by itself is not accountable as it is not an offence. We are not un-mindful that this evidence has been brought as corroborative evidence. But it cannot be acted upon as element of fabrication cannot be ruled out and second, evidence led by prosecution particularly that of judicial confession has been brushed aside as discussed and as such, how a corroborative factor, if it is, can strengthen version of prosecution.



**20.** Referring to the statement of Muhammad Ishaq, Head Constable (P.W.15), it was submitted that extra-judicial confession was also made by appellants at the time of pointation of place of occurrence.

Perusal of statement reveals that certain acts have been attributed to Sangeen Khan (appellant), disclosing his presence at a point No.2, making fire upon deceased from point No.3, snatching of car near “Nagoha Chowk”.

It is an un-successful attempt on the part of prosecution persuading us to believe and act inadmissible evidence keeping in view the provision of Section 38 and 39 of The Qanun-e-Shahadat Order, 1984.

Similarly, evidence of Ayub Khan (P.W.9) who is attesting witness of memo of pointation of place of occurrence (Ex.P.W.9-1) stating that the appellants also intimated the detail of occurrence to the police cannot be taken into consideration for the similar reasons.

**21.** Needless to state that factum of recovery is always considered a corroborative piece of evidence and by itself cannot provide basis for conviction.

This aspect was also heavily relied upon by making an attempt to persuade us to believe and act upon but it was exercise in futility.

Recovery of pistol was effected from the house of Muhammad Suleman on the stated disclosure of Ilyas (appellant) as stated by Muhammad Ishaq, H.C. (P.W.15) through memo (Ex.P.W.15-2) on 14.01.2014. The witness further stated that said appellant also disclosed that pistol was given to Suleman by his brother, Shamshad

to whom same was handed over by said appellant as is evident from the evidence of Ibrar Ahmad (P.W.11).

There is no need to dilate upon this evidence in depth for the simple reason that weapon was recovered from the house of Suleman. Pointation, if any, loses its significance for the reason that according to prosecution case, Ilyas (appellant) gave pistol to his brother Shamshad who in turn handed over the same to Suleman. It was Suleman who kept the pistol in his house. Exclusive knowledge of the said appellant as such is embroidery.

Recovery of pistol on 14<sup>th</sup> January, 2014 as stated by witness (P.W.15) and I.O. (P.W.18) also becomes doubtful in view of the statement of Dr. Iqbal Ahmed (P.W.7) who in cross-examination stated that during conduct of postmortem examination, information was received regarding recovery of pistol from the accused arrested on 9<sup>th</sup> January, 2014.

There is an added reason to brush aside the positive report of Forensic Science Laboratory (Ex.P.W.18-21) as empty and pistol were sent on 16<sup>th</sup> January, 2014 together.

In the circumstances, no reliance can be placed upon the factum of recovery and positive report of Forensic Science Laboratory.

**22.** Medical evidence by no stretch of imagination can disclose and prove identity of culprits. Since there is failure of prosecution to prove the culpability of appellants beyond shadow of doubt as

