IN THE FEDERAL SHARIAT COURT
(CRIMINAL APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE MEHMOOD MAQBOOL BAJWA
MR. JUSTICE SHAUKAT ALI RAKHSHANI

APPEAL NO. 05-I OF 2017

ASHFAQ S/O SARFARAZ R/O QALAT NASEER DARGAI, DISTRICT CHARSADDA, PRESENTLY CONFINED IN CENTRAL PRISON, HARIPUR.

APPELLANT

VERSUS

1. MST. KALSOOM BIBI WIDOW OF SAFDAR KHAN R/O AOROSH COLONY, NAWA SHEHR DISTRICT ABBOTTABAD.
2. THE STATE

RESPONDENTS

APPEAL NO.07-I OF 2017

AIMAL S/O INAYAT, R/O MIRZAI QUETTA, BALOCHISTAN, PRESENTLY CONFINED IN CENTRAL PRISON, HARIPUR.

APPELLANT

VERSUS

THE STATE

RESPONDET

JAIL APPEAL NO.10-I OF 2017

1. FAHAD HUSSAIN S/O SHAUKAT, R/O NOWSHERA KALAN, PRESENTLY CONFINED IN CENTRAL PRISON, HARIPUR.
2. ASIF S/O AJMALI KHAN R/O NAWAB KHAN BANDA SWABI, PRESENTLY CONFINED IN CENTRAL PRISON, HARIPUR.

APPELLANTS

VERSUS

THE STATE

RESPONDET

APPEAL NO.16-I OF 2017

MISBAH UD DIN S/O AFTAB UD DIN, R/O GARHI HAMEED GUL, DISTRICT CHARSADDA.

APPELLANT

VERSUS

1. THE STATE
2. SHERAZ KHAN S/O JAHANDAD KHAN R/O ORAISH COLONY NAWAN SHEHR, ABBOTTABAD.

RESPONDETS

JAIL APPEAL NO.27-I OF 2017

QAISAR S/O MUHAMMAD ZAHIR, R/O SHERIN KHAN COLONY, SWABI, PRESENTLY CONFINED IN CENTRAL PRISON, MARDAN.

APPELLANT

VERSUS

THE STATE & OTHERS

RESPONDENTS

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FIR NO. AND POLICE STATION	…	NO. 19 OF 2014 SARDHERI, DISTRICT CHARSADDA
DATE OF JUDGMENT OF TRIAL COURT	…	26.01.2017
DATE OF PREFERENCE OF APPEALS	…	22.02.2017, 18-03-2017, 24-03-2017, 16-06-2017 AND 10-10-2017 RESPECTIVELY
DATE OF HEARING	…	16.04.2018
DATE OF DECISION	…	24.04.2018

CONSOLIDATED JUDGMENT:

MEHMOOD MAQBOOL BAJWA, J: Since the above-titled appeals arises out of one and the same judgment dated 26th of January, 2017, handed down by a learned Additional Sessions Judge-I, Charsadda, recording conviction and awarding different sentences to the appellants (Detail of which shall be given in the proceedings paragraphs), therefore, shall be disposed of through this consolidated judgment.

2. Amir Dad Khan, ASI (P.W.6), Police Station Sardheri, after getting information about a dead body of unknown person lying in the land of Mino Khan, came at the pointed place, noted the feature of dead body alongwith detail of wearing clothes, incorporated the same in the complaint (Ex.PA-1), opining that occurrence is result of fire arm injuries, upon the strength of which Crime-Report (Ex.PA) bearing No.19 was registered against un-known accused on 16th of January, 2014. As per Murasila name "Safdar Khan" was engraved on the right hand of dead body.

3. Dead body was sent to mortuary for autopsy and later on was buried as un-identified. However, later on Sheraz Khan (P.W.10), brother of Safdar deceased after getting information about the dead body, made application for exhumation and after identifying the same, re-buried it.

4. Fahad Hussain (appellant) who was arrested in another case during the course of investigation of the said case made disclosure about the present occurrence also pointing out names of his associates (appellants and absconders) and upon this disclosure investigation took new turn.

5. The complainant implicated appellants (except Misbah-ud-Din Appellant in Appeal No.16-I of 2017), Yasir and Faisal (absconders) in his statement recorded under Section 164 of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called Act V of 1898) on 1st of February, 2014, with the allegation of murder of deceased and snatching the Suzuki Van, bearing Registration No.QX-481 after collecting credible information from his sources.

Misbah-ud-Din (appellant) was associated in the investigation and sent up for trial with the allegation of receiving stolen vehicle by purchase, in view of his implication by Ashfaq (co-appellant) in his confessional statement recorded on 19th February, 2014.

6. The appellants when charged under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called The Ordinance) and Section 412 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called The Code) questioned the allegations, claimed trial, requiring the prosecution to produce evidence, which was led consisting of ten witnesses.

7. The appellants denied the incriminating evidence put to them in their respective statements under Section 342 of Act V of 1898, pleading false implication.

8. The learned Trial Court through judgment assailed, concluded proof of case under Section 396 of The Code against all the appellants except Misbah-ud-Din, who was convicted under Section 412 of The Code and was awarded sentence of three years Rigorous Imprisonment

with fine of one lac fifty thousand rupees (Rs.1,50,000/) and in default to further undergo six months S.I.

The appellants against whom conviction was recorded under Section 396 of The Code were awarded life imprisonment, requiring them to pay compensation to the tune of Two Hundred Thousand Rupees (Rs.2,00,000/-) each to the legal heirs of deceased under Section 544-A of Act V of 1898 and in default to further suffer six months simple imprisonment.

Benefit of Section 382-B of Act V of 1898 was extended to all the appellants.

9. Heard adversaries at length and perused the record. Arguments advanced though are not incorporated but will be reflected during discussion at appropriate stages.

10. First of all, we will deal with the merits of appeals (5-I, 7-I, 10-I and 27-I) preferred by Ashfaq, Aimal, Fahad Hussain, Asif (joint appeal) and Qaiser Adil, respectively.

11. Case was registered against unknown accused. It is not a case of direct evidence. Though, Sheraz Khan (P.W.10), brother of deceased in his statement made under Section 164 of Act V of 1898 and while appearing in the trial implicated the appellants but in his Magisterial statement while implicating the appellants except Misbah-ud-Din did not disclose his source of information, just making reference to his “Belief” and “Satisfaction” who in cross-examination also stated on similar lines. Implication of appellants as such by him is neither admissible evidence nor got any evidentiary value.

12. Case of prosecution rests upon the circumstantial evidence.

Prior to dealing with the evidence, it is desirable to make reference to the yardstick to establish culpability of person through circumstantial evidence.

Keeping in view the Rule of law enunciated in "Sharad Birdhichand Sarda, appellant v. State of Maharashtra, respondent" (AIR 1984 SC 1622), "IMRAN alias DULLY and another vs. The STATE and others" (2015 SCMR 155), "AZEEM KHAN and another vs. MUJAHID KHAN and others" (2016 SCMR 274) and "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986), following points are to be kept in view in order to prove guilt of accused through circumstantial evidence:

i) Facts so established must be consistent with the guilt of the accused.

ii) Circumstances from which the conclusion of guilt is to be drawn must or should be established and may not be established.

iii) Circumstances must be of conclusive nature.

iv) Same should exclude every possible hypothesis except the guilt of person charged with.

v) Chain must be connected and un-broken. One end must touch the crime and the other neck of the accused.

13. Case of prosecution against all the appellants except Misbah-ud-Din (Appellant in Appeal No.16-I of 2017) rests upon following type of evidence:

i) Judicial confession.

ii) Pointation of places of occurrence and throwing the dead body through memo (Ex.P.W.4-6) by Ishfaq, Aimal, Qaiser and Asif and pointation of same places by Fahad Hussain vide memo (Ex.P.W.4-3).

iii) Call data of cells of Fahad Hussain, Ishfaq as well as deceased.

iv) Medical evidence.

v) Recovery of different articles, i.e., (empties, pistol).

vi) Reports of Chemical Examiner (Ex.PZ) and Forensic Science Laboratory (Ex.PZ-1).

vii) Abscondence.

14. An important evidence produced by the prosecution is confessional statements (Ex.P.W.3-2, Ex.P.W.3-8 to Ex.P.W.3-11) of all the appellants except Misbah-ud-Din.

Great stress was laid down on behalf of adversaries to this aspect of the evidence during the course of arguments, substantiating their stance with case law. In fact this is the only evidence which has to be scanned in order to determine the culpability or otherwise of the said appellants applying degree of care and caution.

15. Confession of Fahad Hussain (Ex.P.W.3-2) was recorded on 17th of February, 2014, while statements of rest of the appellants (Ex.P.W.3-8 to 3-11) were recorded on 19th of February, 2014.

Sheraz Tariq, Judicial Magistrate, Nowshera (P.W.3) recorded all the confessional statements.

It is worth mentioning that statement of Dr. Altaf-ur-Rehman was also recorded as P.W.3, which appears to be clerical mistake.

16. Prior to dealing with evidentiary value of confessions, it is desirable to make reference to the mandatory precautions enunciated by the Apex Court in "AZEEM KHAN and another v. MUJAHID KHAN and others" (2016 SCMR 274) and "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986), which are as follow:

i) All signs of fear intruded by the Investigating Agency in the mind of the accused are to be removed.

ii) Assurance has to be given to the maker that in case of refusal to make confession, his custody shall not be handed over to police.

iii) Sufficient time for reflection is to be provided after administration of first warning.

iv) Second warning is also required to be given to the accused after the expiry of time given for thinking over the consequences of making confession after first warning.

v) Assurance by the Recording Magistrate to the accused that he is in safe hands.

vi) All police officials whether in uniform or otherwise including Naib Court must be kept outside the Court and beyond the view of the accused.

vii) After observing all the formalities referred above, all required questions incorporated in the High Court Rules and Orders should be put and answers given be recorded in the words spoken by accused.

viii) Statement of accused must be recorded by the Magistrate in his own hand and in case of genuine compulsion, note is required to be given to justify dictation to Ministerial Staff who shall be administered oath that he will correctly type or write the correct version stated by the accused and dictated by the Magistrate.

ix) Confessional statement should not contradict the case setup by prosecution on material particulars and also should not be

inconsistent with other confessions, if there are more than one maker.

x) In case, accused only understands his mother language and confession is recorded in another language (Urdu or English), the same shall be explained to the accused in the language which he fully understands with clear stance of Recording Magistrate that he is well-versed with the language in which confession was made which was translated word by word.

xi) Certificate as required under Section 364 of Act V of 1898 has to be given by the Magistrates about the proceedings under his seal and signature.

xii) After recording statement, accused shall be sent to judicial remand and during this process, he shall not be handed over to police official / officer whether he is Naib Court wearing police uniform.

17. In order to act upon the judicial confession as held in the case of "HASHIM QASIM" (supra), it should be made voluntarily, based on true account of facts and has to be proved at the trial.

18. Keeping in view the above-settled parameters, we will examine the confessional statements of appellants, i.e., Ashfaq Ahmed, Fahad, Aimal, Asif and Qaiser.

As referred earlier, statements of the appellants except Fahad Hussain were recorded on 19th February, 2014, while confession of Fahad Hussain was recorded on 17th February, 2014.

19. We have gone through the statement of Sheraz Tariq, learned Judicial Magistrate (P.W.3), Memorandums of Inquiry (Ex.P.W.3-1, Ex.P.W.3-4 to Ex.P.W.3-7), confessional statements (Ex.P.W.3-2, Ex.P.W.3-8 to Ex.P.W.3-11) respectively, made by Fahad Hussain,

Aimal, Qaiser Adil, Asif and Ashfaq and certificates (Ex.P.W.3-3, Ex.P.W.3-12 to Ex.P.W.3-15).

Perusal of all Memorandums of Inquiry (Ex.P.W.3-1, Ex.P.W.3-4 to Ex.P.W.3-7) reveals that all the questions are computer generated, though replies given are in the hand of learned Judicial Magistrate.

Use of printed proformas containing questionnaires was not endorsed by learned Division Bench of Peshawar High Court in the case of "TAJ WALI SHAH v. THE STATE" (2014 P.C.R.L.J. 323), which we respectfully follow:

20. Examination of the confessional statements reveals that these are inconsistent with reference to number of shots fired by some of the appellants, resulting in conflict of medical evidence to this extent. According to Fahad Hussain (appellant), on the asking of Ashfaq (appellant), Yasir (absconder) made two fires on the person of deceased Safdar, who fell down and became un-conscious. He further stated that he and Amial (co-appellant) encircled his neck with rope, dragged him outside the room, put him in wheelbarrow and threw him in the sugar-cane crop where again, Aimal made fire aiming towards his head resulting in his death.

Statement of Aimal on this aspect is on the similar lines.

However, according to Qaiser Adil (appellant) on the asking of Ashfaq, Yasir made a fire. Though, he also narrated the later part of episode by adding that Fahad Hussain and Aimal roped neck of the

deceased and took him outside on wheelbarrow but said appellant did not disclose about the shot fired by Aimal.

Asif (appellant) in his statement though stated that on the asking of Ashfaq, Yasir made firing but number of shots was not disclosed. The said confessor like Qaiser Adil did not disclose factum of fire made by Aimal near the sugarcane field, resulting in the immediate death of deceased as stated by others.

Ashfaq (appellant) though attributed firing (without disclosing number of fire) to Yasir but he omitted his role of abetment stated by others. However, he narrated the factum of shot fired by Aimal on the head of deceased near the field of sugarcane crop.

Confessional statement of Qaiser Adil attributing one shot to Yasir and omission to describe the role of Aimal making one fire on the head of deceased at the place where he was thrown is fatal and casts doubt about the truthfulness of the story disclosed by others. Same is the position of statement of Asif due to non-disclosure of shot fired by Fahad Hussain at the place where deceased in injured condition was taken.

21. We are conscious that Qaiser Adil and Asif as per statements did not accompany Fahad and Aimal, who brought the deceased in injured condition outside the room on wheelbarrow and took him towards standing crop. However, this fact by itself would not be sufficient to ignore this omission because if Ashfaq who also did not accompany Fahad and Aimal, can disclose factum of fire by Aimal on the head of deceased, same could have been explained not only by Qaiser Adil but

also by Asif. It is not the case of prosecution that Aimal and Fahad after disposal of dead body did not meet rest of the appellants.

22. Purpose and object of highlighting this aspect is to point out contradiction between the story setup by prosecution in the medical evidence and confessional statements of two appellants. It is to be noted that as per evidence of Dr. Altaf-ur-Rehman (P.W.1-P.W.3). (He appeared twice) and postmortem report (Ex.PM), there were six injuries in toto on the person of deceased, out of which Injuries No.1, 3 and 5 are entry wounds. With this background, there cannot be two opinions that three shots were fired upon the deceased.

Confessional statements of two appellants as discussed contradicts the story of prosecution on material particular of the case and as such prima facie appears to be untrue. (SEE: "AZEEM KHAN and another vs. MUJAHID KHAN and others" (2016 SCMR 274).

We are not un-mindful that rest of the appellants in their respective confessions mentioned the factum of last one fire by Aimal but no premium can be granted to the prosecution on this score as overall impact of the confessional statements has to be examined. The statements cannot be reconciled on this material aspect.

23. Matter can be examined from another angle as well keeping in view this contradiction. As per stance of Fahad Hussain and Aimal, Yasir (absconder) made two fires upon deceased when they all entered in the room by breaking the door where the deceased was confined. Asif (appellant) though did not disclose number of shots fired by Yasir who

stated that Yasir made firing on the asking of Ashfaq but he too endorsed the version of Fahad Hussain and Aimal with reference to place of firing adding that after breaking the door of the room, they entered in the room and firing was made. Ashfaq (appellant) also did not dispute first place of firing as disclosed by others, simultaneously narrating the factum of fire upon deceased near sugarcane field.

However, no empty was recovered from the second place of firing, though three empties were collected from the first place (room) as is evident from recovery memo (Ex.P.W.4-1).

Perusal of site plan (Ex.PB-1) reveals that the empties three in number were secured from point “F” which is veranda of “Hujra”, statedly in the use of Ashfaq, appellant.

Recovery of three empties from point “F” though two fires were made relates to material aspect as positive report of Forensic Science Laboratory (Ex.PZ-1) is vehemently relied upon by prosecution. Similarly, non-availability of empty from the second place of firing cannot be reconciled with the statements of makers, categorically stating about the shot fired by Aimal, appellant.

The statements when put in juxtaposition with the evidence of recovery of crime empties, contradicts the place of firing or at least number of shots fired.

Above-narrated facts prima facie questions the truthfulness of confessions casting doubt about the veracity of prosecution version.

24. Perusal of the Memorandums of Inquiry (Ex.P.W.3-1, Ex.P.W.3-4 to Ex.P.W.3-7) and certificates (Ex.P.W.3-3, Ex.P.W.3-12 to Ex.P.W.3-15) reveals that first warning was issued to the makers of confessions. Time for deliberation was given to Fahad Hussain, Aimal and Qaiser as is evident from "orders for police file", part of the certificates (Ex.P.W.3-3, Ex.P.W.3-12 and Ex.P.W.3-13) but there is nothing on record to suggest that time was given to Asif and Ashfaq as is evident from "orders for police file" (Ex.P.W.3-14-Ex.P.W.3-15). There is also nothing on record to suggest administration of second warning though it should have been issued and fact should have been specifically incorporated.

Omission for any reason is fatal to the case of prosecution.

25. Perusal of last pages of confessional statements (Ex.P.W.3-2, Ex.P.W.3-9, Ex.P.W.3-10) of Fahad Hussain, Qaiser Adil and Asif reveals that there is an endorsement on the bottom of said pages that statements were explained to them in their mother language.

Sheraz Tariq, Judicial Magistrate (P.W.3) did not highlight this fact in his statement.

26. Question before us is whether the certificates referred above will satisfy the requirement of law. Query can be conveniently answered in negative in view of dictum laid down in "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986) in which while dealing with similar proposition, it has been held at page-996 as follow:

> "Another important aspect, which escaped the notice of the two courts below, is that, the Magistrate in his certificate has mentioned that the accused gave statement in "*Hindko* Dialect" which the Magistrate translated into Urdu. The Magistrate has

> nowhere stated in the certificate or at the trial that he was fully acquainted with or could understand "*Hindko language*" and that the confession was translated word by word from *'Hindko to Urdu'*.
>
> (Emphasis supplied)

The certificates by no stretch of imagination satisfy the parameter. Mere recital that confessional statements were explained to the said makers in their mother language who while understanding put their signatures/thumb impressions would not be sufficient to act upon it.

No doubt mention of explaining the statements in the mother language to the makers, as they were unable to understand Urdu language was necessary but simultaneously it was essential for the learned Magistrate to explain in the certificates or as a witness (P.W.3) that he was fully acquainted or could understand the language in which confessions were made (obviously in Phushtoo keeping in view the text of certificates) and further that the confessions were translated word by word from "mother language" to "Urdu".

27. Another infirmity which has been noted by us keeping in view the yardstick referred earlier is handing over the custody of makers of the confessions to the "Naib Court" as is evident from "orders for police file", part of certificates (Ex.P.W.3-3, Ex.P.W.3-12 to Ex.P.W.3-15), which fact was also disclosed by learned Magistrate (P.W.3) in the end of his direct statement.

28. Perusal of Memorandums of Inquiry (Ex.P.W.3-1, Ex.P.W.3-3 to Ex.P.W.3-7) reveals that confessions were recorded after "about 5 days" as reflected in reply to Question No.3.

The Honourable Shariat Appellate Bench of the Supreme Court in the case of "MUHAMMAD PERVEZ and others v. THE STATE" (2007 SCMR 670) taking note of 5 day's delay in recording judicial confession ruled out such confession from consideration also noting other legal infirmities, which we also find in the present case as discussed.

The position would have been different one if there were no other infirmities, on legal as well as factual premises in which eventuality delay alone would not have been sufficient to rule out the confessions from consideration as held in "GHULAM QADIR and others v. THE STATE" (2007 SCMR 782).

29. For the afore-mentioned reasons, we are not persuaded to believe, rely and act upon the confessional statements of appellants to whom attributed in order to establish their culpability.

30. Even otherwise, confessions by the said appellants were retracted. Act of the appellants was questioned on behalf of prosecution adding that it is deliberate and an afterthought. Putting reliance upon the dictum laid down in the case of "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986) and "Mst. NASEEM AKHTAR and another vs. THE STATE" (1999 SCMR 744), alternatively it was argued by learned counsel for the complainant that even retracted confession can be acted upon.

Without adverting to the reasons of retraction by the appellants to whom confession has been attributed, suffice it to say that retracted confession, if voluntary and true, finding corroboration by independent

evidence can be made basis for recording conviction. Rule of law expounded in the Reports cited at bar on behalf of complainant cannot be questioned but it would not advance the plea of prosecution-complainant in view of discussion made in preceding paragraphs highlighting the infirmities, putting serious doubt about the voluntary character and truthfulness of confessions.

Simultaneously, we find no corroboration to the said confessions in view of discussion going to be made.

31. Pointation of places of occurrence and throwing the dead body by the appellants except Fahad Hussain through memo (Ex.P.W.4-6) and by Fahad Hussain through memo (Ex.P.W.4-3) is another piece of evidence heavily banked upon by learned law officer and learned counsel for the complainant.

Saleem Jan, A.S.I. (P.W.4) in his deposition disclosed this fact.

Both the places were pointed out by Ashfaq, Aimal, Qaiser and Asif on 18th of February, 2014 through memo (Ex.P.W.4-6) while Fahad Hussain made pointation of both the places on 20th of February, 2014. Admittedly, place of occurrence and the point where dead body was thrown as per prosecution case was public secret at that time. Then, how it can be said to be discovery of new fact and evidence on the pointation of appellants named above.

32. Perusal of the pointation memos (Ex.P.W.4-3 and 6) and evidence of Saleem Jan, A.S.I. (P.W.4), clearly reveals that nothing was recovered in pursuance of pointation and as such this aspect of evidence though

relied upon by the prosecution with vehemence is inadmissible. We are fortified in our view by law laid down in "MUHAMMAD RAMZAN vs. THE STATE" (PLD 1957 (W.P.) Lahore 956), "NAEEM AKHTAR & others vs. THE STATE" (1993 Pakistan Supreme Cases (Crl.) 845), "ZIAUL REHMAN vs. THE STATE" (2000 SCMR 528) and "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986).

33. Even otherwise, it was joint effort of four appellants namely, Ashfaq, Aimal Khan, Qaiser and Asif, which in the circumstance cannot be acted upon.

34. Reliance upon the evidence of Dr. Altaf-ur-Rehman and postmortem report (Ex.PM) will not improve the case of prosecution though argued with vehemence to act upon it to connect the appellants in the commission of crime.

35. Prior to dealing with the evidence, it is desirable to add here that statement of said witness was recorded twice. First as P.W.1 and then as P.W.3, though Sheraz Tariq, Judicial Magistrate, already appeared as P.W.3.

36. Perusal of the statement of Dr. Altaf-ur-Rehman and postmortem report (Ex.PM) reveals that there were six injuries in toto on the person of deceased. Injuries No.1, 3 and 5 are entry wounds while Injuries No.2, 4 and 6 are exit. Locale of injuries No.1, 3 and 5 is top of scalp, left thigh lateral aspect and lateral aspect of right thigh, respectively.

Dimension of all the injuries including exit is one and the same, i.e., 1/2x1/2 inch.

Injury No.1 in the opinion of Medical Officer was cause of death inflicted by fire-arm.

37. When we examine the confessional statement of Qaiser Adil, it reveals that he attributed one fire to Yasir (absconder) and also omitted to mention the shot fired by Aimal on the head of deceased, which was explained by Fahad and Aimal in their respective confessional statements. Asif (appellant) also did not disclose about the fire made by Aimal near sugarcane crop. Explaining the earlier part of the occurrence, he stated that Yasir made firing causing injuries to deceased.

Statements of Qaiser Adil and Asif Ali (appellants) suggesting number of injuries cannot be reconciled with number of injuries incorporated in postmortem report (three in number).

Even if this conflict is ignored, it would be of little help to the prosecution because medical evidence cannot prove identity of culprits and can only be used to know number and local of injuries, nature of weapon used, duration of injuries, etc. Reliance is placed upon the Ratio expounded in "ABDUL MAJEED vs. MULAZIM HUSSAIN and others" (PLD 2007 SC 637), "MUHAMMAD TASAWEER vs. Hafiz ZULKARNAIN and 2 others" (PLD 2009 SC 53) and "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986).

38. Evidence of recovery of empties and pistol witnessed through recovery memos (Ex.P.W.4-1 and Ex.P.W.4-5) and report of Forensic Science Laboratory (Ex.PZ-1) though positive would not furnish corroboration to the evidence of confession, which even otherwise has been ruled out from consideration.

Perusal of recovery memo (Ex.P.W.4-1) reveals that three empties of 30 bore (rusted) were taken into custody on 16th of February, 2014, which fact was also deposed by Saleem Jan, A.S.I. (P.W.4), witness of said memo. It is to be noted that case was registered on 16th of January, 2014. It is also worth mentioning that no specific place of recovery has been incorporated in the memo and it finds mentioned that empties were secured "from the nearby place of occurrence". For the purpose of better appreciation, we reproduce the relevant part of deposition of Saleem Jan, A.S.I. (P.W.4) who in the start of his examination-in-chief deposed that:

> "I marginal witness to the recovery memo Ex.P.W.4-4 vide which the investigating officer recovered and took into possession three empty shells of 30 bore (rusted) from the nearby places of the accused and sealed the same in parcel No.5 in my presence……"
>
> (underlining is ours)

39. It is not understandable, why the empties were collected after one month of the occurrence. Expression "nearby places of accused" used by P.W.4 and incorporated in the memo (Ex.P.W.4-1) is intentional, deliberate and result of malice on the part of I.O. (P.W.5). It is clear case of fabrication and conscious attempt to create evidence.

40. Place of recovery mentioned and deposed also cannot be reconciled with the portion of confessional statements of appellants. Perusal of the said statements shows that first attack was made upon the deceased in the room of "Hujra" statedly in the use of Ashfaq (appellant) where two fires were made by Yasir (since absconder) on the abetment of Ashfaq.

Third fire was made by Aimal near the sugarcane field upon the head of the deceased.

41. Marginal notes of site plan without scale (Ex.PB-1) is helpful to understand the situation. According to the marginal notes, "F" is the point, from where three empties were recovered. The said place is veranda of "Hujra" of Ashfaq. Though, place where the dead body was taken for the purpose of disposal has not been shown in this plan but marginal note "E" suggest inter-se distance of both the places, according to which place of occurrence (where deceased was murdered) is at a distance of 1 ½ kilometer from the place where the dead body was taken for disposal in sugarcane field.

42. Evidence of securing 30 bore pistol vide memo (Ex.P.W.4-5) is novel. On 18th of February, 2014, same was taken into custody by the I.O., produced by Jhangir, H.C. (Moharrar police station) after taking the same from "Malkhana" where it was kept as case-property of case F.I.R. No.56 of 2014 registered on 14th of February, 2014, against Ashfaq, appellant with the allegation of keeping illicit arm. As per contents of memo (Ex.P.W.4-5) the said appellant during the course of investigation made disclosure that 30 bore pistol (Ex.P-12) recovered from his

possession at the time of his arrest is the same weapon which was used not only in the present case (F.I.R. No.19 of 2014) but also in the occurrence reflected in Crime-Report No.7 registered on 9th of January, 2014.

If the weapon used in present occurrence was recovered earlier regarding which separate case was registered, then the prosecution should have produced the copy of said memo according to the mandate of Order 10 of 1984, with reference to admissibility of documents.

Production of Memo (Ex.P.W.4-5) as well as deposition of Saleem Jan, A.S.I. (P.W.4), an attesting witness is only proof of production of pistol from Malkhana of police station to the I.O. (P.W.5) of the case, where it was kept as case property of case F.I.R. No.56 of 2014. Reference to stated disclosure attributed to Ashfaq (appellant) in the memo cannot be substitute of proof of recovery from Ashfaq.

43. Factum of recovery can be examined from another angle as well. The appellants, i.e., Fahad Hussain, Aimal, Asif and even Ashfaq in their respective confessions with one voice attributed act of firing to Yasir (since absconder) and then to Aimal. If the confessions recorded were true and voluntary, then the weapon should have been recovered from Aimal. There is nothing on record to suggest that Aimal after the occurrence handed over the pistol to Ashfaq. He may be mastermind of the conspiracy, leading the group for nefarious design but the fact by itself will not justify recovery of pistol from Ashfaq in the absence of

explanation to justify possession of person statedly making disclosure and then its production by third person (Mohrrar) stating that it was kept in Malkhana as case-property.

Mode and manner of production of evidence by prosecution at the most can prove production of 30 bore pistol lying in Malkhana as case-property of case F.I.R. No.56 of 2015.

44. With this background, we will examine the evidentiary value of positive report of FSL (Ex.PZ-1).

As discussed earlier, pistol as per contents of memo (Ex.P.W.4-5) was taken into custody on 14th of February, 2014, at the time of registration of case F.I.R. No.56 of 2014. However, in the present case, it was shown to be taken in custody on 18th of February, 2014. While empties were secured on 16th of February, 2012, as is evident from memo (Ex.P.W.4-1). We may point that there is overwriting upon the number of month under the signature of I.O. (P.W.5). The figure "1" has been converted into "2" by over-writing.

Taking the story of prosecution as gospel truth regarding recovery of empties on 16th of February, 2014, then why the same were not sent to Forensic Science Laboratory immediately. It is not understandable, as to why the empties and pistol were sent together, received in the Laboratory on 21st of February, 2014.

Keeping in view dates of recovery and transmission to laboratory, possibility of fabrication cannot be overruled particularly in view of over-writing with reference to number of month of recovery.

45. Pursuant to above, no implicit reliance can be placed upon the positive report. It by no stretch of imagination can be said to be a corroborative factor.

46. Our attention was also drawn to the collection of calls data secured during the course of investigation in order to provide corroboration to the confessional statements.

47. Calls data of Cells No.0311-5636177and 0300-5636177 statedly owned by deceased Safdar was taken into custody vide memo (Ex.P.W.5-20). Record of SIMs No.0304-5172039,0315-0131717 was procured through memos (Ex.P.W.5-38, 39).

48. Sardar Hussain, S.I.-I.O.(P.W.5) deposed that Fahad Hussain disclosed his own SIM number (0304-5172039) and SIM number 0315-0131717 owned by Ashfaq and he through application (Ex.P.W.5-30) procured calls data through memo (Ex.PW.5-31). It is further in his evidence that on the disclosure of Ishfaq, Aimal, Qaiser, Asif and Fahad, he through application (Ex.P.W.5-38) collected record of cell numbers through memo (Ex.P.W.5-39 consisting of 38 pages).

The appellants in their respective statements recorded under Section 342 of Act V of 1898 denied their ownership.

It is the case of prosecution that SIM No.0304-5172039 was in use of Fahad Hussain while the other bearing No.0315-0131717 was in use of co-appellant Ashfaq. Though, it is the case of prosecution that calls data of cells of all the appellants were taken but evidence when examined does not substantiate this fact. During the course of evidence, it was disclosed that record referred to pertains to cells of Fahad Hussain and Ashfaq.

49. There is nothing on record even to suggest that SIM numbers disclosed by the I.O. (P.W.5) were issued in the name of said appellants. We are not un-mindful that ownership of same has not been attributed and it is asserted that these were in the use of said two appellants but even this fact could not be established. No voice record transcripts of calls was produced.

Procuring of record of mobile phone numbers owned by Muhammad Safdar, deceased through Ex.P.W.5-20 also for the reasons stated would be of no avail to the prosecution.

Detail of calls data (Ex.P.5-30 and Ex.P.5-39) provides type of call (incoming or outgoing), cell numbers of parties having conversation (describing them as ‘A’ and ‘B’ party), duration of calls, site location and IMEI numbers.

It is no where suggestive of the names and particulars of parties calling and at receiving end. In order to suggest it as incriminating evidence, the prosecution should have produced evidence about the

ownership or use of SIMs by the appellants to whom it has been attributed but admittedly, no such evidence was adduced.

Collection of calls data as such remained exercise in futility.

50. Abscondence of the appellants is another factor, heavily relied upon to establish the culpability of appellants except Fahad whose custody was taken from the Nowshera Jail under the order of learned District and Sessions Judge, Nowshera. Application (copy of which is Ex.P.5-26) was made to learned Area Magistrate to procure proclamation under Section 87 of Act V of 1898 against Qaiser, Asif, Ashfaq and Aimal (we intentionally have not made reference about the proclaimed offenders) on 10th of February, 2014 and accordingly proclamations were issued against the said appellants under Section 87 of Act of 1898, entrusted to Jamal Shah, Constable (P.W.2) for execution who in his statement deposed that one copy of each proclamation was pasted on the notice board of the court while second leave of said proclamation was affixed at the outer door of the houses of the said appellants. He produced copies of proclamation (Ex.P.W.2-15 to Ex.P.W.2-20) alongwith reports (Ex.P.W.2-21 to Ex.P.W.2-26), which were returned by him to the Investigating Officer.

We have gone through the reports on the back of leaves of proclamations.

Proclamations were issued on 12th of February, 2014 with the reports of witness made on 13th of February, 2014.

51. Reports of the process-server on the proclamation, even if taken as correct, are not sufficient to act upon the contention regarding abscondence in view of non-compliance of mandatory provisions of Section 87 of Act V of 1898 regarding time to appear before the concerned court. Further, perusal of reports clearly demonstrates that same were made in a mechanical way. Even otherwise, neither statement of process-server (P.W.2) was recorded by the learned Area Magistrate nor any order was made in pursuance of said reports.

It is worth mentioning that Ashfaq, Aimal, Qaiser and Asif were arrested on 14th of February, 2014, just after two days of issuance of proclamation.

Pursuant to above, the appellants cannot be held to be absconder.

Report of Chemical Examiner (Ex.PZ) suggesting human blood on the clothes of deceased by itself would not be sufficient to prove the case of prosecution.

52. Viewed from whichever angle, we are of the considered view that evidence of all types produced by the prosecution is not worthy of credit. It does not inspire confidence, appears to have been coined.

53. Now, will take up the case of Misbah-ud-Din (Appellant in Appeal No.16-I of 2017) against whom charge was framed under Section 412 of The Code, which in view of appraisal of evidence by the Trial Court was statedly proved resulting in recording his conviction under the said provision of law.

54. Evidence led by prosecution is to be scanned on factual as well as legal premises.

55. As pointed out earlier, the said appellant was implicated in view of confessional statement of Ashfaq (co-convict-appellant) who while giving the detail of pre and post occurrence facts disclosed that he alongwith Yasir (absconder) approached Misbah-ud-Din, resident of Meer Abad for the sale of vehicle who get it sold to one Sadiq for Rs.1,35,000/-. However, impression was given by him to his associates that it was sold for Rs.80,000/-.

According to this statement, the appellant was middle man in transaction of sale and the purchaser was Dr. Sadiq, who according to reply given in cross-examination by Sardar Hussain Khan, S.I.-I.O. (P.W.5) was interrogated and was let free being innocent. If the conclusion of I.O. (P.W.5) is acted upon, it would be sufficient to hold that part of confession of Ashfaq (appellant) is un-worthy of credit, and does not ring true, which evidence (confessional statement) at the most could have been used against Misbah-ud-Din as "circumstantial evidence" within the meaning of Article 43 of Order 10 of 1984.

56. It is worth mentioning that frame of van (without engine), seats, gas cylinder, gearbox, switch board, etc.) having grey colour was taken in custody by I.O. (P.W.5) through recovery memo (Ex.P.W.4-4) on 17th February, 2014, produced by Ishtiaq, Moharrar (Head Constable) of Police Station Khanmai as it was taken into custody by the said police station from abandoned place. Saleem Jan, ASI (P.W.4) is one of the marginal witness of recovery memo.

If frame was taken into custody by police of another police station from its territorial domain lying abandoned, which aspect was heavily

relied upon on behalf of prosecution, then the conclusion can be drawn without any fear of contradiction that part of confessional statement of Ashfaq (convict) regarding its sale is result of embroidery, which was also disbelieved by the I.O. (P.W.5) while giving declaration of innocence to Dr. Sadiq as discussed.

57. Production of different parts of van (engine, seats, gas, cylinders, gearbox, switch board, etc.) by appellant Misbah-ud-Din taken into custody vide memo (Ex.P.W.4-7), attested by Salim Jan, ASI (P.W.4) was heavily relied upon by learned counsel for the complainant as incriminating evidence to connect him in the commission of crime.

We are least impressed by the argument for two-fold reasons.

Sheraz Khan (P.W.10), brother of the deceased in cross-examination added that "I received carry dabba from the police station in working condition, however, by that time, the CNG Kit was not available in the carry dabba as the vehicle was repaired by the police and thereafter the same was handed over to me" (Emphasis supplied)

We are unable to believe the truthfulness of the part of deposition regarding repair of vehicle by the police being un-usual act.

Even otherwise, part of the statement of witness (P.W.10) was negated by Sardar Hussain, S.I.-I.O. (P.W.5) who in reply to questions put in cross-examination on behalf of Ashfaq and Fahad Hussain admitted that the vehicle produced in the court was not in such condition when he took the same into custody. Clarified by

voluntarily act that after lapse of time, it might have been repaired, decorated by owner. Replying another question, he categorically stated that he did not perform such duty.

58. Contradictory stance reflected in the evidence as examined clearly reveals that either the confessional statement of Ashfaq (appellant) highlighting the transaction of sale of vehicle is untrue to the extent or premium was granted by I.O. (P.W.5) to Dr. Sadiq for extraneous consideration, making the case of prosecution doubtful against Misbah-ud-Din (appellant), exercising half-hearted attempt to coin the evidence to connect the said appellant in the commission of crime, which remained un-successful.

59. We have also examined the evidence led on the touchstone of yardstick contained in Section 412 of The Code.

In order to record conviction under the referred provision of law, the prosecution was required to prove the following ingredients:

(i) The property in question was stolen.

(ii) Possession of same was transferred by commission of dacoity.

(iii) The accused received or retained stolen property with dishonest intention.

(iv) The accused knew to or had reason to believe that property is transferred by a gang of dacoits.

(v) Duty is of the prosecution to prove not only the guilt but guilty knowledge of the accused.

60. There are statements of the two witnesses, i.e., Saleem Jan, A.S.I. (P.W.4) and Sardar Hussain, S.I.-I.O. (P.W.5), besides part of confession attributed to Ashfaq (appellant).

Cursory glance of the confessional statement is no where suggestive of any of the condition in order to constitute an offence under discussion. Rather his statement maintaining that he alongwith Yasir went to Misbah resident of Rajjar Meer Abad, who sold that vehicle for Rs.1,35,000/- by no stretch of imagination, can satisfy the yardstick. It is to be noted that in his said statement he maintained that he gave impression that vehicle has been sold for Rs.80,000/-.

It can be argued on behalf of prosecution that sale of vehicle on lower sale price would be sufficient to prove the charge but this presumptive argument would not advance plea of prosecution because even in that eventuality question of “receipt” or “retention” does not arise at all. Even otherwise “high probability” cannot be equated with “proof”.

Evidence of Saleem Jan, ASI (P.W.4), attesting witness of recovery memos (Ex.P.W.4-4, P.W.4-7) and Sardar Hussain, S.I.-I.O. (P.W.5) does not satisfy parameter contained in Section 412 of The Code.

Evidence of the said witnesses and Sheraz Khan (P.W.10) regarding the condition of vehicle at the time of superdari coupled with recovery memos (Ex.P.W.4-4, P.W.4-7) and certificate of

exoneration to Dr. Sadiq (stated purchaser of vehicle) by I.O. has demolished the superstructure of the case of prosecution.

61. Expression "know" and "reason to believe" used in Section 412 of The Code are significant which rules out element of surmises, conjectures and suspicion.

Re-appraisal of evidence has not persuaded us to endorse the conclusion on the strength of Article 129 (g) of Order 10 of 1984.

62. Viewed from whichever angle, conclusion arrived at by learned Trial Court is speculative, artificial and perverse.

63. Consequent upon discussion made in proceeding paragraphs, we feel no hesitation to conclude about the failure of prosecution to prove its case against all the appellants beyond shadow of doubt, benefit of which has to be extended to the appellants as a legal compulsion in view of Ratio expounded in "TARIQ PERVEZ vs. THE STATE" (1995 SCMR 1345), "ALLAH BACHAYA and another vs. THE STATE" (PLD 2008 Supreme Court 349), "WAJAHAT AHMED and others vs. THE STATE and others" (2016 SCMR 2073) and "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986).

64. Accordingly, the appellants, i.e., Ashfaq (2) Aimal (3) Fahad Hussain (4) Asif (5) Misbah-ud-Din and (6) Qaiser are hereby acquitted while accepting all the appeals and setting aside the judgment assailed recording conviction and awarding sentences.

65. All the appellants except Misbah-ud-Din are in jail. They shall be released forthwith if not required in any other case.

Misbah-ud-Din (appellant) is on bail. He and his sureties stands discharged of their respective bonds.

SHAUKAT ALI RAKHSHANI
Judge

MEHMOOD MAQBOOL BAJWA
Judge

Announced in Open Court

Dated, Islamabad the
24th April, 2018

Approved for Reporting

Judge