

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

(69)

PRESENT:

MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE NASIR ASLAM ZAHID
MR.JUSTICE KHALIL-UR-REHMAN KHAN

CRIMINAL APPEAL NO.122/I/1994 L.W. (M.R.No.4/I/94)

Asif Mahmood son of Muhammad ... Appellant
Ashraf, r/o Sadwal, Tehsil and
District Chakwal;

Versus

The State ... Respondent

Counsel for the appellant ... Mr.Muhammad Fayaz Ahmed
Khawaja, Advocate

Counsel for the State ... Mr.Muhammad Aslam Uns, Advocate

Date of Institution ... 10-5-1994

Linked With CRIMINAL REVISION NO.29/I OF 1994

Ghulam Abbas Arif son of ... Petitioner
Muhammad Bakhsh r/o
Mohallah Basti Allah Wali,
Chakwal;

Versus

1.Asif Mahmood son of ... Respondents
Muhammad Ashraf and

2.The State

Counsel for the petitioner ... Sardar M.Ishaq Khan, Advocate

Counsel for the State ... Mr.Muhammad Aslam Uns, Advocate

Date of Institution ... 28-6-1994

FIR No., date & ... 129, 29-7-1989,
Police Station Kalar Kahar, Chakwal.

Date of order of trial Court ... 11-2-1991

Date of hearing ... 15-11-1994

Date of decision ... 14-12-1994 (At Lahore)

JUDGMENT:

KHALIL-UR-REHMAN KHAN, J.- Asif Mahmood appellant was tried by the Additional Sessions Judge, Chakwal, for an offence under sections 302/411 PPC and section 17(2) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, hereinafter referred to as the Ordinance. He was convicted under section 302 PPC and sentenced to death and a fine of Rs.25,000/- or in default to undergo further R.I. for three years and in case of recovery of fine the same was ordered to be paid to the legal heirs of Ghulam Mustafa the deceased as compensation. Asif Mahmood appellant was further held guilty of robbery under section 392 PPC and was sentenced to 7 years R.I., and a fine of Rs.10,000/- or in default to undergo R.I. for one year. Fine if realised was ordered to be paid to the legal heirs of the deceased. The appellant was also convicted under section 411 PPC for retaining the stolen property and was sentenced to two years R.I. The sentences awarded under sections 392 and 411 PPC were ordered to run concurrently. The benefit of section 382-B Cr.P.C., was however, allowed.

2. Asif Mahmood, appellant, has challenged his conviction and sentences in this appeal. Ghulam Abbas Arif, the complainant, has also filed a revision petition seeking enhancement of sentences of imprisonment and amount of compensation awarded to the complainant party.

3/11

3. The appeal filed by the appellant in this Court on 10-5-1994 is time barred but the appellant has sought condonation of delay by moving an application on the ground that the appellant had filed appeal within time before the Lahore High Court, Rawalpindi Bench, as the reference for confirmation of sentence of death was forwarded by the learned trial Court to the Lahore High Court. It was pointed out that the Lahore High Court had vide judgment dated 2-4-1994 returned the appeal as well as the reference to the appellant and to the Sessions Judge for transmission to the Federal Shariat Court as the said Court was not competent to decide the appeal and the murder reference as the conviction and sentence awarded to the appellant under section 392 PPC was recorded for committing an offence falling within the purview of section 17(4) read with section 10 of the Ordinance in addition to the offence under sections 302/411 PPC. The reference was then forwarded to this Court.

4. It was added that the appellant had to make arrangement for filing the appeal in this Court, the time taken and the delay involved in the circumstances merits to be condoned. Learned counsel for the complainant opposed the request of condonation of delay. The plea that the appellant was misled by the transmission of the record and submission of the reference for confirmation of death sentence to the High Court has merit. We, therefore, condoned the delay and heard the learned counsel for the parties on merits.

(77)

5. The prosecution version as per FIR Ex.PA/1 registered on the basis of application Ex.PA submitted by Ghulam Abbas Arif complainant the real brother of the deceased to Gulistan Hussain Shah ASI (P.W.17) reads as under :-

"I am an employee in State Life Insurance Corporation. Ghulam Mustafa deceased is my real brother and runs a shop of repairing T.V/V.C.R at Bhoun Road, Chakwal. Yesterday on 28-7-1989 his shop was closed on account of Friday and on 28-7-1989 Ghulam Mustafa my real brother demanded his Suzooki Car No.5566-MRB from a close relative namely Imran Feroz son of Muhammad Feroz Caste Bhatti resident of Basti Allah Wali, Chakwal by visiting his house, as he has to go to Bhoun with a customer in connection with certain work and that he would come back soon. As about 6.30 in the evening Ghulam Mustafa went away with the Car but did not return after a lot of time. I alongwith Shaukat Mahmood son of Mehdi Khan and Imran Feroz son of Muhammad Feroz reached the area lying within village Khai at about 1.30 in the day today on 29-7-1989 in his search, so the dead body of Ghulam Mustafa was found in an agricultural field."

The complainant after detailing the four injuries found on the body of the deceased stated that unknown persons have taken away white coloured suzuki car No.MRB-5566 after murdering the deceased by cutting his neck with sharp edged weapon. It is also mentioned in this report that Shaukat Mahmood and Imran Feroz were left to guard the dead body of the deceased and that it was laterwards known that the said suzuki was found parked behind the bushes on the western side of Bhoun Road facing Sadwall Road.

6. Gulistan Hussain Shah, A.S.I. (P.W.17) after forwarding this application to Police Station for registration of the case proceeded to the place where the dead body was lying. He prepared the inquest report Ex.PE and Ex.PD. He then sent the dead body of the deceased to the Civil Hospital Chakwal for post mortem, recorded the supplementary statement of Ghulam Abbas (P.W.14); the statement of Aziz Akhtar Balam (P.W.7) under section 161 Cr.P.C., obtained the blood stained earth and prepared sealed parcel vide memo Ex.PL and also prepared a site plan Ex.PR. The blood stained clothes of the deceased brought by Tariq Mehmood, Constable, were taken into possession by the Investigating Officer vide memo Ex.PO. The car No.MRB-5566 was also taken into possession vide memo Ex.PF. Dr.Zahid UI Hussan (P.W.5) Medical Officer, District Hospital, Chakwal, conducted post mortem of Ghulam Mustafa deceased at 5.15 p.m. on 29-7-1989 and found the following injuries on the dead body:-

"1. A horizontal gaping and deep incised wound on front of neck 9" x 2½" starting from the left lateral side of neck to the right lateral side of neck, cutting muscles, thyroid, gland and major vessels on front and lateral side of neck, both sides. It was more deep on front and left side and tapering to the right lateral side where it was skin deep under larynx, Trachea and oesophagus were completely cut and in the distal end of trachea clotted blood and mud were present.

2. Incised wound 5" x 1" muscle deep on front and right side of neck ½" below injury No.1 and tapering towards right and horizontal in direction.

3. Incised wound 1 ¼" x ½" skin deep on left side of chin below left side of lower lip.

4. Abrasion 1 x ½" on outer part of left shoulder.

6. Stab wound ¾" vertical x ½" x chest cavity deep on the front and left side of chest lower part 2½" from

79

midline. Corresponding cut mark on shirt and bunyan. On internal examination this injury perforated the lower and middle side of left lung and clotted blood in left chest lower part was present directed backward inward medially.

7. Stab wound $1\frac{1}{2}$ " x $\frac{1}{2}$ " abdominal cavity deep, directed forward inward and medially and upward. On internal examination it was found that there were clotted blood in abdomen on left side and posterior wall of stomach was perforated. Corresponding cutmark on Shirt and bunyan present, it was situated on the back left side of lumberrigon.

8. Stab wound $\frac{3}{4}$ " x $\frac{1}{4}$ " muscle deep directed medially backward and slightly downward and $2\frac{1}{2}$ " deep on front and upper part of left thigh $5\frac{1}{2}$ " below and medial to left iliac crest."

Scalp, skull and vertebrae were healthy. Membrances-Brain, spinal cord were healthy. Mark throat was cut from front. Incise wound on front left chest lowerpart. Ribs healthy. Left pleurae injured at lower and medial side on front. Larynx and tracheae cut. Right lung was healthy. Left lung injured at lower side and medially. Paricardium and heart were healthy and few blood in Rtchamber. Blood vessels in nect injured. Abdomen Walls was injured at posterior side and left side in Lumber region. Peritoneum were injured by injury No.7. Oesophagus was cut, mouth and Pharynx were healthy. Diaphragm was healthy. Stomach and its contents perforated and empty. Pancreas was healthy and small intestines and their contents were healthy and contain chyme. Large intestines and their contents was healthy and contain stool. Liver and spleen were healthy. Kidneys healthy and bladder was healthy and few ounces of urine present. Organs of generation external and internal was healthy. Muscles of nect cut from front and lateral side."

Death in the opinion of doctor was due to severe bleeding and shock produced by cutting of major vessels of neck on both sides and injury to left lung and stomach and asphyxia produced by cutting of larynx and trachea and blockade of distal and of trachea by clotted blood and mud. In the opinion of the doctor injuries No.1.2. 6 and 7 were individually and collectively fatal to cause death in the ordinary course of nature. The reports of the chemical examiner Ex.PS, Ex.PT, Ex.PU, Ex.PV, Ex.PW and Ex.PX are also on record.

It may also be noted that human blood was found on the clothes of the accused and the dagger Ex.P6.

95

7. Asif Mahmood appellant as per entries on record was arrested on 3-9-1989 when he appeared himself before Mian Muhammad Inspector (P.W.18) at the bus stand at Kallar Kahar at about 6 O'clock in the morning. Mian Muhammad Inspector (P.W.18) had taken over the investigation from Gulistan Shah ASI PW on 30th July, 1989. He got the site plan Ex.PB prepared from Muhammad Hanif Patwari (P.W.4). According to the prosecution during interrogation in the presence of Ajmal Lodhi (P.W.11) and Muhammad Ashraf P.W. (given up) disclosed that he had concealed the TV/VCR, two cassettes, the driving licence of deceased, wrist watch, registration book of car, transfer letter and the key of the car in the village which he could recover. Asif Mahmood appellant then led the party in a room at village Sadwall and produced from an iron trunk the registration book of the car No.MRB-5566 Ex.P1, key of the car Ex.P2, VCR National Brand Ex.P3, A TV set Ex.P4, a pair of cassetts Ex.P5/1 & Ex.P5/2, driving licence of Ghulam Mustafa deceased Ex.P10, a wrist watch on the back of which Ghulam Mustafa was written in english Ex.P11 and the transfer letter of Imran Feroz PW. These articles were taken into possession vide memo Ex.PM which was signed by the aforesaid two persons. Again on 9-9-1989 Asif Mahmood appellant in the presence of Sh. Muhammad Nasim Advocate and Haji Khuda Bukhsh(given up PW) offered to get recovered dagger and led the party to the field in the area of village Khai

70

and dug out from there a blood stained dagger Ex.P6 which was taken into possession by Mian Muhammad Inspector/SHO (P.W.18) vide memo Ex.PJ which memo was then signed by the aforementioned two attesting recovery witnesses. Asif Mahmood appellant on the same day on interrogation after the alleged recovery of dagger in the presence of the above mentioned witnesses at his own pointation from his house in village Sadwall got recovered his own blood stained clothes from the ground after digging the same. These wearing apparels stained with blood were taken into possession vide memo Ex.PK, which was also signed by the said witnesses. On 13-9-1989 Mian Muhammad, Inspector (P.W.18) produced the accused before the Ilaqa Magistrate who remanded accused/convict to judicial custody. It is also the case of the prosecution that after the said inspector had obtained judicial remand of Asif Mahmood he expressed his desire to make a confession and as such he again produced Asif Mahmood before the Magistrate and submitted an application Ex.PQ/3 that Asif Mahmood desires to have a confession recorded. The accused was produced before Rai Zafar Abbas Bhatti, Magistrate Ist Class, Chakwal, and allegedly confessional statement Ex.PQ made by Asif Mahmood was recorded. Then challan was completed and submitted to the Court.

8. At the trial the prosecution produced 18 witnesses to substantiate its case. The guilt of the accused was sought to be

77

proved by relying on :

- (a) (i) Judicial confession through the testimony of Rai Zafar Abbas Bhatti, MIC Chakwal (P.W.16);
- (ii) Extra judicial confession through the testimony of Malik Mehboob Hussain (P.W. 13).
- (b) (i) Recoveries of driving licence Ex.P10, registration book of the car Ex.P1, key of the car Ex.P2, wrist watch Ex.P11, Television of Aziz Akhtar Balam PW Ex.P4, VCR Ex.P3, two cassettes Ex.P5/1 & P5/2 at the pointation of the accused from his house through the testimony of Ajmal Khan Lodhi (P.W.11) and Mian Muhammad Inspector/SHO (P.W.18);
- (ii) Recovery of dagger Ex.P6 on 9-9-1989 through the testimony of Sh.Muhammad Nasim Advocate(P.W.9) and Mian Muhammad Inspector (P.W.18);
- (iii) Recovery of blood stained wearing apparels of the accused vide memo Ex.PK comprising Qameez Ex.P7, Shalwar Ex.P8 and Bunyan Ex.P9 through the testimony of P.W.9 and P.W.18;
- (c) - Medical evidence of Dr.Zahid Ul Hussain (P.W.5) and motive evidence through the testimony of Ghulam Abbas Arif complainant.
- (d) Last seen evidence.

The prosecution also relied on the testimony of Imran Feroze (P.W.6)

from whom the deceased had allegedly borrowed the car No.MRB-5566

for a trip to village Bhoun as well as on the testimony of Aziz Akhtar

Balam (P.W.7) who had allegedly given the articles, TV, VCR and

two cassettes and a sum of Rs.5,000/- to the deceased at about

6.30 p.m. on 28-7-1989. Arshad Hamid (P.W.12) in his testimony

had claimed to have seen the deceased and the accused in the car

78

at Ashraf Filling Station the petrol pump situated at Bhoun road and after getting the petrol the car drove towards Bhoun at 6.30/6.45 p.m. The other piece of last seen evidence was furnished by Pir Hussain Shah (P.W.10) as he deposed that on 28-7-1989 when he and his son returned at about evening time after sowing the lands for two hours, they saw a blue colour suzuki car stopped in "Nula Soaj" and Ghulam Mustafa deceased alongwith Arif Mahmood appellant alighted from that car and went towards south in the Kohder, in the area of village Khai. Malik Mehboob Hussain Councillor (P.W.13) in his statement besides deposing about the alleged extra judicial confession of the appellant claimed to have seen Arif Mahmood appellant on 28-7-1989 at about Esha prayer time standing near blue colour suzuki car No.MRB-5566 owned by Imran Feroz at a distance of about one mile from village Bhoun towards Chakwal. He was proceeding to Bhoun in his own car and on seeing the said car, he halted his car and assertedly found Asif Mahmood the appellant standing near the suzuki car and on enquiry Asif Mahmood told him that the wheel of the car had got punctured and that he had changed the same. He was further told by the appellant that he had borrowed this car from Imran Feroz PW. This piece of evidence furnished by Malik Mehboob Hussain was, however, not noticed or discussed by the learned trial Court in its judgment. This is in all the important

and the pertinent pieces of evidence relied upon by the prosecution.

9. Asif Mahmood convict/appellant in his statement under section 342 Cr.P.C. denied the prosecution case and the alleged incriminatory material relied upon by the prosecution and took up the position that he was arrested on 29th/30th of July, 1989 and was kept under illegal detention by the police at Police Station Kalar Kahar till 3-9-1989 when his arrest was shown in the papers and in all this period he was continuously tortured to make a confessional statement which he made under unbearable torture. He added that when he was confident that the police could not obtain his custody back from jail he sent an application through the Superintendent of Jail on 7-1-1990 that his confessional statement was not voluntary and true and was the out come of the police torture and thus he retracted the same at the earliest possible opportunity. He further added that the murder of Ghulam Mustafa was an unwitnessed crime and evidence through witnesses and fake recoveries have been manipulated to make out a case. He added that news of his arrest and that of one Riaz was published in Daily Jang Rawalpindi on 6-8-1989. He placed on record a certified copy of application from the District Jail Jhelum dated 6-8-1989. He produced Shaukat Nawaz Tiwana, Deputy Superintendent of Jail (D.W.1) to prove the submission of the application respecting the confession. Farukh Saeed, Ahlmad of the Court of Rai Zafar

40

Abbas Bhatti, MIC Chakwal also appeared as D.W.2. The learned trial Court has accepted the judicial confession as true and voluntary and has also believed the evidence of recovery and motive. These recoveries, the last seen evidence supported by the medical evidence and the testimony of motive were considered sufficient to establish the guilt of the appellant. The evidence of Malik Mehboob Hussain (P.W.13) regarding extra judicial confession was, however, disbelieved.

10. We have heard the learned counsel for the appellant, the State and the complainant and have gone through the evidence and material on record minutely.

11. Learned counsel for the appellant argued that the learned trial Court has failed to evaluate the prosecution evidence in its true perspective and the evidence manipulated through dishonest investigation and fake recoveries cannot be made a basis for convicting the appellant. He argued that the so called confession was the result of torture and the same being not voluntary is of no value specially when the so called confession was retracted by the appellant at the earliest possible opportunity. He pointed out that if the confession is ruled out of consideration, the evidence of recoveries will have to be discarded as to hold these recoveries as genuine and trustworthy, confessional statement has been read as providing necessary corroboration. Learned counsel for the appellant also referred to Muhammad Sharif versus

81

The State (1975 P. Cr. L. J. 889), Munir Ahmad etc. versus The State (NLR 1987 Criminal 831(834), Liaqat Bahadur and other versus The State (PLD 1987 Federal Shariat Court 43), State versus Asfandiyar Wali and 2 others (1982 SCMR 321) in support of the contentions that confessional statement recorded without putting to accused six set questions as given in printed form in Chapter 13 Vol-III, High Court Rules & Orders and after many days of the arrest should be ruled out of consideration.

12. Learned counsel for the complainant and the State in reply argued that the directions given in the proforma prescribed by the High Court are not mandatory in nature and any minor or inadvertent omission does not render the confession inadmissible or involuntary. He argued that delay in making the confessional statement is no longer taken a ground to discard the confession as non-voluntary and that the precedents relied upon are distinguishable on facts. He added that last seen evidence and recovery of remains of the dead body was considered sufficient basis for holding the accused guilty of murder [Abdus Samad versus The State (PLD 1964 SC 167)]; that motive and recovery of blood stained spear and body at the pointation of accused was made basis of conviction in the case of Allah Ditta versus The State (PLD 1958 SC[Pak] 290). Likewise in the case of Allah Ditta versus The Crown (1969 SCMR 558) evidence of the deceased last seen with accused who was then seen coming back



alone and recoveries of incriminatory articles were considered sufficient to prove the guilt and in Habibullah versus The State (1971 SCMR 341) confession though was retracted, recovery of dagger and evidence of witness having no enmity was made basis of conviction. Learned counsel for the complainant submitted that witness produced by the prosecution are neither inimical to the accused nor are related to the complainant party, they are independent and their deposition being truthful were rightly believed and relied upon and are sufficient to establish the guilt of the appellant/convict beyond all shadow of doubt. He, therefore, urged that the conviction and sentences awarded merit to be confirmed.

13. The prosecution case which emerges from the evidence on the record is that on 28th July, 1989, at deegar-wela, Ghulam Mustafa deceased, who was running a shop for repairing TV/VCR at Bhoun Road, Chakwal, borrowed blue coloured suzuki car No.5566/MRB from his relative namely Imran Feroz, PW for visiting Bhoun with a customer in connection with certain work. It was 6.30 p.m. that Ghulam Mustafa deceased went saying that he would come back soon but did not return for quite some time. Ghulam Abbas Arif (P.W.14) his brother searched him that very night but could not find him. The aforesaid part of the version was narrated at the trial by Ghulam Abbas Arif(P.W.14) and Imran Feroz (P.W.6), Aziz Akhtar Balam (P.W.7), deposed that

63

at about 6.30 p.m. on 28th July, 1989 Ghulam Mustafa, deceased came to him in a suzuki car bearing No.MRB-5566 and informed him that he had partly repaired the VCR delivered by him two days back and that the rest of the repair will be made by his friend namely Asif Mahmood and that a T.V. set be also given to him so that after the repair of VCR it could be operated with the said T.V. He added that Ghulam Mustafa also demanded a sum of Rs.5,000/- for purchasing a VCR available in the village Bhoun. Aziz Akhtar Balam (P.W.7) further stated that he handed over the T.V. and two VCR cassettes available in his shop and took him to his house for giving him sum of Rs.5000/-. The TV and two VCR cassettes were kept in the car and both of them then came to the shop of Ghulam Mustafa in the said car where Arif Mahmood, appellant, was sitting and that the appellant took his VCR belonging to him and placed the same in the car and then all the three came on that very car to his house where he handed over Rs.5000/- to Ghulam Mustafa who alongwith Asif Mahmood drove away to village Bhoun.

14. Arshad Hamid (P.W.12) deposed that at about 6.45 p.m. he had obtained petrol for his motor cycle from Arshad Filling Station at Bhoun Road, Chakwal, that a suzuki car No.5566-MRB came from Chakwal side at the said petrol pump. Asif Mahmood appellant was sitting in the said car on the front seat of the car which was driven by Ghulam Mustafa deceased and

on the rear seat a VCR and TV were lying. Arshad Hamid (P.W.12) had inquired from Ghulam Mustafa deceased as to where he was going and was told that he was going to drop Asif Mahmood at Bhoun since he had to get repaired a VCR at Bhoun. The car after obtaining petrol set off for Bhoun.

15. Pir Hussain Shah (P.W.10) claims in his deposition to have seen car suzuki brand, blue colour stopped in 'Nula Soaj' and Ghulam Mustafa(deceased) alongwith Asif Mahmood appellant alighted from that car and went towards South in the Kohder. The witness was returning alongwith his son at about evening time after sowing the land for two hours. This land belonged to Nazir Hussain Shah resident of village Khal, who was his Phupi Zad and whose land he used to look after as he was locked in jail during the days of occurrence. The next piece of relevant testimony is that of Malik Mehboob Hussain (P.W.13) as he deposed that at Esha prayer time on 28-7-1989 while he was going in his own car to fetch his family from Bhoun, he spotted a suzuki blue coloured car bearing No.5566-MRB standing near the road bank. This car was owned by Imran Feroz PW, and he halted his car there and found Asif Mahmood appellant standing nearby the said car and on inquiry the appellant told him that a wheel of the car had got punctured and that he had changed the same. He added that Asif Mahmood appellant further told that he had borrowed this car from Imran Feroz. Malik Mehboob Hussain

PW claims that he offered his services but the appellant refused and thereafter he went to his in-laws house at village Bhoun and on the next day he was present in his shop at Chakwal, when at about 2.00/2.15 p.m. he came to know that Ghulam Mustafa had been murdered within the area of village Khai.

16. The next day at about 1.30 p.m. on 29th July, 1989 Ghulam Abbas Arif (P.W.14) as per the FIR Ex.PA alongwith Shaukat Mehmood (given up PW) and Imran Feroz PW reached the area falling within the area of village Khai and found there the dead body lying in the agricultural field. Ghulam Abbas Arif in his cross-examination deviated from this version a little as he deposed that he was accompanied in the search mission by Mazhar Hussain who had met him in the house of Imran Feroz and about 1.15 p.m. ^{and} at the Ada in village Bhoun he and Mazhar Hussain came to know from some person whose name he did not remember that a dead body was lying within the area of village Khai and so they reached the dead body where 5 or 7 persons were present but none of them were known to him. He left Mazhar Hussain for supervision of the dead body and met ASI Police at Upper wala Ada in village Bhoun. At about 2.00 noon application Ex.PA was submitted to ASI on the basis of which the FIR was ultimately registered. A.S.I. Police namely Gulistan Shah accompanied him to the place where the dead body was lying.

17. Imran Feroz PW deposed that he in the accompany of Shaukat Mehmood (given up PW) reached the field where the dead body was lying. This field was at a distance of 3-1/2 to 4 kilo metres from the main road leading to Kalar Kahar from Chakwal. It was about 1.30 or 1.45 when they reached that place and the police had reached there after 20-25 minutes of their arrival. He stated that he came back from that place when the police had reached there and he did not know as to when the dead body was removed for post mortem. When the police arrived there besides him, Aziz Akhtar Balam, Muhammad Hussain, Muhammad Ashraf, Ajmal Khan Lodhi and several other persons were present there. He added that when they reached at the place of recovery of dead body, Ghulam Abbas Arif, complainant had left that place to lodge the report with the police and during this period he apprised the complainant that the car was also found by him where he had seen it parked.

18. Aziz Akhtar Balam (P.W.7) stated that he reached the field where the dead body was lying at about 2.30 afternoon on receiving information at his shop that Ghulam Mustafa had been murdered in village Bhoun. He reached the village Bhoun where he was informed by the people that at some distance a dead body was found and the police was already there. He further deposed that after his arrival at the spot and till the removal of the dead body from there he did not talk with Ghulam

Abbas Asif and that he wanted to tell the police something about the murder but they directed him to remain aside and asked him to wait. He claims that Ghulam Abbas Arif was not present when he so told the police at that time and that when the dead body was removed, he narrated what he knew about the occurrence to the police. At that time Ghulam Abbas Arif was present. He deposed that he had given VCR for repair and a TV set and sum of Rs.5000/- to Ghulam Mustafa deceased and Asif Mahmood at his house. The dead body was despatched at 4.30 p.m. for mortuary and inquest report was signed by Imran Feroz PW and Shaukat Mehmood (given up PW). The suzuki car was also taken into possession at night time and the recovery memo was signed by Imran Feroz also. These two documents belie the statement of Imran Feroz to the extent that he had left the place of recovery of dead body after the arrival of the police. This contradiction does not adversely effect the prosecution case seriously as version of Imran Feroz of having delivered the car to Ghulam Mustafa, deceased, for visiting Bhoun stands established rather this aspect of the prosecution version was not challenged by the defence.

19. The next comes the stage when Asif Mahmood was arrested and recoveries of incriminatory articles allegedly were effected on his pointation. As per prosecution version Asif Mahmood

was arrested on 3-9-1989 when he appeared before Mian Muhammad (P.W.18) at 6.00 a.m. and on that very day, on his disclosure driving licence of Ghulam Mustafa deceased Ex.P10, Registration Book of car No.MRB-5566 Ex.P1, Key of the car Ex.P2, wrist watch of the deceased Ex.P11, TV set of Aziz Akhtar Balam Ex.P4, VCR of Aziz Akhtar Balam Ex.P3, two cassettes Ex.P5/1 and Ex.P5/2 were got recovered by Asif Mahmood, vide memo Ex.PM in the presence of Ajmal Khan (P.W.11) and Mian Muhammad Inspector (P.W.18). The other witness of recovery namely Muhammad Ashraf was given up being unnecessary. These articles were then identified by Ghulam Abbas Arif PW and Aziz Akhtar Balam PW as the articles belonging to the deceased or Aziz Akhtar Balam PW. Again on 9.9.1989, dagger Ex.P6 was dug out by the appellant from the field of Nazar Hussain Shah in the presence of Shaikh Muhammad Nasim Advocate (P.W.9) and Mian Muhammad Inspector (P.W.18), Haji Khuda Dad the other recovery witness was however, given up. On the same day in the presence of the aforesaid two witnesses and police officials blood stained clothes were got recovered after digging out the ground of the courtyard vide memo Ex.PK. These clothes comprising of Qameez Ex.P7, Shalwar Ex.P8 and Bunyan Ex.P9 had blood stains which on examination were found to be human blood vide report of the chemical examiner Ex.PX.

20. Malik Mehboob Hussain (P.W.13) also deposed that after about one month of the incident Asif Mehmood appellant,

89

met him in front of the house of his in-laws at Bhoun and narrated all the facts and stated that he had murdered Ghulam Mustafa with a dagger within the area of village Khai and asked him to effect a compromise with Ghulam Abbas Arif, the brother of the deceased as the said Ghulam Abbas Arif was also a Councillor. It was also claimed by him that Asif Mahmood had told him that he had killed Ghulam Mustafa deceased for a TV/VCR and for some money. This part of testimony of Malik Mehboob Hussain PW regarding the extra-judicial confession was, however, not believed by the learned trial Court. However nothing was said in the impugned judgment as regards the claim of this very witness that he had seen Asif Mahmood on 28th July, 1989 at about Esha Wela standing near the suzuki car and about his talk with Asif Mahmood at that occasion. The aforesaid version of Malik Mehboob Hussain (P.W.13) does not fit in the prosecution story as by Esha time on the fateful day Ghulam Mustafa had been killed and if Asif Mahmood was the killer his clothes must have been besmeared with blood. These clothes were recovered statedly at the pointation and rather were dug out as per prosecution version by the accused in the presence of the witnesses on 9th September, 1989. Blood stains on the clothes were not seen by Malik Mehboob Hussain PW who halted his car on spotting the suzuki blue coloured car bearing No.5566-MRB of Imran Feroz parked on the road and who even talked to Asif Mahmood while

standing alone. If by that time Ghulam Mustafa was alive then he should have been seen by Malik Mehboob Hussain, PW in the company of Asif Mahmood, appellant. Moreover, there was no reason for Asif Mahmood to have confided with him and made a confessional statement before him. In the circumstances we are also not prepared to place reliance on the statement of Malik Mehboob Hussain PW.


21. The other important piece of evidence is judicial confessional statement Ex.PQ recorded on 13th September, 1989 by Rai Zafar Abbas Bhatti, Magistrate First Class (P.W.16). The learned counsel for the parties have advanced arguments on the question of voluntariness or otherwise of the judicial confession. The pleas have been noted in one of the paras above.

22. The relevant circumstance and features emerging from the evidence are that the confessional statement was recorded after Asif Mahmood had remained in custody of the police for 10 days as per the arrest entry on the police record and after 15 days of his arrest as per version of the defence. This delay by itself does not render the confession inadmissible. In the case of Sharif-ud-Din Pirzada versus Sohbat Khan and three others, PLD 1972 Supreme Court 363, the confessional statement respectively made after 11 days, 15 days, 12 days and 13 days were accepted as voluntary in the circumstances of the said case, observing that remaining of accused person for some time in police custody

does not effect their judicial confessions and that the Magistrate who recorded the statement had clearly stated in his statement that full opportunity was given to the accused persons to explain the circumstances in which they were giving their statements and he had complied with the proforma which was available for recording the judicial confessions.

23. The observations of the then Chief Justice on which learned counsel for the complainant laid much stress may be quoted :-

"Mr. Abdul Wahab, learned counsel for the respondent has referred to Chapter VI, Part 'C' of Federal Capital of Sind Court in which it is mentioned that the person from whom the confession is taken should be asked as to how long he had been in police custody. This formality was not complied with. It is contended that for this reason the trial Court and the High Court were perfectly justified in rejecting the confessions. The contention of the learned counsel has not impressed us. The direction in the Criminal Circular was of a directory nature and its irregularity does not vitiate the confessions. Mr. Murtaza Hussain, learned counsel for the appellants, has referred to the case of Juma and others vs. the Crown (PLD 1954 Lah 783) this decision supports his contention that an irregularity of this nature is not sufficient to reject the confession".

 Learned counsel for the complainant argued that failure to put any of the questions prescribed by the High Court in Chapter 13 Volume III, Lahore High Court Rules and Orders does not

vitiating the confessions and on account of such omission the confession cannot be ruled out of consideration. It is true that the mere fact that any question mentioned in the instructions issued by the High Court was not asked, could not itself be sufficient ground for holding that the confession was the result of inducement, threat or promise. By prescribing the questions, guideline is sought to be provided to the Magistrates for ensuring that the accused is making the confession with free consent and voluntarily and a Magistrate who fails to ask those questions will be remiss in the discharge of his duties. It will however, be seen that mere formal compliance will not satisfy the purpose of law as the Magistrate is required by law to receive satisfaction by asking these questions or other such questions in the circumstances of the case to ensure that confession is not being made due to any threat, inducement or promise proceeding from a person in authority. It is for the Court before which a confession is sought to be used, to decide whether or not Article 37 of the Qanoon-e-Shahadat 1984 hits the confession and if a Court is satisfied that in spite of the instruction, as distinguished from mandatory provisions of law, not having been satisfied, the confession was voluntary, non-compliance with the instructions contained in the printed form prescribed by High Court would not be sufficient ground for holding that the confession was

irrelevant or inadmissible. As regards the precedents relied upon by the learned counsel for the appellant, it would be seen that the learned judge in the circumstances of the each given case found the confession inadmissible and refused to act on the basis of the confessions so recorded. The principle of law relating to admissibility of the confessions as enunciated by Supreme Court can not be said to have been departed. The purpose of the law, the instructions and the printed proforma is to emphasize the necessity of ensuring to the accused a choice to make or not to make a statement admitting guilt by dispelling from his mind any threat, promise or inducement. The asking of the prescribed questions and such other questions intelligently according to the circumstances of each given case would go a long way to attain satisfaction in the matter of voluntariness or otherwise of the confession, and Magistrates should not fill in the proforma as a matter of routine. Similar observations were made by a Division Bench of the Lahore High Court, in the case of Juma and others vs. The Crown (PLD 1954 Lahore 783). We have examined the question of voluntariness or otherwise of the judicial confession in the light of the aforesaid principles and guidelines noted in the precedent. We have also noticed that some questions were not put to the accused and there was no occasion to make the confession after ten days of his arrest

when admittedly he on the same day was produced before the same Magistrate who had terminated the police custody and ordered that Asif Mahmood be sent to judicial lock up. The magistrate admitted that he had informed Asif Mahmood and explained to him that he is not bound to make statement and if he did so, he would not be handed over to the police custody and also informed that he had already passed order¹ to send him to judicial lock up. The contents of Ex.PC further show that accused was asked certain questions in the presence of police without removing the hand cuffs but thereafter hand cuffs were removed, the police was made to leave the court and questions were again asked. The magistrate in his statement before Court stated that he was satisfied after asking these questions that the accused was making the statement voluntarily and with free consent. With regard to making of the confession, reference may be made to the application Ex.DF submitted by the appellant to the Magistrate through Superintendent Jail in January 1990, no reference was made to statement before the Magistrate. The complaint made therein was that the police had forced him to sign blank paper on the threat of arresting his mother and that police has been beating and torturing him since the date of arrest i.e. 29th July, 1989. It was prayed that his statement be got recorded in Court. This does not amount to retracting from the confession made before the magistrate. Again in his statement/ Asif Mahmood u/s 342 Cr.P.C.,

in answer to the question regarding confession stated that he had given such a statement under pressure of police and the said statement was recorded in the presence of police. These pleas are conspicuously missing in the application Ex.DF.

We, therefore, agree with the learned trial Court that confession was made before the Magistrate voluntarily. We, therefore, find that no reasonable ground exists to rule the confession out of consideration.

24. The plea that the investigation by the police was not conducted honestly and fairly and as such evidence pertaining to incriminatory article cannot ^{be} relied upon may now be noticed.

The appellant was shown to have been arrested on 3-9-1989 when he surrendered voluntarily at 6.00 in the morning before Mian Muhammad Inspector (P.W.18) at the bus stand Kalar Kahar.

The version of the appellant is that he was arrested on 29th July 1989. In order to show that entry of arrest in the record was false, reference was made to Parcha remand Jasmani Ex.DF dated 3.9.1989 submitted by Mian Muhammad Inspector before the Ilaqa Magistrate for obtaining remand. The Inspector in

Ex.DF stated that Asif Mahmood was arrested yesterday i.e. on 2nd September, 1989 and as investigation was to be conducted for recovering the instrument of killing and the other stolen property viz VCR/TV the accused be remanded to police custody for ten days till 12-9-1989. Mian Muhammad Inspector PW in

his statement explained that the date noted in Ex.DF was written inadvertently. This plea cannot be accepted. It was stated in Parcha remand Jasmani Ex.DF that yesterday on 2nd September, 1989 the accused was arrested and remand for ten days terminating for 12th September, 1989 was sought. Had the mistake occurred inadvertently he would not have written "yesterday", "2nd September, 1989" and then "ten days remand terminating for 12th September, 1989". There is yet another factor on record which falsifies this assertion of the police officer. A news appeared in Daily Jang dated 6.8.1989 which was sought to be produced in defence by producing the Reporter but the request was refused by the learned trial Court in our view wrongly. This news report is to the effect that Asif Mahmood and one Riaza have been arrested in connection with murder of Ghulam Mustafa the brother of Ghulam Abbas Arif Councillor and VCR and other items were also recovered. Such a news obviously would not have been published at the behest of the accused as he would not benefit by falsely pronouncing his arrest in the murder case by the police.

It was observed in Islamic Republic of Pakistan versus Abdul Wali Khan (PLD 1976 SC 57) that reports of contemporaneous events in newspapers are admissible in evidence particularly when such events are of local interest or of such public nature as would be generally known throughout the community and when testimony of eye-witnesses is not available. In the instant case Ghulam Abbas Arif (P.W.14) as well as Mian Muhammad

Inspector PW denied having seen the newspaper carrying the aforesaid news but this stance cannot be believed as the newspaper has a wide publication and had the news been untrue they would have contradicted the same. Be that as it may refusal to produce the Reporter to prove the report was illegal as admissible evidence was not allowed to be produced. Had the Court allowed the proof of the facts stated in the report to be proved the prosecution would have the opportunity to show that the news was contrary to the factual position then obtaining. In any case, the fact that the accused was falsely entered as having been arrested on 3rd September, 1989 stands established. It, therefore, follows that investigating officer had not conducted the investigation fairly and honestly. This situation demands that the evidence pertaining to recovery of incriminatory articles be scrutinized cautiously and evaluated on its intrinsic value. The question of credibility of witnesses deposing about recovery assumes importance. Having gone through the evidence pertaining to recoveries as well as the last seen evidence minutely we find that the defence has failed to shatter the testimony of these witnesses. These witnesses appeared to be independent witnesses as they bear no animosity towards the accused/convict and have no motive to falsely implicate the appellant in the heinous offences and to support the prosecution. Aziz Akhtar Balam PW though is a Bhatti by caste but otherwise he is not related to the complainant and the deceased. The deposition

made by him is natural and there appears no reason for him to falsely implicate the appellant in the case. Same is the position of Arshad Hamid (P.W.12). Ghulam Mustafa borrowed the car at about 6.30 p.m. from Imran Feroz (P.W.6) and thereafter went to Aziz Akhtar Balam (P.W.7) for receiving TV and money. Aziz Akhtar Balam PW brought Ghulam Mustafa deceased to his house in the car in which Asif Mahmood appellant was also sitting. They left for Bhoun and on the way got petrol from Ashraf Filling Station where they met Arshad Hamid PW. then in the area of village Khai they were seen by Pir Hussain Shah (P.W.10) who was returning from the fields alongwith his son. These two witnesses again had no motive to falsely implicate the appellant. This last seen evidence coupled with the medical evidence and recoveries duly proved through the testimony of Ajmal Khan Lodhi (P.W.11) an independent witness and Sh. Muhammad Nasim Advocate (P.W.9) who testified recovery of blood stained dagger and clothes of the appellant sufficiently bring home the guilt of the appellant. We cannot expect an advocate who knows the consequences of implicating a person in the offence of murder to falsely depose against a person against whom he has no motive, cause or grievance. He could not even be connected with the complainant party. The aforesaid evidence apart from the judicial confession in our considered view establishes the

99

offences for which the appellant has been held guilty by the learned trial Court. We, therefore, confirm the sentence of death awarded to the appellant. The sentences awarded for offence under sections 302/392/411 PPC are also appropriate and merit no interference. The sentences awarded being adequate and proper there is no occasion to enhance the same.

25. For the reasons given above we dismiss the appeal as well as the revision petition.

(Khalil-ur-Rehman Khan)
Judge

(Dr. Fida Muhammad Khan) (Nasir Aslam Zahid)
Judge Judge

Announced in open Court at Lahore.