(168)

IN THE FEDERAL SHARIAT COURT

(Appellate/Revisional jurisdiction)

PRESENT

HON:MR.JUSTICE DR.FIDA MUHAMMAD KHAN
HON:MR.JUSTICE ABDUL WAHEED SIDDIQUI
HON:MR.JUSTICE CH.EJAZ YOUSAF

Criminal Appeal No. 168/I/1995.
Criminal Revision No.36/I/1995.
Criminal Murder Reference 3/I/1995.

Tahir Baig s/o Banaris Baig, Caste Mughal, r/o village Qazi Chak, Tehsil & District Jhelum.	.....	Appellant
	Versus	
The State	.....	Respondent
Counsel for the appellant	.....	Ch.Muhammad Yaqoob Advocate
Counsel for the petitioner	.....	Ch.Muhammad Iqbal Advocate
Counsel for the State	.....	Mr.Arshad Ali, Advocate
FIR No. date and police station	.....	261 dated 25-8-1988 P.S. Dina
Date of the judgment of the trial court	.....	28-8-1995
Date of Institution	.....	4-9-1995
Date of Hearing	.....	14-05-1997
Date of Decision	.....	14-05-1997

JUDGMENT:

ABDUL WAHEED SIDDIQUI,J:- Appellant has assailed a judgment delivered by the court of Sessions Judge, Jhelum on 28-8-1995 whereby he has been convicted under section 302 P.P.C and sentenced to death and fine of Rs:100,000/- and in default of payment of fine to suffer R.I. for 2 years. The amount of fine, if recovered, shall be paid to the legal heirs of the deceased as compensation as envisaged under section 544 Cr.P.C. It shall be recoverable as arrears of land revenue and shall be paid to the legal heirs of the deceased. He is also convicted under section 404 P.P.C and is sentenced to R.I for 2 years and a fine of Rs.2000/- and in default of payment of fine to suffer R.I. for 6 months. This sentence under section 404 P.P.C is kept operative in case death sentence is not confirmed. By the same judgment the appellant is acquitted from the charges under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and section 377 P.P.C. The same judgment has also been impugned through Criminal Revision Petition whereby it has been prayed that amount of fine should be imposed separately and compensation should be awarded separately under section 544-A Cr.PC and

the amount of compensation awarded to the heirs of the deceased may be increased in accordance with the gravity of the offence. A criminal murder reference for confirmation of death sentence has also been submitted by the trial court.

We propose to dispose off the Criminal appeal, Criminal Revision Petition and the Criminal murder reference by this consolidated judgment.

2. Story of prosecution in brief is that complainant Zahid Hussain Shah (PW-19) reported at police station Dina District Jhelum on 25-8-1988 at 750 P.M. that he is a traffic officer at COD and out-backs every day for his duties from his home. On the reporting date when he returned from his duty around 5.15 P.M, he gave Rs.2/- to his son Imran Ali Shah, aged 12/13 years to purchase potatoes from a shop in a chak nearby. The boy did not turn up for about 1½ hours, so he came out in his search. Then he came to know that in a millet field nearby a dead body of some boy is lying. When he reached there, he found the dead body of his own son lying in a pool of blood and the neck of the dead body was cut with some sharp-edged weapon. The azar band of the shalwar of the dead body was also opened. The complainant stated further that he has no enemity

with any body nor has he any suspicion about any person. A formal F.I.R. was lodged and after necessary investigation, the appellant was arrested, challand and charged firstly under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, secondly under section 377 P.P.C, thirdly under section 302 P.P.C, and fourthly under section 404 P.P.C. Appellant did not plead guilty. Prosecution examined 21 witnesses, appellant gave statement under section 342 Cr.P.C, declined to be examined on oath and did not produce any defence.

3. We have heard the counsel for appellant,petitioner and State. The learned counsel for appellant has contended that it is a case of blind murder in which the appellant has been substituted for some other unknown culprit; that the appellant was arrested on 7-9-1988 whereas his judicial confession under section 164 Cr.P.C was recorded 6 days later on 13.9.1988 and naturally all this period he was tortured to confess as per the dictation of the police; that the magistrate recording the judicial confession has admitted that he did not record the question put to the accused/appellant and his answers in the proceedings before recording the statement Ex.PD and therefore judicial confession is not a reliable document reliance being

placed on 1983 P.Cr.LJ 892, 1987 NLR 831, 1992 SCMR 196, 1993 SCMR 1822, 1995 P.Cr.LJ 159; that extra-judicial confession is not corroborated strongly by other evidence and even otherwise it is the week type of evidence reliance placed on 1987 P Cr.LJ 1817; that there is violation of the mandates created by section 103 Cr.P.C reliance placed on 1995 MLD 927; that there is conflict between judicial confession and medical evidence and therefore in view of principles laid in 1988 P.Cr LJ 655 the judicial confession is a piece of evidence which must be discarded; that the acquittal from charge under section 377 P.P.C evaporates alleged motive for the murder; that there is no witness of the locality and all the independent witnesses are Gakhars who are the murids of the father of the deceased and have deposed under his influence and they are also residents of 25 to 26 miles away from the locality of occurrence reliance is placed on 1984 SCMR 930; 1995 P Cr.LJ 1816; that there are material contradictions among PW-18, PW-20 and PW-16; that PW-16 is a person in authority and therefore extra-judicial confession before him is not admissible as envisaged in 1973 P Cr.LJ 156, 1975 P Cr.LJ 1124, 1968 P Cr.LJ 347 and then this PW-16 is not reliable as he is indulging in perjury;

that hairs of the appellant in the hands of the deceased are falsified by medical sciences; that the appellant has suffered double jeopardy as he was once placed in the death cell and then he came out of it and then once again he has been lodged in the death cell once again and this is in violation of the Fundamental Rights as explained in PLD 1972 SC 363/1993 SCMR 23; that at any rate this is not a case of capital punishment. The learned counsel for petitioner has contended that the abscontion of the appellant/accused from his normal residence after having come to know that he was suspected for the offence is in the nature of such a res gestae which cannot be brushed aside; that the guilt of the appellant stands proved beyond all reasonable doubts by way of wajtakar evidence, connecting recoveries from the spot, recoveries of wrist watch etc on the pointation of the appellant, hairs from the scalp of the appellant found in the hand of the deceased and reported to be human-hairs originating from the head of the appellant, extra judicial as well as judicial confessions; that extra-judicial evidence is fully supported and corroborated by other evidence; that the medical evidence and green staining on the clothes of the deceased and grass found on the back and healthy condition

of the deceased suggests struggle on the part of the deceased to save himself and these circumstances coupled with open string of shalwar is indicative that at least an attempt of sodomy was made; that there does not exist double jeopardy for the appellant as the records prove that the appellant has never been brought out from the death cell as he was never acquitted and consequently question of expectancy of life does not arise reliance being placed in this context on 1985 SCMR 2070, 1987 PLJ (SC) 413, PLD 1971 SC 541. On the admissibility of the confessional statement reliance has been placed on, inter alia, PLJ 1981 SC 52, 1977 SCMR 547, PLD 1950 Lah. 212, 1989 SCMR 446, PLD 1952 FC 1 and 1985 SCMR 1455. The learned counsel for State has adopted the arguments of the counsel for petitioner to the extent of the proof of the guilt of the appellant beyond all reasonable doubts and has supported the impugned judgment.

4. So far as the contention of appellant's counsel that there is no ocular evidence and it is a blind murder is concerned we agree with him to that extent. But it does not mean that when strong evidence is produced by the prosecution in a manner that each and every piece of evidence is corroborative inter se to the extent that all reasonable doubts

are removed, yet the accused is to be acquitted for none had seen him committing the offence. The appellant's counsel has contended that judicial confession was extracted after torturing the appellant for 6 days is misconcieved and his reliance on the citations quoted by him is of no avail to the appellant for being distinguishable in every respect.First of all Atta Muhammad (PW-5) Magistrate Class I has replied to certain suggestions that although he had not recorded the questions put to the appellant and his answers in the proceedings before recording the confessional statement Ex.PD, but he mentioned this fact in the certificate appended under the statement. The relevant portion of the said certificate (Ex:PD/1) reads:

قلمبندی بیان سے قبل ملزم کو پولیس حراست سے آزاد کرایا گیا اور تمام لوگوں کو کمرہ عدالت سے باہر بھجوا دیا گیا - ملزم پر واضح طور پر عیاں کیا گیا کہ اسکیلئے اقبال جرم کرنا یا اقبالی بیان تحریر کرنا ضروری نہیں ہے اور اگر وہ ایسا کرنا چاہتا ہے صرف اور صرف اپنی آزادانہ مرضی اور رضا و رغبت سے کرے اسپر یہ بھی واضح کیا گیا کہ جو وہ تحریر کرو بیگا وہی بیان اسکے خلاف بطور شہادت استعمال کیا جا سکتا ہے - اس ساری تلقین اور وضاحت کے باوجود ملزم طاہر بیگ نے یہ کہہ کر اسکا اقبالی بیان قلمبند کئے جانے پر اصرار کیا کہ وہ سچ بیان کرکے اپنے ضمیر کا بوجھ ہلکا کرنا چاہتا ہے - مجھے کامل یقین ہے کہ ملزم طاہر بیگ نے اپنی مکمل رضا و رغبت سے تحریر کرایا ہے ملزم پر سوائے اسکے اپنے ضمیر کی آواز کے کوئی دباؤ نہ تھا بیان بالکل اسکے مافی الضمیر مطابق تحریر کیا گیا ہے جو میرا سنا ہوا اور دستخطی ہے -

So far as reliance on the principle laid down by a DB of the High Court of Sind at Karachi, cited as 1983 P Cr.LJ 892 is concerned, in which judicial confession recorded three days after the arrest of accused was ruled out of consideration, the circumstances of the case were such that not only that the judicial confession was not corroborated at all but no other evidence was available on the record to prove the guilt of the accused/appellants. So much so, that at placentium C the honourable judges noted that even the learned counsel for the State Mr.Rashid Akhtar Qureshi had not supported the convictions and sentences. In the present case the learned counsel for the State Mr.Saliheen Mughal has vehemently argued in favour of the convictions and sentences as awarded by the learned trial court. So far as reliance on the principle laid down by the Shariat Appellate Bench of the Supreme Court of Pakistan at placentium B of 1993 SCMR 1822 is concerned, again it is in the distinct circumstances of the case. The principle enunciated reads:

> "The only evidence directly connecting the respondent with the offence of Zina, in this case, is his confessional statement which he

> allegedly recorded before the Magistrate on 15-2-1987, after his arrest by the police. The respondent, however, retracted from his confession at the trial and denied even having made any such confessional statement. It is true that the conviction of an accused could be based on his retracted confession if the Court finds that it was made voluntarily and was true. However, the superior Courts have consistently held, and it has now become almost a well settled rule of prudence in criminal cases, that the courts before convicting an accused for a criminal offence on the basis of his retracted confession must look for its corroboration in material particulars from other independent pieces of evidence in the case.

As shall be shown later in this judgment, it is not only the judicial confession, although retracted, which is connecting the appellant with the offence, but there are many other strong and confidence inspiring pieces of evidence which are proving the guilt of the appellant beyond any reasonable doubts.

So far as reliance on placentium I of 1992 SCMR 196 of the judgment delivered by Mr.Justice Abdul Karim Khan Kundi xxxxxxxx xxxxxxxxxxxx is concerned, the tests kept for admissibility of a judicial confession have been followed by the recording

Magistrate although the sequence has been altered. But this alteration of sequence is of no avail to the appellant as there exist other strong evidence against him to an extent that even if the judicial confession is discarded, yet he cannot escape the fate he has chosen for himself by virtue of his evil deed. The tests as laid in the above-mentioned citation are quoted verbatim:

> "The test whether the confession was admissible in evidence as having been recorded according to law and is being true and voluntary was considered in a case reported P L D 1958 (W.P.) Lah. 559 as follows:-
>
> > The language of subsection (3), does not admit of any ambiguity. It is mandatory prov provision of law, which requires that the warning should be given before the recording of the confession. It obviously means that the warning is to be given before commencing recording of the confession. It will be a meaningless warning, if it is given half an hour, or an hour or a few hours earlier. The very object will be frustrated if the warning is not given at the commencement of the recording of the confession.
> >
> > It must be a real endeavour on the part of the Magistrate to find out if the confession is being made voluntarily.
> >
> > Besides putting the set questions the magistrate

is required to make a real endeavour to find out the volunary nature of the confession, it is a solemn duty which should be performed with great care and caution, and not mechanically.

Magistrate will be well advised to adopt the following procedure for recording a confession:-

As soon as a person is produced before a Magistrate for getting his confession recorded, his handcuffs should be removed and all the police officers shall be turned out of the Court room, and he should be informed that he was before a Magistrate and that whether he made any statement or not, he will not be handed back to the police, but will be sent to the judicial lockup. He should then be given sufficient time to ponder over the matter. Then he should be warned that he was not bound to make any statement and if he did so, it may be used as evidence against him and then the following questions should be put to him:-

(1) For how long have you been with the police?

(2) Has any pressure been brought to bear upon you to make confession?

(3) Have you been threatened to make a confession?

(4) Has any inducement been given to you?

(5) Has you been told that you will be made an approver?

(6) Why are you making this confession?

Then if the Magistrate is satisfied that the prisoner is making the confession voluntarily, he should put the set questions as given in the printed form and record the confession. The job is, no doubt, thankless and somewhat tedious, but it must be remembered that on it depends the fate of the prisoner.

> The record of the confession must be so prepared that the Court dealing with such a confession should have no difficulty in finding for itself whether the confession was made voluntarily or not."

If the above warning and questions are not put to the accused then the so-called confession is inadmissable in evidence and is not voluntary in nature. In the present case, these questions were not put to appellant Saifullah before recording of the confession and no warning was given to him, therefore, the confession is not admissible in evidence. In a case reported in P L D 1964 SC 813 it has been laid down as follows:-

> "Unless a retracted confession is corroborated in material particulars, it is not prudent to base a conviction in a criminal case on its strength alone. It is the duty of the Court that is called upon to act upon a retracted confession to enquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true."

It appears from the deposition of Atta Muhammad (PW-5) and Ex.PD/1 that these six questions were put to the appellant expressly as well as impliedly and therefore we do not find it in the fitness of things to reject this piece of evidence.

So far as reliance on the principles enunciated in

placentium A of 1995 P Cr.LJ 159 by a single bench of this court is concerned, the same are reproduced as under:

"I have minutely perused the entire record of the case. Section 164, Cr.P.C. enjoins upon a Magistrate, competent to record a confession of an accused, to observe certain legal formalities before recording the confession. In accordance with the provisions of section 164, Cr.P.C. and numerous judgments of the superior Courts the said formalities can be the following:-

(a) when any accused dicloses his intention to record a confessional statement, the first act of the Magistrate is to remove the handcuffs of the accused if he is in handcuffs;

(b) the police officials present inside the Court room are to be immediately turned out from the Court room;

(c) the Magistrate has to explain to the accused that he is appearing before a Magistrate;

(d) that the accused is not bound to make any confession and if he makes any confession it may be used against him and he may be convicted on its strength.

(e) the Magistrate has to ask the accused if police had used any coercive method to obtain a confession from him;

(f) the Magistrate is required to give sufficient time to such accused to ponder over the matter;

(g) thereafter the Magistrate has to again ask the accused whether he was still willing to make a confession and on his reply in the affirmative he may record the confession;

(h) thereafter the Magistrate has to remand the accused to judicial custody if he is in handcuffs;

(i) even after recording the confessional statement of the accused the Magistrate is required to record some prosecution evidence in corroboration of the confession;

(j) it is also mandatory that the Court should record a statement of the accused under section 342, Cr.P.C wherein he may be asked the question whether he had made confession voluntarily or whether he had made the same under coercion or duress;

(k) when the accused had refused to plead guilty at the time of framing the charge and he wants to make a confession thereafter, conviction should not be based on the sole confessional statement of the accused but some corroborative prosecution evidence must be recorded.

In the present case, as described above, the mandates have been complied with by the Magistrate recording the confessional statement and that the conviction of the appellant is not based on his sole confessional statement. Reliance on a single bench judgment of Bahawalpur jurisdiction of the High Court of Lahore cited as NLR 1987 Cr.831 makes a reference to the six set questions as given in printed form in chapter 13, vol.III, High Court Rules and orders has already been dealt with in the above mentioned citations and principles.

It is a set rule of prudence and justice that where a procedure laid down by the rules of the High Courts has not been followed in all its details, the same is cureable in case it meets the requirements of the substantial justice. On the other hand we find , in the circumstances of this case, principles laid by the apex court cited as 1989 SCMR 446 by the learned counsel by the petitioner are applicable on the present case. Heading (a) of the said citation reads:

> "S.302- Case of no evidence-- Retracted confession, whether sufficient in law to maintain conviction-- Appeal against conviction-- No eye-witness of occurrence-- Prosecution based on retracted confession of accused-- Plea that retracted confession was not sufficient in law to maintain conviction, not entertained- No legal bar exists for recording a conviction on a confession which is subsequently retracted if it is voluntary and true-No infirmity having been found in confessional statement of accused to render it unacceptable and accused having told truth, he was rightly found guilty.--

Petitioner's reliance on PLD 1950 Lah.212 is also pertinent to the present case. The principles laid by a DB are quoted verbatim:

"A confession under section 164 does not require to be recorded in the form of questions and answers.
A confession recorded in the form of a narrative and not in the form of questions and answers is properly recorded and is admissible in evidence.
It would in most cases be impossible to record the confession in the form of questions and answers because the Magistrate to whom a person charged with an offence is taken so that his confession may be recorded does not generally know what the case is.
Per Munir C.J,- I am of the view that portion of section 364, which requires the examination of an accused person to be taken down in the form of questions and answers, is not applicable to confessions made under seciton 164, and cannot accept as correct the contention that even where the confession of an accused person is recorded during the course of police investigation, it cannot be taken down in a narrative form and must be racorded in the form of questions and answers. In fact, such questions have generally to be avoided so as not to provide ground for the objection that the confessions was the result of cross-examination by the Magistrate and, therefore, involuntary."

The counsel for appellant also contended that the

appellant was not confronted with his confessional statement, piece by piece, during his statement under section 342 Cr.P.C and in this context he has relied upon the principle enunciated per Abdul Rashid C.J. cited as PLD 1952 FC 1. The said principle reads:

> "It would be most unfair to the accused, and it would amount to a violation of a fundamental principle of natural justice if he is convicted solely on the basis of an admission alleged to have been made by him without calling his attention to the admission and asking for his explanation when he was examined in Court.

We are afaid that this contention is misconceived as Question No.13 in statement under section 342 Cr.P.C is clearly calling the attention of the appellant to his confessional statement ——— Ex.PD. On the other hand, the counsel for petitioner have relied on the same judgment , but per Muhammad Munir,J. The principle laid is:

> "It is true that the appellant when examined under section 342 of the Code of Criminal Procedure was not specifically questioned about the confession. But for that reason alone the confession does not cease to be admissible. It may be that where an accused

person has not at all been questioned on the salient aspects of the prosecution case, the conviction becomes indefensible but the omission to put a particular incriminating circumstance to him stands on a different footing. In such a case the appellate Court will have to consider whether the omission occasioned any prejudice to the accused."

Consequently we hold that the confessional statement is a substantial piece of evidence which cannot be brushed aside. It reads:

"بیان کیا کہ 85/8/88 کو بوقت 5 بجے شام میں اپنے دیہہ قاضی چک کے باہر چاہ مغلاں پر موجود تھا۔ ہمارا رضبہ بھی وہاں واقع ہے۔ اسی اثناء میں ایک لڑکا عمران علی بعمر ۱۱ سال جو کہ ڈھوک صوبیداران کے زاہد شاہ کا بیٹا تھا میرے نزدیک سے گذرا۔ میں اسکو جانتا تھا۔ اُس وقت میں وہاں اکیلا تھا۔ عمران علی کو اکیلے جاتے دیکھ کر میری نیت میں فتور آ گیا اور میں نے اسے آواز دیکر روک لیا۔ پھر میں نے اُسے کہا کہ میں اسکے ساتھ فعلِ خلاف وضع فطری کرنا چاہتا ہوں اس نے انکار کیا تو میں نے چھری نکال لی جو میرے پاس تھی۔ اور اسکو جان سے مار دینے کی دھمکی دی وہ ڈر گیا اور خاموش ہو گیا میں اسکو قریبی کھیت باجرہ میں لے گیا اور زبردستی اسکے ساتھ بدفعلی کی عمران علی نے ناراضگی کا اظہار کرتے ہوئے کہا کہ وہ گھر جا کر بتا دے گا پہلے میرا اسکو قتل کرنیکا کوئی ارادہ نہ تھا۔ میں نے بیعزتی اور بدنامی کے خوف سے یہ سوچ کر عمران کا خاتمہ کر دوں۔ چنانچہ میں نے اسکا گلا دبایا۔ کچھ دیر بعد وہ بے ہوش ہو گیا تو میں نے اپنی دستی چھری سے اسکو ذبح کر ڈالا اور پھر اسکی لاش گھسیٹ کر راستہ پر پھینک دی تا کہ راہگیروں کو پتہ چل جائے کہ اُسے کسی نامعلوم شخص نے قتل کر دیا ہے۔ بعد میں دیہہ پولیس نے میرے سمیت [illegible] کو شامل تفتیش کیا تو میں نے اقبال جرم کر لیا اور ساتھ ہی ایک اور لڑکے یونس کا نام بھی لیا حالانکہ

پولس کا کوئی گناہ نہیں ہے ۔ اب جبکہ میں نے اپنا جرم تسلیم کر لیا ہے میرے ضمیر پر یہ بوجھ باقی ہے کہ میں نے ایک بے گناہ شخص کو خواہ مخواہ اپنے ساتھ ملوث کر رکھا ہے ۔ میں خدا تعالیٰ کو حاضر ناظر جان کر اقرار کرتا ہوں کہ عمران علی کو میں نے قتل کیا تھا ۔ میرے علاوہ کسی شخص کا کوئی قصور نہ ہے ۔ پولس کا نام میں نے محض ذاتی مخالفت کی بنا پر پولیس کو لکھوایا تھا ۔ "

5. The contention that extra-judicial confession of the appellant before Raja Sultan Mehmood (PW-16) cannot be relied upon for being uncorroborated by other evidence is again misconceived. It has been assailed on two grounds:

(1) That this witness has admitted that he was a member of Zila council from Tehsil Sohawa during the days of this occurrence hence he was a man of authority and extra-judicial confession made before him could not be considered. In this respect reliance is placed on single bench judgments cited as 1975 P Cr LJ 1124 (Lahore) and 1968 P Cr.LJ 347 (Lahore).

So far a first citation is concerned, the relevant principle at placentium B reads:

> "The evidence of the ocular witnesses (as deposed by Ghus Bakhsh during the trial and as transferred under section 288 Cr.P.C. in the case of the other two) is supported by the recovery of the crime weapon, i.e., Kassi (Exh.P.5) from a place which was

within the special knowledge, of the appellant. I am satisfied that the appellant had inflicted the fatal blow. I am, however, inclined to discard from consideration the extra-judicial confession because the same had been made before a Lambardar who, in this Province, has been held to be a person in authority vide Monir's Law of Evidence, Fourth Edn, p.160."

In the second cited judgment, placentium A and B are relevant which read:

" From the above, it would be seen that a Chairman of the area has to perform multifarious duties of executive and judicial nature. Therefore, he, is a person in authority within the meaning of section 24 of the Evidence Act.
The next question is whether there was any inducement offered by Inayat Ullah P.W. It is in his evidence that the appellants took him aside and told him that a case had been registered against them and that he told them that he would help them in case they make a true statement and it was after his promise that the appellants made extra-judicial confessions. The finding of the learned Additional Sessions Judge that Inayat Ullah P.W. had trimmed his evidence in favour of the appellants would not help the prosecution, as the evidence of a witness is to be read as a whole. We would, therefore, hold that there was an inducement offered to the appellants to make these confessions and that it did proceed from a person

in authority, and was sufficient in our opinion, to give the accused grounds which would appear to them reasonable for supposing that by making it they would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against them. Therefore, these extra-judicial confessions must be excluded."

Although both these judgments are of a single bench of the Lahore High Court and are not binding for us, yet we are inclined to discuss the distingiushing features of the present case.

In the first cited case, extra-judicial confession was made before a Lambardor who was held to be a person in authority. In the present case, Raja Sultan Mehmood (PW-16) was a member of Zila Council from Tehsil Sohawa at the relevant time. During cross he has deposed that his village Panchoor may be at a distance of 20/25 miles from the place of occurrence i.e Chak Qazi to which the appellant also belongs. Now first of all a member of a Zila Council was not a person in authority like a Lambardar and secondly that this witness was a resident of a village 20/25 miles away from the village of the appellant. In the second case, the person in authority is held to be a

Chairman of the Union Council of the area, whereas present witness is neither a Chairman of the Union Council nor is he a member of the Zila Council giving representation to the village to which the appellant belongs.

Consequently we hold that extra-judicial confession was made before a person who was not a person in authority at the relevant time.

(2) That this witness (PW-16) is a liar and therefore cannot be safely relied upon. For this allegation, the proof which has been placed before us is that on the one hand he is deposing that the appellant was previously known to him because of his father was on visiting terms with him and on the other, during cross, he has admitted that he does not know about the number and names of the brothers of appellant nor about his sisters. He has also shown ignorance about the details of the family of the appellant. We do not agree with this proposal that ignorance about the details of a person's family does not prove visiting terms with such a person. No enemy with this witness is suggested. He is not related with the complainant. It has been suggested that extra-judicial confession is a weak type of evidence. Indeed it is so provided it is not corroborated

by other independent evidence. In the present case, following pieces of independent evidence are comprehensively and completely corroborating both the judicial and extra judicial confessions:

(I) WAJ TAKKAR EVIDENCE

Mirza Mushtaque Ahmed (PW-13) has proved that on the day of incident at Diger wela he was going to the house of his relative in Qazi Chak and on his way he stayed to see a race of oxen near a well in the areas of the said Chak. There he saw appellant going towards Bajra crop field. On enquiry, the appellant replied that for the purpose of unination he was going towards the fields. It appears form the cross that this witness is not a chance witness as his two cousins are married with the daughters of his relative Qurban Ali in village Qazi Chak. He has denied being of the followers of Pir Bashir Hussain Shah. His deposition stands inspiring confidence to the extent that he saw the appellant in the evening on the day of incident going towards the fields in which the occurrence took place.

Then emerges the evidence of Raja Javeed Iqbal (PW-15) who saw the appellant coming out of Bajra crop between diger wela and mughrib prayers having only one shoe in his one foot,

holding something wrapped in a piece of cloth. He is also not a chance witness and his evidence has not been shattered in any way by the defence and his deposition inspires confidence.

Both these witnesses of Waj-takkar provide such a strong res gestae evidence against the appellant which cannot be ignored specially when none of them is a chance witness and no animus has either been suggested or proved.

(II) Evidence of Abscondence

The occurrence is that of 25th of August, 1988. Raja Javaid Iqbal (PW-15) who had seen the appellant emerging from bajra crop, has deposed that after hearing about the incident he went to the father of deceased for condolence on the next day and told him what he had seen on the preceeding day. Since the appellant was suspected due to Waj-takkar evidence, from the next day of occurrence he disappeared from his village. Muhammad Ayyaz (PW-18), Inspector of police, has replied to a suggestion that no person was suspected other than the appellant on 26-8-1988. After absconding from his village, the appellant remained finding out some influential person who could save him till he met Raja Sultan Mehmood (PW-16) on 7.9.1988 who produced him before S.H.O. of the relevant police station. Defence has

taken up the plea that the appellant was in the police custody alongwith several other persons as suspects from the next day of occurrence. Although many witnesses have been crossed on this point, but nothing is emerging to help the appellant on this point.

(III) Evidence of Recoveries

Following recoveries, connecting the appellant with the crime, have been proved as made on his own pointation:

(a) One wrist watch casio (P-1) belonging to deceased recovered on 12-9-1988 from the house of appellant vide Memo Ex.PF.

(b) One churri (P-2) which was used for culpable homicide amounting to murder on 12-9-1988 from the house of appellant vide Memo Ex.PG

(c) One blood stained shalwar (P-3) and shirt (P-4) belonging to appellant, one left foot shoe mukashin (P-5) on 12-9-1988 from the house of appellant vide memo Ex.P.H.

All these recoveries were made before two independent witnesses namely Raja Muhammad Aslam (Pw-17) and Mirza Gul Awaz.

(IV) Recovery of the hairs of appellant from the hand of deceased

Dr.Muhammad Ihsanul Haq (Pw-4) Medical Officer has deposed that hair were found on clothes and in the right hand of deceased

which were different from that of the deceased, even differentiated with unaided eye-view. According to the report of chemical examiner Ex.PW/1, hairs taken from the hands of deceased Imran Ali and from scalp of the appellant could be of the same person.

A quotation from Taylor's Principles and practice of Medical Jurisprudence page 177(13th edition printed in Hong Kong) shall be relevant which reads:

> "In this connection hair may assume a position of outstanding importance. It is frequently found at the scene of a crime, or upon the victim or suspect, as contact or trace evidence. Not only may a few strands of head hair be found on clothing but some may be found in the hands of a victim of an assault, and in rape pubic hair may be transferred from the assailant to the victim and vice versa. In hit-and-run car accidents, some of the victim's hair may be found upon the vehicle involved in the accident."

6. One of the contentions of the learned counsel for appellant is that there is a conflict between the judicial confession and medical evidence. Consequently judicial confession is to be discarded. The contention is based on that piece of judicial confession which indicates the commission of sodomy with the deceased. Zahid Hussain Shah (PW-19) father of the deceased, has deposed that he had found the string of the shalwar of the deceased untied. In contradiction to this position,

Dr.Muhammad Ihsunal Haq (PW-4) has deposed:

> "Anus and peri-anal region was examined. No.bruise or tear could be seen. No semen stained could be seen in the peri-anal or anal region."

The Report of Chemical Examiner (Ex.Pu) which concerns Shalwar Kameez and shoe worn by the appellant at the time of incident do not suggest the finding of semen. In view of these circumstances, the appellant has been acquitted from the charges under article 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and section 377 P.P.C. It has also been contended that the motive for murder is, therefore, shrouded in mystery as commission of sodomy is not proved.

We have pondered about these contentions with caution. We find that Dr.Muhammad Ihsanul Haq (Pw-4) has deposed about the deceased that it was a dead body of a young boy of healthy built wearing shalwar qamees of light green colour with small linings, blood stained, mud-stained and green staining due to grass particularly on back side. Grass was also present on clothes. This piece of deposition has gone unchallenged indicating that the healthy deceased boy had struggled hard to save himself from the commission of sodomy and he succeeded in

that at the cost of his life. An attempt of the crime was made failing which the culprit murdered him out of frustration and fear that the attempt might be exposed. Consequently this contention is repelled.

7. It has been contended that incriminating churri (P-2) was recovered on 12-9-1988 i.e 17 days after the occurrence. Report of chemical examiner (Ex.P.S) dated 22-9-1988 indicates that the packet of the said churri was received in his office on 21-9-1988 and it was found to be stained with blood. Even if analysis took place on the date of receipt, it was made 27 days after the occurrence. Serologist's Report (Ex.P.T) giving a positive result of staining with human blood seems to have been made almost one month after the occurrence. The contention is that the results could not be positive and the reliance in this respect is placed on placentium R of 1985 P.Cr.LJ 2238 in which a DB of Lahore jurisdiction has given the following ruling:

> "Moreover, the hatchet was recovered on 25-2-1980 i.e. after about six days of the occurrence. It was, therefore, not possible that the hatchet P.25 could have remained stained with human blood during these days. We, therefore are of the view

that the recovery of hatchet P.25 would not corroborate the ocular account of this case against Ijaz appellant."

With due respect for the honourable judges framing this ruling, we do not agree for the reason that forenisic sciences and skills do not agree with it.

About Blood, Gray's Anatomy (Thirty-Eighth Edition 1995, London page 1400) explains:

Blood

"Blood is an opaque turbid fluid with a viscosity somewhat grater than that of water (mean relative viscosity 4.75 at 18 C), and a specific gravity of about 1.06 at 15 C. When oxygenated, as in the systemic arteries, it is bright scarlet and when deoxygenated, as in systemic veins, it is dark red to purple. Blood is a heterogeneous fluid consisting of a clear liquid, plasma, and formed elements, corpuscles; because of this admixture it behaves hydrodynamically in a complex fashion and belongs to that class of fluids termed non-Newtonian. This characteristic has important consequences in the physical study of blood flow in vessels (haemorrheology).

Plasma

Plasma is a clear, slightly yellow fluid

which contains many substances in solution or suspension: the crystalloids give a mean freezing-point depression of about 0.54 C. Plasma is rich in sodium freezing-point depression of about 0.54 C. Plasma is rich in sodium and chloride ions and also contains potassium,calcium, magnesium, phosphate, bicarbonate and many other ions,glucose, amino acids, etc. The colloids include the high molecular weight plasma proteins, composed chiefly of those associated with clotting, particularly prothrombin, the immunoglobulins and complement proteins involved in immunological defence (p.1418), glycoproteins, polypeptides and steroids concerned with harmonal activities and globulins engaged in the carriage of hormones,iron and numerous other blood-borne substances. Since most of the metabolic activities of the body are reflected in the composition of the plasma, routine chemical analysis of this fluid has become of grate diagnostic importance and a considerable body of imformation on its chemistry is available. The formation of the clots by the precipitation of the protein fibrin from the plasma is initiated by the release of specific meterials from damaged cells and blood platelets (p.1406) in the presence of calcium ions. If blood or plasma samples are allowed to stand clot formation accurs to leave a clear yellowish fluid, the serum.

> Removal of the available calcium ions by means of citrate, various organic calcium chelators (EDTA, EGTA) and oxalate prevents clot formation in vitro, heparin in also videly used as an anticlotting agent, its action interfering with another part of the complex series of chemical interactions leading to fibrin clot formaiton."

Further elaboration on the issne comes from Modi's Medical Jurisprudence and Toxicology (Lahore Publishing company, Lahore page 92) in the following words:

> "Blood has two main constituents (a) the cellular part and (b) the fluid part known as plasma in which the cells float. The cellular part contains haemoglobin as the main constituent possessing the peroxidase activity as a true enzyme. It breaks down to hematin exposure to inclement atmospheric conditions. Hematin behaves like a pseudo-peroxidase enzyme with much less peroxidase activity than haemoglobin. Old blood stains owe much of their peroxidase activity to hematin."

Thus it stands indicated that old blood stains can be detected through peroxidase activity of hematin. After how much time the old blood stains can be detected? The reply is coming

from Parikh's Text Book of Medical Jurisprudence and Toxicology (third edition 1979 Bombay page 380) that it can be detected after several years depending on the thickness of the stain and the conditions to which it has been exposed. The wording is:

> "Recent stains on a white cloth are at first red. After a variable interval, due to conversion of haemoglobin into methaemoglobin and haematin, the colour gradually changes to reddish brown within about 24 hours, dark brown or even black within a few days and remains so for several years, depending on the thickness of the stain, and the conditions to which it has been exposed... On many metallic articles blood stains appear as dark staining spots or smears and when desiccated, show fissures and cracks."

Out of the two tests for calculation of the lonegvity of stains, the first one is the thickness of stains on the recovered incirminating article. The recovered churri (P-2) can well he visualsied from the following piece of deposition of Dr.Muhammad Ihsanul Haq (PW-4):

> "I found the following injuries on the dead body. Throat was cleanly cut with sharp weapon up to cervical vertebra."

A churri which has gone cutting the throat out and out

upto cervical vertebra means that the thickness of blood-stains on the article must have been so much that the final remains of hematin on it could be detected several years after the occurrence, what to say of 27 days only as in the present case.

So far as the second test of the conditions to which such an article has been exposed naturally are as to whether it was exposed to sun or kept in any acqueous solution so that the stains of blood are removed soon. In the present case, Raja Muhammad Aslam (PW-17) has deposed:

> "Thereafter the accused in our presence went inside the room of chaff of his house and he took out the blood stained churi Ex.P.2 from the rafter of the roof, the police made the said churi in sealed parcel after preparing its sketch on the paper and secured it vide memo Ex.P.G. My self and M.Gul Awaz attested the memo. The said churi was made into the sealed parcel by the police."

This piece of evidence is enough to prove that the churri under consideration was neither exposed to sun nor kept under any acqueous solution. We are of the considered view that had the churri remained there for several years, yet the thickness

of hematin could have been detected leading to the conclusion that it was human blood leaving behind traces of hematin.

8. It has also been contended that in case of capital punishment, violation of the fundamental Right conferred on the appellant under article 13 (a) of the Constitution of Pakistan is taking place and if the conviction is to be maintained, capital punishment shall not be maintainable under the law of the land. The entire contention is based on the following para No.5 of the impugned judgment and the relevant facts.

> " to be mentioned here that the challan against the accused was earlier submitted in the court of Judge, Punjab Special Court for Speedy Trials No.7 Rawalpindi, and the trial against the accused was conducted and completed by the aforesaid court and that the accused was convicted and sentenced by the aforesaid court vide judgment dated 28.2.89. The accused preferred appeal against his order of conviction and sentence before the Hon'ble Lahore High Court, Rawalpindi Bench, Rawalpindi, which was accepted and the impugned order of conviction and sentence was set aside and the case was sent to this court for fresh trial according to law. So, on receipt of the file, accused Tahir Baig was charge sheeted by this court u/s 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, 377/302/404 PPC, to which he pleaded not guilty and claimed trial ."

Reliance has been placed on, inter alia, 1993 SCMR 239, 1990 P Cr.LJ 419 and 1995 P.Cr.LJ 74.

Article 13 (a) of the Constitution of Pakistan reads:

"No person
(a) "shall be prosecuted or punished for the same offence more than once, or"
(b) ----------

According to the learned counsel, the appellant is being punished for the same offence more than once as he was convicted and sentenced to death by the Punjab Special Court for Speedy Trials No.7 Rawalpindi vide judgment dated 28.2.1989. Resultantly he was sent to the cell for condemned prisioners, but later on Lahore Court Rawalpindi Bench set aside the above mentioned conviction and sentence and sent the case to the court of Sessions Judge, Jehlum for fresh trial and this way the appellant came out from the cell for condemned prisioners and regained expectancy of life. Consequently the sentence of capital punishment is, inter alia, in violation of the principles of higher expectany of life. It has also been contended that the trial having been prolonged for a period of more than five years itself creates mitigating circumstances.

First of all we do not agree with the contention that going into the cell for condemned prisoners and the pendency of appellate/revisional proceedings coming out of such a cell during the

creates higher expectancy of life or mitigating circumstances and in the present case the appellant was neither acquitted nor the record proves that he had ever been brought out of the cell for condemned prisoners. Delay in trial in this respect has been dealt with at placentium A of PLJ 1987 SC 413 in the following ruling:

> "We notice that although at one time the principle of "expectancy of life" which was supposed to have arisen due to passage of time as a result of the delay in the conclusion of trial or in the disposal of the appeal was taken to be a ground for reduction of sentences of persons convicted for murder. But, in view of the changed circumstances, this Court has in the past about 1½ decades repeatedly held that this theory no longer holds the field and preponderance of authorities now is that detention of the convicts in jails is not by itself a mitigating circumstance entitling the persons convicted for the lesser penalty or reduction of sentence, specially when they have acted in a gruesome or cruel manner."

This way the apex court gave its ruling at placentium B of 1985 SCMR 2070 to the effect that expectancy of life arises out of an order of acquittal but in the present case such an order does not exist. The ruling is quoted verbatim.

"The expectancy of life, such as may be taken note of by Courts, arises ourt of an order of acquittal recorded in Court proceedings. It does not arise out of a leave granting order. Even where it arose out of acquittal orders as in Asadullah V. Muhammad Ali P L D 1971 S C 541, Muhammad Khan V. Dost Muhammad and 17 others P L D 1975 S C 44, it played not decisive part in awarding the sentence finally."

In the present case, appellant has acted in gruesome and cruel manner and is not a fit case for consideration of a punishment lesser than the capital one.

9. So far as the contention of the petitioner about inadequacy of the compensation of Rs:100,000/- to be paid to the heirs of the person killed under section 544-A Cr.P.C is concerned, we find it adequately determined having regard to the circumstances of the case. Consequently it is disposed of accordingly.

10. Through a short order, we had dismissed the appeal,

answered muder reference in affirmative and disposed of Revision Petition. These are the reasons for the said short order.

(Abdul Waheed Siddiqui)
Judge

2.12.97
(Dr.Fida Muhammad Khan)
Judge

(Ch.Ejaz Yousaf)
Judge

Approved for reporting

Islamabad, the
14th May, 1997.
Zain/*