

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO 8/I OF 2019

KHALID MEHMOOD SON OF AURANGZEB, CASTE TANOLI, RESIDENT
OF PAKHWAL CHOWK, TEHSIL & DISTRICT MANSEHRA.

..... APPELLANT

VERSUS

1. THE STATE
2. SULTAN MUHAMMAD SON OF KALA
3. MST. QURESHAN BIBI WIFE OF SULTAN MUHAMMAD

BOTH RESIDENTS OF MOR BAFFA KALAN TEHSIL & DISTRICT
MANSEHRA.

..... RESPONDENTS

COUNSEL FOR THE APPELLANT : MR. GHULAM YOUNAS KHAN
TANOLI, ADVOCATE.

COUNSEL FOR THE STATE : MR. WILAYAT KHAN,
ASSISTANT ADVOCATE
GENERAL, KPK.

FIR NO., DATE & PS : 1314/2012, DATED 05.12.2012,
P.S. CITY MANSEHRA,
DISTRICT MANSEHRA.

DATE OF IMPUGNED : 26.03.2016
JUDGMENT OF THE
TRIAL COURT

DATE OF INSTITUTION OF : 14.03.2019
APPEAL IN FSC

DATE OF HEARING : 23.10.2019

DATE OF DECISION : 23.10.2019

DATE OF JUDGMENT : 25.10.2019

JUDGMENT

SHAUKAT ALI RAKHSHANI, J:- Khalid Mehmood

(Appellant) was put on trial in case FIR bearing No.1314/12 dated 05th of

December, 2012 lodged within the local limits of Police Station City, Mansehra under Section 17(2), later on altered to section 17 (4) of the Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 ("Hudood Ordinance") concluding in a verdict of guilt, whereby the appellant was convicted under Section 302 (b) of The Pakistan Penal Code [XLV OF 1860] ("Penal Code") and sentenced to imprisonment for life as Tazir; in addition to the above sentence, the appellant was also made liable to pay Rs.2,000,000/- (two millions) as compensation to the legal heirs of the deceased as contemplated under Section 544-A of The Code of Criminal Procedure [Act V of 1898] ("The Code"), extending the benefit of Section 382-B of The Code, through judgment rendered on 26th of March, 2016 ("Impugned Judgment") by a learned Additional Sessions Judge-IV, Mansehra ("Trial Court").

2. Laconically, Iltaf Khan, Inspector (PW.3), who was serving as ASHO in Police Station City, Mansehra, on 5th of December, 2012 being on routine patrol duty received an information that an injured person has been brought to KATH (King Abdullah Teaching Hospital), later known to be Zeeshan Ahmad lying in a serious condition; who reported at about 08:30 pm to him in the hospital that he is driver of Suzuki and that at about 06:00 pm, while he was going towards his house; when he reached near Mohallah Jalal Abad, Khalid son of unknown resident of Mohallah Jalal Abad on seeing him put the barrel of a pistol on his head and asked him to hand over whatever he had; he caught hold of him but he was fired at, whereby he received a bullet injury in his abdomen, which statement was reduced by him in the form of Murasila (Ex.PW.3/1). He (PW.3) also prepared injury sheet of Zeeshan Ahmed, complainant as (Ex.PW.3/2), on the basis whereof FIR (Ex.PW.7/1) was registered by Sukhraj Ahmed, ASI (PW.7).

Dr. Saeedullah Khan, CMO (PW.9), KATH Mansehra stated to have received Zeeshan Ahmed son of Sultan Muhammad on 5th of December, 2012 at

about 08:30 pm brought by Constable Shoaib (PW.14) which was medically examined and treated. He observed an entry wound of bullet in the abdomen below the umbilicus; the edges of wound were inverted and some of peritoneum coming out of the hole, the size of wound was about ½ inch circular in shape, red in colour, duration whereof about one to two hours, who was shifted to AMC (Ayub Medical College) for further treatment. In the meanwhile, Muhammad Anwar, ASI (PW.6) was entrusted with the investigation and on the fateful night at 09:15 pm he inspected the crime scene but found no one there. Constable Shoaib (PW.14) produced him one t-shirt (P-1) black in colour and a sweater (P-2) having correspondence cut marks, which was sealed in parcel No.1, affixing seals denoting MA through recovery memo (PW.1/1). During inspection of crime scene a Nokia mobile set Model 1280 (P-3), a Samsung folding mobile (P-4), a cap having strips (P-5), a white cap (P-6) and an empty of 30 bore (P-7), which according to him had a fresh smell of its discharge were secured in parcel No.2 through recovery memo (Ex.PW.2/1). According to him, the appellant was arrested on 6th of December, 2012 at about 04:15 pm from his room situated at Pakhwal Road i.e. a 30 bore pistol of steel colour Pak made with four live bullets (P-8) and a 30 bore pistol of black in colour, Pak made with three rounds (P-9) were recovered through recovery memo (Ex.PW.2/2), whereof arrest card (Ex.PW.6/2) was prepared. The said pistols were recovered beneath the pillow of his room in the presence of constable Muhammad Rashid (PW.2) and Constable Ibrar Ahmed (Not Produced). On 7th of December, 2012 police remand was obtained from Judicial Magistrate, Mansehra through an application (Ex.PW.6/3); granting a day custody. Appellant Khalid Mehmood pointed out different points of place of the crime scene, whereof memo of pointation (Ex.PW.4/1) was prepared by also making addition with red ink in the site plan (Ex.PW.6/1) marked as (Ex.PW.6/4). On 8th of December, 2012 the confessional statement of the

appellant was got recorded under Section 164 of The Code and he was remanded to judicial custody. He placed the Forensic Science Laboratory report ("FSL Report") regarding garments of the deceased as (Ex.PW.6/8) and the FSL report of Fire Arms as (Ex.PW.6/9). According to Investigating Officer (PW.6), he had been visiting Zeeshan (complainant), who was admitted in AMC, Abbottabad to record his statement but he was unable to give his statement and only said that he was fired at by felon for snatching money. On 13th of January, 2013 Zeeshan (complainant) succumbed to his injuries in the AMC, whose inquest report (Ex.PW.6/10) was prepared by him.

Postmortem examination was conducted by Dr. Munawar Ali Awan (PW.12), who issued and produced the postmortem report as (Ex.PW.12/1) with the observation that the dead body of deceased Zeeshan son of Sultan Muhammad aged about 20 years; was referred to ATH, Abbottabad for autopsy by police constable on 13th of January, 2013 and that he (PW.12) conducted autopsy of deceased Zeeshan at about 12:30 pm. He observed that the cause of death is injury to gutt secondary to firearm injury, which led to infected abdomen and further sepsis; probable duration between injury and death was mentioned as within 39 days.

3. On 28th of February, 2013, the appellant was formally charged, who denied the indictment of committing murder of the deceased Zeeshan with the purpose of robbery, professing his innocence. The prosecution in order to substantiate its charge has produced as many as 14 (fourteen) witnesses and on conclusion of the prosecution evidence, the appellant was confronted with the incriminating evidence brought forward by the prosecution, which was denied; not opting to record his statement on oath as envisaged under section 340 (2) of The Code. At the end of the trial the learned Trial Court returned a verdict of

guilt, thus in consequence thereof; the appellant was convicted and sentenced as mentioned in the para (supra).

4. We have anxiously and carefully examined the entire record with the able assistance of Mr. Ghulam Younas Khan Tanoli, learned counsel for the appellant as well as Mr. Wilayat Khan, Assistant Advocate General, KPK for the State.

5. Learned counsel for the appellant inter-alia contended that the mursaila (Ex.PW.3/1), containing the statement of the deceased then injured Zeeshan does not qualify to be a dying declaration in view of the law settled by the Hon'ble Supreme Court of Pakistan, henceforth the Trial Court has erred on relying upon such piece of evidence. He also argued that the confessional statement is not only unvoluntarily but untrue as well, which could not be made basis for holding the appellant culpable of the murder of the deceased, more particularly when such confessional statement was retracted by him. He maintained that the statement of the appellant, referred as dying declaration by the prosecution is contradictory to the confessional statement as well as to the testimony of Muhammad Hafeez (PW.4) and Mst. Qureshan Bibi (PW.5) with regard to arrest of the appellant on the spot. He added that the recovery of the pistols (Ex.PW.2/2) made by Constable Muhammad Rashid (PW.2) from the appellant on 6th of December, 2012 being the crime weapon is belied and contradicted by the prosecution witnesses (PW.4) and (PW.5) respectively, who testified to have arrested the appellant from the crime scene on 5th of December, 2012. Regarding FSL report, it was argued that the recovery is doubtful, therefore, the FSL report thereof also becomes of no use to the case of prosecution. Objecting the FSL report, the learned counsel for the appellant further argued that sending the empties with the pistols together has diminished the evidentiary value of FSL report. In support of his arguments, he

relied upon the judgments reported as 2016 SCMR 274, 2011 SCMR 646, 2010 SCMR 1009, 2000 SCMR 785, and PLD 1996 SC 67.

6. Conversely, Mr. Wilayat Khan, Assistant Advocate General, KPK for State, while controverting the argument so advanced by the learned counsel for the appellant forcefully urged that the FIR by all means is a dying declaration, wherein the appellant was nominated, thus reliance upon on such statement by the Trial Court is well founded by law. He frankly admitted that there are certain discrepancies in the confessional statement if read with other circumstantial evidence but argued that the same has been left deliberately by the appellant in his confessional statement to save his skin from the guilt and conviction, however, insisted that the confessional statement is worthy and credible to hold the appellant culpable of the crime. He also refuted the contentions with regard to recovery of the pistols being contrary to the testimony of Muhammad Hafeez (PW.4) and Mst. Qureshan Bibi (PW.5). He maintained that the FSL report of the crime weapon has corroborated the confessional statement and the dying declaration, thus the impugned judgment is based on unshakeable prosecution evidence, requiring no interference, therefore, he made prayer for dismissal of the appeal. He relied upon a judgment reported as "REHMAT ALIAS KAKU VERSUS THE STATE AND ANOTHER" (2017 YLR NOTE 221) and submitted that defective omission on the part of the police officials during investigation would not be a ground for acquittal of the accused.

7. Mainstay of the prosecution case is the statement of deceased then injured incorporated in the FIR (Ex.PW.7/1), confessional statement, testimony of Muhammad Hafeez (PW.4) and Mst. Qureshan Bibi (PW.5) and the recovery of the pistols .30 bore and empty secured from the crime scene wedded with the positive FSL report.

Undeniably there is no eyewitness of the occurrence and as such the entire case of the prosecution is based upon the circumstantial evidence. We are well conscious of the evidentiary value and criteria for appreciation of the circumstantial evidence, holding guilty of an accused facing trial, particularly in a case of capital charge. To act upon circumstantial evidence, the benchmark by the apex Court in the cases of "IMRAN ALIAS DULLY AND ANOTHER VS. THE STATE AND OTHERS" (2015 SCMR 155) and "AZEEM KHAN AND ANOTHER VS. MUJAHID KHAN AND OTHERS" (2016 SCMR 274) requires to be followed, which contemplates firstly that the facts so established must be consistent with the guilt of accused, secondly, the circumstances must be conclusive and conclusion of guilt must be established, thirdly suspicion how much strong would not be substitute of proof, fourthly, the chain of evidence must be complete in all respect leaving no room about the innocence of the accused and last but not the least, the evidence must make an un-broken chain; whereof, one end must touch the crime and other neck of the accused.

Foremost crucial evidence, whereupon the prosecution rested its case is the statement of the deceased then injured Zeeshan incorporated in the FIR (Ex.PW.7/1) on the fateful evening of 5th of December, 2012. We have scanned and examined such piece of evidence from various angles in view of the arguments so advanced by the adversarial sides. Prior to dilating upon the instant statement of deceased Zeeshan, who succumbed to his injuries after 39 days of the occurrence, we would like to refer to the dicta laid down by the Hon'ble Supreme Court of Pakistan through its variety of judgments, while interpreting Article 46 of the Qanun-e-Shahadat Order, 1984 ("Order of 1984") related to dying declaration. The apex Court in the case of "MST. ZAHIDA BIBI VERSUS THE STATE" (PLD 2006 SUPREME COURT 255) expounded the dicta that dying declaration is like a statement of an interested witness, which

requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell a lie. It was further observed that dying declaration or a statement of a person without the test of cross-examination was a weak kind of evidence and its credibility depended upon the authenticity of the record and the circumstances under which it was recorded. It was further reiterated by the Hon'ble Supreme Court of Pakistan in the case of "TAHIR KHAN VERSUS THE STATE" (2011 SCMR 646) at para 12, which for the purpose of convenience is reproduced herein below:-

"12. It is thus absolutely clear from the principles laid down by this Court that a dying declaration is a weaker type of evidence, which needs corroboration and that conviction can be based on the basis of such a declaration when fully corroborated by the other reliable evidence. Thus the facts and circumstances of each case, have to be kept in view and also the credibility, reliability and acceptability of such a declaration by the Court."

(Emphasis Applied)

8. Moreover, Rule 25-21 of the Police Rules, 1934 provides that a dying declaration, whenever possible, be recorded by a Magistrate and the declarant be examined by a medical officer with a view to ascertain that he is sufficiently in senses to make a lucid statement and if in case a Magistrate is not available, such declaration shall be made in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case. It further provides that if no such witnesses can be obtained, without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers and that a dying declaration made to a police officer should, under section 162 of The Code, be signed by the person making it. A full bench of the Hon'ble Supreme Court of Pakistan, while adjudicating upon the case of "SOMAID AND ANOTHER VERSUS ALI GOHAR ALIAS GOHAR ZAMAN AND OTHERS" (2019 SCMR

1008) while examining article 46 of The Order 1984 held and observed in the words reproduced herein below;

“Dying declaration, in legislative wisdom, is an exception to general rule of direct evidence; it is admitted to the detriment of an accused without opportunity of cross-examination upon the declarant under the belief that a person, face to face with God, would tell nothing but the whole truth. Sanctimonious hypothesis notwithstanding before conviction is based upon such a declaration, prosecution must demonstrate beyond shadow of doubt that it comprises of the words of declarant alone without extraneous prompting or additions; the person who records dying declaration is therefore a most important witness to verify veracity thereof.”

(Underline is ours)

9. Admittedly, the statement of the deceased then injured incorporated in the FIR (Ex.PW.7/1) was recorded in the hospital but neither his statement was attested by the concerned Doctor to verify that the deceased then injured was medically fit and was in his senses to make such statement nor has been verified and signed by any other police official or any private witness; adhering to the requisites as contemplated under the Police Rules, 1934 *ibid*. As observed by the Hon'ble Supreme Court of Pakistan in the Somaid's case *supra* that dying declaration has a distinctive exception to general rule of direct evidence, where the statement of deceased then injured is accepted as a whole truth without opportunity of cross-examination on the hypothesis that a person on the death bed cannot lie; but here the case is distinguishable, for the reason that the deceased then injured did not die within a short spell of time rather he remained alive for 39 days. In such scenario, it was obligations upon the prosecution to have had proved on record through medical evidence that during such period of treatment he was able and fit to make statement albeit Muhammad Anwar, ASI (PW.6) in his examination-in-chief stated that he had been visiting the injured admitted in AMC, Abbottabad but deceased then alive was unable to give his statement and that he only stated that he had been fired at by accused just for snatching money. If the statement of Investigating Officer

(PW.6) is believed to be true and correct then question mounts that if he was not able to make statement during his treatment in a hospital wherein he remained for 39 days, how come he could make statement on the fateful day. In absence of such explanation, the need of medical evidence arises to prove such factum, which is missing. The prosecution had to establish through cogent evidence that the dying man was in full sense, conscious, alert to surroundings, fully orientated to time, space and able to make such statement, whereof a fitness certificate about the medical condition of declarant was must, which has not been obtained and brought forward on record, thus in no way such declaration of deceased Zeeshan Ahmed can be considered as a dying declaration. Obviously, such statement if not considered as a dying declaration did gather weightage of a statement recorded under Section 161 Cr.P.C, but its admissibility in evidence was subjected to opportunity of cross-examination and in absence of such right, the statement incorporated in the FIR cannot be held to be a proof. Even otherwise, if such statement is considered to be a dying declaration, even then the same being very weak type of evidence, requires strong, independent and reliable evidence for the sake of safe administration of justice, thus relying upon such statement qua alone would be un-safe.

10. Looking the matter from another angle; assumingly, if the statement of deceased Zeshan Ahmed is believed to be a gospel truth even then it is of no help to the prosecution case because he although named one Khalid as perpetrator, who came to rob him but he did not disclose his parentage and caste except that he was resident of Mohallah Jalal Abad. There may be hundreds of persons in the vicinity with the name of Khalid. If the deceased had mentioned that the appellant was his friend, neighbor and acquaintance or was known to him earlier due to some relation; even then it could have been relevant but not in the present situation. Furthermore,

deceased then alive did not mention in his statement that the appellant was caught hold of him or handed over the appellant to police by him. It is worthy to mention that Muhammad Hafeez (PW.4) testified that he was owner of the Suzuki and deceased Zeeshan Ahmed was working with him as a conductor, which fact belied the deceased so narrated in the FIR, claiming to be driver of the Suzuki. Muhammad Hafeez (PW.4) maintained that on the fateful evening he was called on phone by the deceased then alive that he has been attacked by some robber and he (Zeeshan Ahmed) caught hold of him and asked him (Muhammad Hafeez PW.4) to reach at the spot; whereupon when he reached on the crime scene and called the deceased then alive but he did not attend his call; believing that he might have received the bullet shot, where-after he and one Majid (Not produced) reached the exact spot of crime, where deceased then injured handed over the accused to him and told that the accused has caused firearm injury to him. He further testified that they brought the deceased then injured to the hospital and on the way informed the SHO of P.S. City about the occurrence and apprised him that they have apprehended the assailant and that on arrival by the police in the hospital, they handed over the accused to the SHO of P.S. City. Mst. Qureshan Bibi (PW.5) stated that she is resident of of Mohallah Bhattain near Punjab Chowk Mansehra and that on the relevant day Muhammad Hafeez (PW.4) informed her about the occurrence that her son was injured, whereupon she reached at the KATH, Mansehra, where she found that the injured had already been taken away to AMC Abbottabad. According to her, after elapse of four hours, her son came out of the operation theatre, where her son Zeeshan Ahmed then alive told her that a boy standing in his way threatened him to take out whatever he had by putting the pistol on his head; which pistol was snatched and thrown by him but the boy took out another pistol by which he fired at upon him; said boy was brought to the road by him (deceased); PWs reached there and he handed over the boy to them, who was

wearing white clothes smeared with blood of injured Zeeshan Ahmed and that the police officials commended that he was a brave boy (deceased), when he had handed over the boy to the police at the spot. During cross-examination mother of deceased (PW.5) admitted that she was not the eye witness of the occurrence and admitted that her information is based upon the information furnished by the deceased then injured.

Analysis of her statement reveals that the culprit was over powered and apprehended by the injured himself alone despite having received bullet injury in abdomen and called Muhammad Hafeez (PW.4), who alongwith Abdul Majid came on the crime scene, whereafter the culprit was handed over to the police on the spot. Her statement does not reconcile with the statement of Muhammad Hafeez (PW.4) because he stated that culprit was brought to the hospital and in the meanwhile he called the SHO of P.S. City, Mansehra and informed him about the apprehension of the culprit, who was then handed over to police in the hospital on their arrival. Both statements of Muhammad Hafeez (PW.4) and Mst. Qureshan Bibi (PW.5) have been contradicted by Muhammad Anwar, Investigating Officer (PW.6) who testified that the accused was arrested on the next day on 6th of December, 2012 at about 04:15 pm from his room situated at Pakhwal Road. No clothes of the appellant were taken into possession to corroborate the statement of Mst. Qureshan Bibi (PW.5), who stated that the clothes of the culprit, white in colour were smeared with the blood of his son; which is intriguing. The statement so-called dying declaration of deceased was incorporated in the shape of mursaila (Ex.PW.3/1) on the basis whereof FIR was lodged, which has been found by us to be inconsistent to the depositions of Muhammad Hafeez (PW.4) and mother of deceased Mst. Qureshan Bibi (PW.5); rather contrary regarding so called dying declaration, arrest of the appellant on the spot and then handing over to the

police in the hospital. One of material witness Abdul Majid, who alongwith Muhammad Hafeez (PW.4) brought injured deceased then alive to hospital was not produced and abandoned for being unnecessary on 30th of September, 2013 without assigning any reason, which infer us to believe as provided under Article 129 (g) of the Order of 1984, that had he been produced before the Court he would have not supported the prosecution version. In this regard we are guided by dicta laid down in the case of "LAL KHAN VERSUS THE STATE" (2006 SCMR 1846).

After scrutiny of the testimony of Muhammad Hafeez (PW.4) and mother of deceased Mst. Qureshan Bibi (PW.5) and the deposition of Investigating Officer (PW.6) on the touchstone referred thereto in the preceding paras on the basis of cited cases; we have irresistibly concluded that the statement of the deceased as incorporated in the FIR by no means can be considered as a dying declaration as well as no importance to strengthen the case of prosecution.

11. Coming to the confessional statement of the appellant, we have scanned the questionnaire (Ex.PW.13/1), confessional statement as well as have minutely scrutinized the testimony of Naeemullah Khan Jadoon (PW.13), who recorded the confessional statement of the appellant. Before evaluating the confessional statement in view of the testimony of Recording Magistrate (PW.13), we would like to refer to the mandatory pre-cautions enunciated by the Hon'ble Supreme Court of Pakistan in the cases of "AZEEM KHAN AND ANOTHER VS. MUJAHID KHAN AND OTHERS" (2016 SCMR 274) and "HASHIM QASIM AND ANOTHER VERSUS THE STATE" (2017 SCMR 986), which follows as under;

- 1) Fear in the mind of accused intruded by the police requires to be removed by sending the police officials including Naib Court and other staff from the Court room.
- 2) Accused is well in senses to understand the consequences of his confessional statement and must be made to understand that he is before the Judicial Magistrate.
- 3) Sufficient time for reflection is to be provided after administration of first and then second warning with interval.
- 4) The maker of a confession must be assured that in case of recording as well as non-recording of a confessional statement, he shall not be handed over to the police.
- 5) The requisite question as incorporated in the form issued as per High Court Rules and Orders should be put to the maker and answers given by him shall be recorded in his own words.
- 6) The confession of the accused must be handed down by the Magistrate himself unless there are compelling circumstances not allowing the Recording Magistrate to do so; but such compulsion must be disclosed in a special note.
- 7) Confessional statement must not contradict the case setup by prosecution witnesses on material particulars of the case and also should not be inconsistent with other confession, if there are more than one maker. .
- 8) If the maker only understands his mother language and confession is recorded in another language same shall be explained to the accused, which he fully understands with clear stance of Recording Magistrate that he is well-versed with the language in which confession was made, and word by word translated as provided under Section 364 of The Code. The required certificate must be given by the Magistrate about the proceedings under his seal and signature.
- 9) After completion of recording of the confessional statement accused shall not be sent to judicial custody through police official including Naib Court wearing police uniform.

On scanning of the evidence with regard to the confessional statement, we have found material illegalities and irregularities in the process of recording confessional statement of the appellant, questioning the voluntariness of the confessional statement, more particularly with regard to the truthfulness of his confession for being inconsistent rather contrary to the other circumstantial evidence.

12. According to Recording Magistrate (PW.13), on 8th of December, 2012 accused Khalid Mehmood was produced by local police before him for recording his confessional statement vide application (Ex.PW.6/5), where-after complying with all codal formalities, he recorded the confessional statement. He produced the questionnaire, whereby questions were put to the accused as (Ex.PW.13/1), confessional statement as (Ex.PW.13/2), memorandum of enquiry as (Ex.PW.13/3) and lastly the certificate as (Ex.PW.13/4). In cross-examination he admitted not to have asked any question other than mentioned in the questionnaire (Ex.PW.13/1) and that after recording confessional statement, he committed the appellant to judicial custody through Naib Court. He admitted that the confessional statement (Ex.PW.13/2) was not written by him in his hand but was scribed by the steno of the Court on his dictation. Admittedly, Recording Magistrate (PW.13) has provided only one opportunity with a single warning for reflection.

In the questionnaire (Ex.PW.13/1), memorandum of enquiry (Ex.PW.13/3) and certificate (Ex.PW.13/4), it does not find mention that in case the appellant does not record his confessional statement, he would not be handed over back to the police, which contravenes the method so enumerated in the above referred judgment, which questions the voluntariness and admissibility of the confessional statement. Usually, the Naib Court is in the uniform, thus shifting of the confessor through a Naib Court also offends the pre-caution enunciated in the Azeem Khan's case *supra*. Moreover, not providing two opportunities for reflection with intervals intentionally violates the directions rendered by the apex Court in the case (*supra*). Further, presence of Court official and writing the confession by him without offering explanation and such fact not contained in the certificate makes the entire proceeding of

confessional statement un-voluntary and erroneous, making the same inadmissible.

13. Now, adverting to the confessional statement made by the appellant with reference to its truthfulness and same being not inconsistent with the available circumstantial evidence. After analysis, we have found the confessional statement to be absolutely untrue and inconsistent to the other circumstantial evidence. In the confessional statement maker states that he and deceased Zeeshan Ahmed became friends about six months back and that on the fateful day at about 06:00 pm deceased met him near Mohallah Jalal Abad, who asked him to see off him, whereupon both of them proceeded and on the way, he and deceased had some altercation. It was also mentioned in the confessional statement that he had two pistols with him, which he had kept with him to make aerial firing in his cousin's marriage and that he (deceased) snatched one of his pistol; aimed and was going to hit by saying that he (appellant) and Hamza have committed fraud with him; as such today he would settle the matter. As per confessional statement, maker of the confession apprehending threat to his life made fire upon him (Zeeshan) whereby he got severely injured.

Perusal of the confessional statement reveals that appellant and deceased were friends since last six months and due to some personal grudge, altercation took place between them and that as per confessor, he in self defence fired at the deceased. This narration contradicts the entire version of the prosecution brought forward through the so-called dying declaration made by deceased, incorporated in the FIR, who statedly remained firm till his death that he was fired by the culprit for the purpose of robbery. Muhammad Hafeez (PW.4) and Mst. Qureshan Bibi (PW.5) also stated that the deceased then alive told them that in the course of robbery the culprit made fire upon him, whereby he

received injury in his abdomen, which contradicts the confessional statement. The confession seems to have been extorted to make the case in line with the version built up by police, ignoring what has been reported by the deceased and Muhammad Hafeez (PW.4) and Mst. Qureshan Bibi (PW.5), with regard to the arrest of culprit from the spot and handing over him to police, negating the confessional narrative together. Astonishingly, nothing was taken away by the felon on the fateful day apparent from the recovery of two mobile phones from the crime scene, which factum also dispels the story of robbery.

After thorough scrutiny of the above evidence, we have arrived with no doubt in our mind that the confessional statement is untrue, which has contradicted the circumstantial evidence on material facts so furnished by the other prosecution witnesses, thus it would be unsafe to place reliance upon such confessional statement, particularly in a case of capital charge without strong, independent and unimpeachable corroborative piece of evidence. As the confessional statement has been held by us to be unvoluntarily and untrue as well as inconsistent with the other circumstantial evidence, therefore, need not to dilate upon the plea of exercise of right of self defence mentioned in the confessional statement. Learned counsel for the State during his arguments could not deny the conflicting versions as discussed herein the preceding paras and showed inability to explain the circumstances except urging that homicidal death of the deceased has been proved to have been committed by the appellant, which assertion alone is obviously not enough to hold the appellant guilty of the crime, entailing severe punishment of death or incarceration for life.

14. Regarding recovery of the pistol being crime weapon of the murder of the deceased recovered on 6th of December, 2012 from a room being in possession of the appellant, suffice it to observe that the arrest of the appellant

on the said date and the recovery made at the same moment from the room of the appellant is diverse to the testimony of Muhammad Hafeez (PW.4) and Mst. Qureshan Bibi (PW.5) that the culprit, who committed murder was apprehended at the spot on 5th of December, 2012 by the deceased himself, which was handed over to police official in the hospital and that the police praised the deceased for doing so bravely. Moreover, since the recovery of pistols have not been effected in consequence of disclosure and the police had raided the room on prior information, therefore, it was incumbent upon police officials to have had associated compulsorily private witnesses from the locality to become marginal witness of recovery, which offends provisions of Section 103 of The Code and the dicta laid down in the case of "MUHAMMAD AZAM VERSUS THE STATE" (PLD 1996 SUPREME COURT 67), wherein it has been held that the police cannot ordinarily be allowed to ignore the provision of Section 103 The Code and as such insisted upon associating independent witnesses; provided in compelling circumstances it is not possible then explanation to such effect must be offered as to why witnesses were not associated with the alleged recovery, otherwise such recovery would not be worthy of reliance; henceforth in such view of the matter as well the recovery being doubtful is ruled out of consideration.

15. The prosecution has also procured the FSL report to establish that an empty recovered from the crime scene has been fired by the pistol recovered from appellant from his room beneath the pillow. One of the fascinating statement which has come on record is that Muhammad Anwar, ASI (PW.6) testified that on 6th of December, 2012, while inspection of the crime scene he secured an empty; giving fresh smell of its discharge, which was taken into possession through recovery memo (Ex.PW.2/1). As the occurrence had taken place on 5th of December, 2012 at about 07:00 pm, than how come would it be

possible, till next day, the empty giving fresh smell of its discharge. The record reflects that the recovery of pistols were made on 6th of December, 2012 and sent on the same day to Forensic Science Laboratory (FSL), Crimes Branch, Khyber Pakhtunkhwa, Peshawar, but the same were received on 10th of January, 2013; whereof no explanation has been offered to justify late receipt of the aforesaid weapons, which makes the FSL report (Ex.PW.6/9) unworthy of reliance. Moreover, since the recovery has been considered to be highly doubtful and thus discarded as such the FSL report (Ex.PW.6/9) cannot be considered as helpful to the case of prosecution for if redundant.

16. The arguments so advanced by the Assistant Advocate General, KPK for State to overlook the omissions and infirmities arising during the course of investigation has no strength because the case has to be proved on the basis of strong corroborative pieces of evidence, consistent with each other, particularly in a case of circumstantial evidence where different pieces of evidence should make one un-broken chain of events, missing no link and casting absolutely no doubt in mind that the accused has committed the offence as charged in this case. There are material contradictions and severe inconsistencies, which cannot be considered as omissions or formal defect so referred by learned counsel for the State by placing reliance upon the case reported as "REHMAT ALIAS KAKU VERSUS THE STATE AND ANOTHER" (2017 YLR NOTE 221), which has no application in the attending circumstances of this case.

17. Upshot of the above discussion is that the prosecution has miserably failed to bring home the charge against the appellant and the findings arrived at by the learned Trial Court are misconceived, contrary to the evidence and guiding principles enunciated by the apex Court, henceforth we are unable to maintain the impugned judgment for being unsustainable, infirm and based on cryptic evidence.

18. For the foregoing reasons, through our short order dated 23rd of October, 2019, we allowed the appeal, overturned the impugned judgment and recorded acquittal of the appellant of the charge, following the above reasons.

(SHAUKAT ALI RAKHSHANI)
JUDGE

(DR. FIDA MUHAMMAD KHAN)
JUDGE

Islamabad, the
Dated 25th of October, 2019
khurram/-