

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE DR.FIDA MUHAMMAD KHAN
MR. JUSTICE SHAHZADO SHEIKH

CRIMINAL APPEAL NO.02/I OF 2013

1. Amir son of Sheraz, resident of Mohallah Kandal, Dari Chowk, Sector No.3, Haripur
2. Waqas-ur-Rehman son of Saif-ur-Rehman, resident of Dari Chowk, Sector No.4, KTS, Haripur
3. Hashim son of Amjad, resident of Mohallah Dari, Sector No.3, Khalabat Township, Haripur

.... Appellants

Versus

1. The State
2. Painchi son of Haji Ulti, Afghan Refugee, present resident of Mehmood Nagar, District Attock

..... Respondents

Counsel for appellants Mr. Saeed Akhtar Khan,
Advocate

Counsel for State Mian Saadullah Jandoli,
Deputy Advocate General, KPK

FIR, Date and Police Station 414, 22.11.2010
Khalabat Township, Haripur

Date of judgment of trial court 20.12.2012

Date of Institution 22.01.2013

Date of hearing 25.07.2013

Date of decision 25.07.2013

Date of Judgment 02.08.2013

JUDGMENT


DR. FIDA MUHAMMAD KHAN, Judge.- This appeal, jointly filed by Amir son of Sheraz, Waqas ur Rehman son of Saif ur Rehman and Hashim son of Amjad, is directed against the judgment, dated 20.12.2012, passed by the learned Additional Sessions Judge-III, Haripur whereby he has convicted all the appellants/accused under section 302(b) PPC as Tazeer and sentenced them to life imprisonment, each, on four counts. He has further convicted all the appellants under section 458 PPC and sentenced them to 14 years R.I., each, with a fine of Rs.30,000/-, each, or in default of payment of fine further undergo 3 months S.I., each. All the appellants/accused have also been convicted under section 379 PPC and sentenced to 5 years R.I., each, with a fine of Rs.5000/- each, or in default of payment of fine further 15 days S.I., each. All the appellants/accused are further ordered to pay Rs.400,000/-, each, to the legal heirs of the deceased as compensation under section 544-A Cr.P.C. or in default of payment to suffer further 6 months S.I., each. The benefit of section 382-B Cr. P.C. has been extended to all the appellants/accused. All the substantive sentences are ordered to run concurrently.

2. Briefly stated, the facts of the case as disclosed on 22.11.2010 by complainant Painchi vide Murasila (Ex.PA/1) which was incorporated into FIR (Ex.PA), on the same day, are to the effect that during night

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falling between 21-22/11-2010, subsequent to receiving telephonic information, he came, from Attock, to the house of his sister Mst Ughal Jan, situated at Sector No.3 KTS Haripur, where he found that his sister Mst. Ughal Jan, her sons Arif (aged about 20/21 years), Alam (aged about 18-19 years) and her daughter Mst. Hanifa Bibi (aged about 23/24 years), had been killed by some unknown persons. On his report, the case in hand was registered against unknown culprits.

3. After registration of the case, the complainant Painchi made a supplementary statement on 24.11.2010, wherein he nominated the appellants/accused and one absconding co-accused Bakhtiar alias Khilji in the present case as the accused who had committed the murders. Thereafter Haji Muhammad Amin, husband of Mst. Ughal Jan deceased who at the time of occurrence was confined in a jail in Afghanistan in some case. He came to know about the present occurrence over there and, after his release, came on 15.01.2011. He also charged the appellants/accused for commission of the Offence. The case was investigated and the appellants/accused were arrested. On completion of the investigation challan was submitted in the Court. Subsequently while the appellants/accused Amir and Waqas-ur-Rehman, were formally charged on 02.02.2011, the appellant/accused Hashim was charged on 21.09.2011.

 They did not plead guilty and claimed trial.

4. At the trial prosecution produced as many as 16 witnesses.

The gist of their evidence is given hereinbelow:-

- * PW.1 is Bashir Khan, ASI. On receipt of Murasila through Constable Babar on 22.11.2010 he correctly incorporated its contents into FIR (Ex.PA);
- * PW.2 is Fazal-e-Gul, Judicial Magistrate-II, who deposed that on 29.11.2010 he recorded confessional statement of appellant/accused Waqas ur Rehman, which is Ex.PW.2/3;
- * PW.3 is Rashid Rauf Swati, Judicial Magistrar. He stated that on 30.11.2010 he recorded confessional statement of appellant/accused Amir Khan, which is Ex.PW.3/3;
- * PW. 4 is Nazir Muhammad, IHC. He deposed about disclosure made by the appellant/accused Waqas ur Rehman on 28.11.2010. Thereafter he pointed out the place of occurrence and on his pointation eight ropes, one piece of cloth and one bulb were recovered. In the same transactions, one pistol concealed in sand, nearby the tower, was also recovered on his pointation and taken into possession vide recovery memo (Ex.PW.4/1);
- * PW.5 is Ghayyur Khan, ASI. He is marginal witness to the recovery memo (Ex.PW.5/1) vide which Suzuki Carry, No.CJ-4184/Karachi, was taken into possession and he signed the same as marginal witness;

- * PW.6 is Shiraz, Constable. He deposed that on 15.08.2011. Madad Moharrir handed over to him one parcel containing one pistol 30 bore (local made), alongwith 06 live bullets of 30 bore, which were packed and sealed into parcel No.6. The same was deposited by him into FSL Peshawar on the same day;
- * PW.7 is Muhammad Arif, SI. He made deposition about the arrest of appellant/accused Hashim by SHO. He interrogated him under section 13 of the Arms Ordinance. He produced him before the Judicial Magistrate for police custody which was granted for two days. He interrogated him and during the process the appellant/accused pointed out the place of occurrence. He took into possession 10 'Tasbeehs' (Ex.P/9) in the presence of marginal witnesses vide recovery memo (Ex.PW.7/5) He also produced him before the Judicial Magistrate for his confessional statement under section 164 Cr.P.C. but he refused to confess his guilt, and hence, he was sent to judicial lockup. He recorded his statement under section 161 Cr. P.C. He received the report of FSL (Ex.PW.7/7). After completion of investigation he handed over the case file to SHO for submission of supplementary challan against him;
- * PW.8 is Raja Mehboob Khan, Inspector. He arrested the appellant/accused Hashim and recovered 30 bore pistol P(10) alongwith 06 live bullets P(11) from his personal possession.

He secured the same vide recovery memo (Ex.PW.8/2).

Thereafter he submitted supplementary challan against him;

* PW.9 is Sardar Bahadur, Constable. On 22.11.2010 he produced the garments of the deceased to the IO who took the same into possession vide recovery memo (Ex.PW5/4). He also escorted the four dead bodies of deceased Muhammad Arif , Muhammad Alam, Mst. Ughal Jan and Mst. Hanifa Bibi, alongwith the Injury Sheet and Inquest Report, to DHQ Hospital for PM examination and thereafter he handed over the report alongwith clothes as well as the dead bodies of all deceased;

* PW.10 is Dr. Dildar Ahmed. On 22.11.2010 he conducted autopsy of the dead body of Alam. Inter alia, he found that his stomach was intact and empty.

On the same day he also conducted autopsy of Muhammad Arif son of Amin and found his stomach and its contents empty. In each case, the doctor opined that the cause of death was fire arm injury which after causing haemorrhage had damaged the vital organs. He found firearm injury wounds on the chest left side above left nipple.

* PW.11 is Haji Ahmed, SI. He is marginal witness to the recovery memo (Ex.PW.8/2) vide which Raja Mehboob, SHO took into possession 30 bore pistol (Ex.P10) alongwith 6 live bullets of 30 bore;

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- * PW. 12 is Dr. Shagufta Altaf. On 22.11.2010, she conducted PM examination of the dead body of Mst. Hanifa Bibi. Similarly she also conducted PM examination of Mst. Ughal Jan on the same day. She opined that the cause of death was fire arm injury which had resulted in haemorrhage, and had damaged the vital organs;
- * PW. 13 is Shaukat Zaman, SHO. On the receipt of the complaint he prepared Murasila and sent the same to Police Station for registration of the case. He conducted the investigation and after its completion submitted challan before the Court;
- * PW.14 is Jahanzeb Khan, OII. He prepared site plan, took into possession blood from the place of occurrence from nearby the four places where the deceased were lying, took into possession two empties of 30 bore and four others from the next place and sealed the same into parcel, one mobile phone of Nokia having SIM No.0323-5012013 lying near the dead body of Mst. Hanifa Bibi and also took into possession post mortem examination report, drafted application for FSL for sending the samples, sent the empties recovered from the spot for Arms Expert opinion, arrested Amir and Waqas from a Suzuki carry bearing No.CJ-4184/Karachi and also recovered there-from two cloth sheets whereby allegedly the accused had muffled their faces, obtained police custody of the said accused, recovered 30 bore pistol P1 from a deserted place, recovered a churri P10, a wrench P5, plass P6 and emergency

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china light and sealed the same into parcels. He produced Waqas-ur-Rehman on 29.11.2010 and Amir on 30.11.2010 for recording their confessional statements before Judicial Magistrate. He also recorded statement of Haji Muhammad Amin, husband of Mst. Ughal Jan, under section 164 Cr.P.C. and completed other formalities regarding investigation.

* PW.15 is Haji Muhammad Amin. His deposition was recorded in the following words:-

“Since the PW is Persian speaking hence his statement is being recorded through one Tor Khan son of Khan Muhammad interpreter (Afghan refugee) r/o camp No.11 Haripur.

That deceased Mst. Ughal Jan was my wife, while Arif and Alam were my son and Hanifa Bibi daughter. During the days of occurrence I was in Jail in Afghanistan. I came to know in Jail in Afghanistan that my above mentioned wife children and daughter have been murdered at KTS Haripur. When I came to Pakistan after my release from the prison I was informed about the murder of my above mentioned relative, whereupon I offered my statement under section 164 Cr.P.C. (STO) I charged the accused for the commission of offence.”

* PW.16 is Babar Sakar, Constable. He deposed as follow:-

“During the days of occurrence I was posted as Madad Moharrir at PS KTS. SHO handed over to me parcel No.19 containing 30 bore pistol in case FIR No.414 dated 22.11.2010 under section 17(4) Haraaba/458 PPC and parcel No.6 containing 6 empties of 30 bore in case FIR No.345 dated



05.8.2011 under section 13-AO P.S. KTS, which I kept in Malkhana of the PS. I handed over both the parcel through road certificate No.43/21 through constable Shiraz No.502 for depositing it into Arms Expert FSL Peshawar, who on the same day after depositing handed over the receipt of the same to me. Attested photocopy of road certificate is Ex.PW 16/1. (STO) My statement was recorded under section 161 Cr.P.C. by the I.O.”

* Muhammad Ali, Constable and Muhammad Aslam, SHO are formal witnesses who were examined as C.Ws. All the appellants/accused made statements under section 342 Cr.P.C. They denied the allegations and pleaded innocence. Each one stated that PWs being police officials were interested in conviction and no independent witness had deposed against them. All the appellants declined to make statements on oath as required under section 340(2) Cr.P.C. Moreover, none of them produced any evidence in defence.

5. We have heard learned counsel for the appellants as well as the Deputy Advocate General, KPK for State.

6. Learned counsel for the appellants made the following submissions:-

* It was a case of unseen murder and no one has been nominated in the report made by Painchi, brother of deceased.

* The police has introduced the names of accused on 24.11.2010, on a supplementary statement made by the complainant.



- * The police has made the story of prosecution doubtful while admitting this fact that on the same day of report (i.e. 22.11.2010) they came to know about the names and whereabouts of accused.
- * The prosecution case is based on circumstantial evidence and no direct evidence is available in this case.
- * The confessional statements are not only retracted but the same are exculpatory in nature. Even otherwise the same have not been recorded after observing the legal requirements as laid down in section 364 Cr.P.C. No certificate in this behalf has been issued by the concerned Magistrate.
- * The confessional statements of both the accused have also lost its legal value as the accused were handed over to the police after their confessional statements.
- * Accused/appellant Hashim was arrested on 5.8.2011 and alleged pistol was recovered at the time of his arrest but the marginal recovery witness has not been shown in recovery memo whereas FSL report in this regard is also negative, hence this recovery regarding pistol from the possession of accused/appellant Hashim is not useful for prosecution nor it can make basis for conviction.
- * In confessional statements, it is stated that accused Bakhtiar (P.O) had fired the deceased Arif on his head but it is not shown in postmortem report that any head injury has been caused to deceased Arif.



- * Recovered pistol (i.e. weapon of offence) and empties recovered from the place of occurrence were sent to FSL for Chemical Analysis both on the same day, which creates serious doubt in the story of prosecution.
- * Recovery of pistol (i.e. weapon of offence) on the pointation of accused/appellant Waqas from an abandoned house is very fanciful as this place was easily approachable to all common people. Moreover these could have been destroyed by the accused/appellant within a period of these 07 days.
- * The recovery of *plass* and other incriminating articles recovered on the pointation of accused from the place of occurrence on 28.11.2010 has no legal value as the I.O. had already inspected the place of occurrence on 22.11.2010 and secured some incriminating articles from there.
- * The I.O. recovered one set of mobile near the dead body of Mst. Hanifa but this fact is not properly investigated by the I.O. to confirm who was the owner of the mobile set, neither he collected the data of calls made there-from and, even the last call received was not shown.
- * Recovered knives (*Churries*) have lost its evidentiary value as the same have not been used during the commission of offence as per medical evidence.
- * FIR against the unknown accused was registered under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as the said Ordinance)



whereas only *Tasbeeh* which is commonly available in market was recovered and it does not fulfill the requirement of 'Nisab' as laid down in section 6 of the said Ordinance.

* The confessional statements made by co-accused were exculpatory in nature. The same were not put to Hashim accused at the time of his statement under section 342 Cr.P.C, which was necessary under the law. Hence involvement of Hashim in this case in light of exculpatory confessional statement is not at all legal.

* There are many discrepancies/doubts in this case and it is settled principle of law that a single doubt is sufficient for acquittal of the accused.

The learned counsel in support of his contentions, placed reliance on cases reported as 2003-YLR 1709, 2010-SCMR 1604, 2011-SCMR 1517, 1992-SCMR 196, 2002-SCMR 1986, 2008-SCMR 707, 2007-SCMR 670, PLD 2009-Peshawar 1, 2001-P.Cr.L.J. 890, 2009-SCMR 4, 1999-SCMR 172, 2010-SCMR 1009 and PLD-1995 20.

7. Learned Deputy Advocate General, KPK for State submitted that:-

* the judgment passed by learned trial Court is a speaking and reasoning judgment and the learned trial Court has rightly convicted the accused/appellant after properly appreciating the evidence available on the record.

- * the police has arrested the accused and recovered incriminating articles i.e. weapon of offence on their pointation and the accused had not proved any ill will or enmity against the police.
- * although it is an unseen occurrence and based on circumstantial evidence but the circumstantial evidence is duly corroborated and shows full involvement of the accused/appellants.
- * the confessional statements were made by the accused on their own free will and both the learned Judicial Magistrates have recorded the same after observing all the legal requirements as laid down in section 364 Cr.P.C.
- * the *Tasbeeh* recovered from the accused was supposed to be made of precious gem stones, which is commonly used by Afghan people.
- * the as per confessional statement all the accused planned in *Batik* of absconding accused Bakhtiar, for committing dacoity in the house of Arif deceased, hence common intention is very much clear in the light of this plan of dacoity and commission of offence.
- * the alleged vehicle i.e. Suzuki carry which was used during the offence has been recovered by the police on the pointation of accused which is also a corroborative piece of evidence.
- * the recovered pistol i.e. weapon of offence on the pointation of accused Waqas and empty recovered from the place of



occurrence were matched as per report of armed expert and so corroborate the evidence.

* four innocent persons have lost their lives in this occurrence and there is strong corroborative evidence which supports the confessional statements of both the accused available on record and thus fully involve the present accused/appellants in this case. Hence trial court has committed no illegality by recording conviction and awarding sentences.

* As the case against the appellants is fully proved in the light of evidence available on record therefore, appeal against conviction may be dismissed.

The learned Deputy Advocate General, KPK in respect of contention made in this case, placed reliance on PLD-2005-SC 168, PLD-2006-SC 30, 2004-SCMR 1808, PLD 1996-SC 305 and 1998-SCMR 2669.

8. We have heard learned counsel for the parties and have anxiously perused the record with their assistance. It transpires that this tragic incident wherein four persons namely one mother and her three children lost their lives, took place during the night preceding 22.11.2010. Though report in this respect was lodged on the same day by one Painchi brother of deceased Mst. Ughal Jan, the occurrence was admittedly unseen and therefore the FIR lodged by him was against "unknown persons". After two days, however, the said complainant recorded a supplementary

statement on 24.11.2010 wherein after his "satisfaction" he nominated the appellants/accused but he did not disclose the reasons of his such "satisfaction" nor any source of his information till last and did not even appear before the trial court. Later on one Haji Muhammad Amin, husband of Mst. Ughal Jan, also appeared as PW.15 and charged the accused for commission of offence. He also did not disclose the names of "relatives and people of locality" who had furnished information about the occurrence to him. He admitted that he had not produced any one of those persons to record his statement. He did not mention even parentage or address of the said persons. He frankly admitted that the private PWs were not available in Pakistan nor were they able to come here for evidence. It is pertinent to mention that Painchi and Haji Muhammad Amin both are not eye witnesses of the occurrence as at the time of occurrence Painchi was in Attock and the latter was allegedly confined in a jail in Afghanistan. Both got information about murder of the four deceased while they were far away from the town where this shocking occurrence took place. Likewise PW.14 Jehanzeb Khan I.O., who investigated the case, deposed that on the very day of his investigation he received information "through his own sources" that accused Amir alongwith others were suspects in this case but, in the same breath, he admitted that he had not traced out any source of information and that no one came forward for recording his statement.



Thus it was absolutely an unseen occurrence, and the statements of complainant and Haji Muhammad Amin (PW.15) as well as that of Jehanzeb Khan (PW.14) are only hearsay unfounded assertions.

9. Perusal of record reveals that the case of prosecution mainly rests on circumstantial evidence which consists of some recoveries as well as confessional statements made by the two appellants/accused namely Amir and Waqas-ur-Rehman. However, for the reasons summed up below, the aforementioned evidence is highly doubtful and as such insufficient to sustain conviction of the appellants on such a capital charge. No doubt whoever be the accused, they have committed a very gruesome, callous and heinous crime but, in any case, establishing guilt of an accused requires a strong un-impeachable evidence and that is lacking in the instant case.

10. Before discussing the evidence brought on record in this case, we would like first to refer to the main principles, consistently followed in criminal cases by the Superior Judiciary for safe administration of justice. By now, it is well-settled that the prosecution is duty bound to prove its case on the strength of its own evidence and an accused is presumed to be innocent till he is proved guilty. Accused is considered a favourite child of law and he may take any plea, however absurd or false it may be, but he can not be punished for his flaws or falsity in his plea or his failure to prove the plea taken by him. Moreover, in case of any doubt, not being artificial,



the accused shall be entitled to its benefit as a matter of right. The appreciation of evidence in a criminal case is, however, never governed by a mathematical formula and no hard and fast rule can be laid down for accepting or rejecting an evidence because each criminal case has its own peculiar facts and circumstances and the Court has to consider the entire evidence on its own intrinsic value. Deposition made by a witness is always scrutinized in the light of attending circumstances.

11. Regarding the circumstantial evidence, as is the position in the instant case, we may point out that the circumstances from which the conclusion of guilt has to be drawn should be fully established and the facts so established should be consistent only with hypothesis of the guilt of the accused. The circumstances should be of conclusive nature and, besides, must exclude other possible hypothesis except the one to be proved. Moreover the chain of evidence should be complete and must not leave any reasonable gap. In view of this, any circumstance which destroys presumption of innocence can be taken into consideration for the purpose of ascertaining whether the other circumstances also lead to the guilt of the accused. In the instant case, we find several material discrepancies and serious illegalities that make this case highly doubtful.

12. The occurrence in the case on hand took place on 22.11.2010.

Though the accused are stated to have pointed out the place of occurrence

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but being residents of the same area, it was already well known, even to all the police officials much prior to that, and this pointation cannot be termed as "exclusive knowledge" of appellants and thus inconsequential. Similarly the recoveries of ropes, piece of cloth, Tasbeeh, garments of deceased, cloth sheets, churries, wrench, plass and emergency light have no material effect in circumstances of the case as the postmortem report does not positively hint at their use during the offence nor any other piece of evidence apparently points towards their incriminating nature. Likewise the Suzuki carry having not been seen at the time of occurrence in the nearby vicinity is of no use to the prosecution. The recovery of a Nokia mobile phone having SIM No.03235012013 is also legally worthless as, admittedly, PW.14 neither took the trouble of ascertaining its ownership nor made any effort to obtain the data of its incoming or outgoing calls which could have been very helpful to provide some clue to the callers and their whereabouts. The recovery regarding blood stained earth and a blood stained churri as well as six empties of 30 bore from the place of occurrence, is however, very significant. So far as the blood stained churri is concerned that has no incriminating impact on the case as neither such injury appears to have been inflicted by it nor any thumb impressions or finger prints were found on the same. Also no corroborative evidence of its use is available on record. The six crime empties recovered, however, have

great significance, as the postmortem reports conducted on all the deceased person show firearm injuries on their bodies and the recovery of crime empties from the spot carry great legal weight. Its legal effect will, however, be discussed below.

13. It is also notable that after arrest of accused Amir and Waqas on 26.11.2010, when several recoveries (i.e. 8 ropes, one piece of cloth, two bulbs, one wrench, plass, screw driver, one emergency light and one churri) were effected from the place of occurrence. Although, as stated above, these articles have no practical bearing on the case of prosecution, it is worth noticing to observe that why the police officials had earlier failed to recover these articles on 22.11.2010 when they had "thoroughly" searched every nook and corner of the house and had ample opportunity for doing the same. The recoveries effected from appellant/accused Hashim are also inconsequential. As per record, one 30 bore pistol, without number., one magazine with six live cartridges were recovered on his personal search on 05.08.2011 This 30 bore pistol was sent to FSL, Peshawar but no empty was found wedded with it and the report of FSL in this respect was submitted in "negative". So this recovery is immaterial and it cannot form basis for his conviction. Regarding the pistol recovered on pointation of the appellant/accused Waqas on 28.11.2010, we feel constrained to mention that it is insufficient to create nexus of the said accused with the



commission of offence as according to the confessional statement he did not fire a single shot. It is also pertinent to mention that the six crime empties despite having been recovered on 22.11.2010, were not sent to FSL soon thereafter. These were sent on 28.11.2010 after the alleged recovery of pistol from the said appellant/accused. Although fire arms recovered from an accused forms a valuable piece of evidence, it must be borne in mind that when a crime empty, recovered before recovery of weapon, is not sent immediately and the concerned officials wait for recovery of incriminating weapons and thereafter send both the articles together, such recovery loses its sanctity and could not be believed because this conduct definitely increases the chance of manipulation. The report of FSL in respect of the pistol having been found matched the four crime empties is thus not credible. It is also note worthy that according to confessional statements the firing from pistols aiming the deceased were made by appellant/accused Hashim and the absconding co-accused Bakhtiar and not by the other two appellants. The confessional statements also contradicts each other. According to one confessional statement Hashim had handed over his pistol to appellant/accused Waqas while according to the other it was Bakhtiar accused who had handed that over to him. Thus all the said recoveries allegedly effected and FSL report on the same are of no legal value.



14. We may also mention here that this is a case where the investigation has been badly conducted. Neither any effort was made by the I.O. to obtain and secure finger/foot prints from inside the house of occurrence nor any other evidence was collected from the nearby vicinity. Even the scratches on wall supposedly created by the appellant by scaling over that were not searched, which, at best, could have been used for corroborating the confessional statement.

15. As stated above the appellant/accused Amir and Waqas have allegedly made confessional statements on 29.11.2010 and 30.11.2010 respectively. As a basic principle of law confession of an accused person is a substantive piece of evidence, and conviction can be recorded solely on its basis. However, the nature and quality of confession is to be carefully scrutinized to ascertain whether it was actually made before a competent authority, was made by the accused himself, was made voluntarily, rings true and is not prompted by various motives viz, inducement, torture, threat, compromise, hope, desire to harm or benefit others etc. If there are circumstances from which it appears that the confession was not made voluntarily, the Court would be justified in rejecting that confession straightaway. We may mention that we are fully conscious of the fact that a confession, even if retracted, can be made basis for conviction in Ta'azir cases. However, the confession must be inculpatory, true, voluntarily and



trust worthy. Resultantly the weight to be attached to a confession depends on the facts and circumstances of each case. In the instant case the appellants Waqas-ur-Rehman and Amir were arrested on 26.11.2010. Both had allegedly confessed their guilt before PW.14 on 26.11.2010, as admitted by him. However, it transpires that both the appellants were produced before PW.2 Fazal Gul and PW.3 Rashid Rauf Swati, Judicial Magistrates. P.W.2 recorded the confessional statements of Waqas-ur-Rehman on 29.11.2010 and P.W.3 recorded confessional statement of Amir on 30.11.2010. PW.2 who recorded confessional statement Waqas-ur-Rehman admitted that the proforma of questionnaire and proforma of recording statement and certificate were already available with him in printed form with his name, designation and the Court and he filled the blanks of all the three documents on 29.11.2010, when the appellant/accused Waqas was produced before him at 11.30.a.m. Thereafter he gave him 30 minutes for consultation with his counsel. It is strange that he made the accused sit in his retiring room before recording his statement and suspended judicial work for 30 minutes. He did not issue second warning to the appellant prior to recording his confessional statement. He admitted that the appellant had neither attributed to himself the role of killing the deceased nor had done so even to the other appellant/accused Amir. He could not deny the fact that replies to Questions No.8 and 9 were

mixed up with each other and the entries were obviously wrong. He also admitted that he had not issued any certificate as required under the provisions of section 364(2) Cr.P.C. He was suggested that he had copied out the statements already recorded under section 161 Cr.P.C. It shows that the proceedings were simply mechanical in nature and just a formality adopted by PW.2. The cross-examination further reveals that on 29.11.2010 the appellant/accused Amir was also produced for recording confessional statement but, instead, he was granted one day custody and accordingly his confessional statement was recorded on 30.11.2010. He was also suggested that the appellant/accused Amir was ready to make confession on 27.11.2010 but again he was granted police custody for two days and even then the situation remained same and he was granted further one day for recording his statement. This clearly establishes the fact that, in circumstances, he was not ready to make voluntary confession, otherwise it could have been recorded at the first instance. Moreover, these statements have been retracted, and are also exculpatory in nature. Both the appellants/accused while making their statements under section 342 Cr.P.C. have stated that the confessional statements were result of police torture, coercion and use of third degree method on them. In this connection it is also highly pertinent to note that after recording confessional statement, the accused Waqas was handed over back to

PW.14. This was absolutely illegal and completely shatters the voluntary nature of his confession. Moreover, this was sufficient to teach a lesson to Amir accused who was still reluctant on that day to record his confession. In addition to all this, these confessions not only lack corroboration but also contradict the PM report which does not show any head injury on the body of Arif, as alleged in the said statements.

16. All these bits and pieces put together lead to the conclusion that these confessions were not voluntary at all and as such cannot be made foundation for conviction nor could be considered sufficient to sustain it on appeal. In this context, it may also be pertinent to mention that if a confession is to be made basis for conviction it has to be taken into consideration as a whole, in its entirety, and not to be dissected into different sentences and considered in piecemeal/portions to pick out some of them inculpatory and be conveniently used in favour of the case of prosecution. In the instant case both the retracted confessional statements are exculpatory and the factum of murder has been attributed to the absconding co-accused Bakhtiar and the appellant Hashim.

17. So far as Hashim appellant is concerned, he was produced before the Magistrate for recording confession but he refused to do so and was sent to judicial lock up thereafter. The pistol recovered from him was dispatched to FSL but, as stated above, no empty was found wedded with



it and the report of FSL was submitted in negative. The Tasbeeh recovered on his pointation was inexpensive, common, easily available in market and bore no specific mark or sign to be presumed the stolen property. No reference to that was even made by the complainant in FIR nor any other relative mentioned about its theft. It was not put to identification test as required by law. The so called confessional statements of his co-accused were also not put to him in his statement under section 342 Cr.P.C. So there is absolutely no incriminating evidence against him, even worth the name. It is also noteworthy that according to PW.15, they had "many enemies" but no question to any of the appellants/accused has been put to determine whether he had enmity with any one of them or, if so, of what nature and gravity. This was necessary as the circumstances of the case reflect grave animosity and not any dacoity at all.

18. The cumulative effect of above discussion referring to the material discrepancies, legal infirmities and biased investigation make the case of prosecution highly doubtful. In such eventuality, when evidence adduced against the appellants/accused is wholly unsatisfactory, the presumption of innocence which is the basis of criminal jurisprudence assists the appellants/accused persons and compels this Court to render the verdict that the charge is not proved against them beyond any reasonable

doubt and they are entitled to get the benefit thereof. Therefore, we extend the benefit of doubt to all the appellants and acquit them of the charges.

18. Consequently for the reasons stated above, this appeal is accepted and conviction and sentences of appellants/accused, namey Amir son of Sheraz, Waqas-ur-Rehman son of Saif-ur-Rehman and Hashim son of Amjad awarded by the learned Additional Sessions Judge-III, Haripur vide the impugned judgment are set aside they are acquitted of the charge. They shall be released forthwith, if not required in any other case.

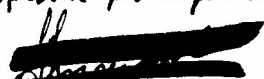
19. These are the reasons of our Short Order dated 25.07.2013.

20. We may add that the case of Bakhtiar absconding co-accused shall be decided on the strength of evidence to be brought against him whenever he is arrested and tried.

 Sc
JUSTICE DR. FIDA MUHAMMAD KHAN

 Sc
JUSTICE SHAHZADO SHAIKH

Approved for reporting


Islamabad the 02nd August, 2013

Umar Draz/