IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

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

CRIMINAL APPEAL NO. 28-I OF 2017

Kaleem Ullah son of Aslam Khan, Resident of Dawlat Tajazai, Tehsil and District Lakki Marwat

…… Appellant

Versus

1. The State
2. Zahir Ullah son of Ali Marjan, Resident of Gambila Tehsil and District Lakki Marwat.

… Respondents

For the appellant	…	M/S Sher Afzal Khan Marwat and Shahidullah, Advocates,
For the respondent No.1	…	Mr.Akhtar Hussain Awan, Assistant Advocate General KPK.
For the respondent No.2	…	Mr.Muhammad Ashraf Khan Advocate
No.& date of FIR & Police Station	…	No.92/2014, dt.20.3.2014, P.S Ghazni Khel, District Lakki Marwat.
Date of judgment of trial court	…	20.10.2017
Date of Institution in this Court	…	16.11.2017
Date of hearing	…	23.04.2018
Date of decision	…	02 .05.2018

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- The appellant, Kaleem Ullah by means of instant appeal bearing No.28-I of 2017 has questioned the legality and factuality of the judgment dated 20.10.2017 (hereinafter referred as "Impugned Judgment") rendered by Additional Sessions Judge-II, Lakki Marwat (hereinafter referred as "Trial Court") in pursuance of FIR bearing crime No.92 of 2014 (Not Exhibited)registered with Police Station Ghazni Khel, whereby he has been convicted and sentenced under section 302(b) of the Pakistan Penal Code (hereinafter referred as "Penal Code") to suffer rigorous imprisonment for life with fine of Rs.800,000/-, half whereof payable to the legal heirs of the deceased Sharif Khan as compensation as envisaged under section 544-A of the Criminal Procedure Code (hereafter referred as "the Code") recoverable as land revenue and in case of default of payment of fine further to suffer simple imprisonment for six months with the premium of section 382-B of the Code.

The appellant through this appeal has sought annulment of the impugned judgment with consolation of acquittal.

2. Aphoristically, the facts surfaced by the prosecution appears to be that on 20.3.2014 at 9.30, P.W.6 Zahir Ullah (complainant) lodged an FIR (Not Exhibited) vide crime No.92 of 2014 with Police Station Ghazni Khel of District Lakki Marwat under section 17(4) of

Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred as the 'Hudood Ordinance') read with section 302/34 of the Code, with the averments that his brother Sharif Khan (deceased) is driver of car bearing registration No.184-AXQ, white in colour XLI, Model 2012, owned by one Peer Abdul Bari. According to him, yesterday morning, his brother left the house and did not turn up, whereof today in the morning, he received information that a dead body of his brother Sharif Khan (deceased) is lying on a metal road leading from nursery to old Gambila bridge near the fields of one Nawaz Khan at Tajazai, thus he rushed to the place of occurrence, where he found the dead body of his brother in the pool of blood murdered by fire arm and that the registration book of the said car was found lying on the chest of the deceased. He further stated that it appears that his brother had been murdered yesterday night by some unknown culprits, who have also taken away his car as well and maintained that he has no enmity with anyone.

3. P.W.7 Abdur Rahim Khan, S.I after being entrusted with the investigation of the case rushed to the crime scene, secured blood stained grass/earth through memo (Ex.PW.6/1), a crime empty of .30 bore pistol through memo (Ex.PW.6/2), registration book of the car bearing No.AXQ-184 through recovery memo (Ex.PW.6/3), blood stained clothes of the deceased through recovery memo (Ex.PW.6/4), and prepared Site Plan (Ex.PW.7/1). After preparation of inquest

report (Ex.PW.2/3), the dead body of deceased was examined on 20.3.2014 by P.W.2 Dr.Niaz Ali, who issued post mortem report (Ex.PW.2/1), opining that the death was caused by firearm with a single entrance and exit wound coupled with a bruise and an abrasion.

Moving ahead with the investigation, the car in question bearing No.AXQ-184 was recovered by the official of the police station Jarma District Kohat, lying abandoned in a grave-yard as such he went to the said police station and took into possession the aforesaid snatched vehicle and original CNIC of Irshad Khan through memo Ex.PW.7/2.

P.W.7 Abdul Rahim Khan, S.I maintained that during the investigation, he collected the Data of SIM No.0310-5236846, being a suspect number used by one Kaleem Ullah working as Cleaner with the Coach. On perusal of the Called Deta Record (hereinafter referred as CDR) the aforesaid SIM number was found to be in contact with SIM 0312-1914740 used by one co-accused Tariq, obtained in the name of one Muhammad Ghulam, which further led him to know that said co-accused Tariq was in connection with one Muhammad Amin. Record also reveals that SIM 0341-8027600 of the deceased and SIM 0310-5236846 were being used in a mobile set having IMEI No.35635105004477. As such having clue of appellant Kaleem Ullah, on 2.4.2014, he was arrested and from his personal search recovered two cellular sets one blue in colour MTK and another red in colour, Nokia 103, which were taken through memo Ex.PW.5/1.

Thereafter, Muhammad Amin was interrogated on 2.4.2014, who stated to be the nephew of said co-accused Tariq and disclosed that appellant Kaleem Ullah and his uncle co-accused Tariq came to his village, where he noticed some blood in the Car and on query co-accused Tariq told him that it is his own blood due to injury caused to him, but he did not find any wound on his body, therefore, he got suspected. In view of his such statement, allegedly he was produced on 3.4.2014 before P.W.3 Mr.Ajmal Shah, Judicial Magistrate, where the statement of said Muhammad Amin was recorded in the presence of appellant, who also availed the opportunity of cross- examination.

On 4.4.2014, appellant Kaleem Ullah in the presence of the complainant P.W.6 Zahir Ullah led the police party to the crime scene which was produced as (Ex.PL/3) and memo of spot verification was produced as (Ex.P.W.PL/4).

On 5.4.2014, the appellant was allegedly produced before the Judicial Magistrate. The application of the police regarding recording of judicial confession was produced as (Ex.PW.3/1), questionnaire as (Ex.PW.3/2), judicial confession of the accused as (Ex.PW.3/3), the certificate as (Ex.PW.3/4), order for police as (Ex.PW.3/5).

On the conclusion of investigation, proceedings against absconder accused namely Tariq were initiated and the case file was handed over to P.W.11 SHO Raza Khan for submission of challan, who submitted complete challan on 10.4.2014, which was produced as (Ex.PL/9).

4. On receipt of the challan, the trial court proceeded against the absconding accused Tariq as envisaged under section 87 and 88 of the Code and thereby declared him as proclaimed offender. The charge under section 17(4) of the Hudood Ordinance read with section 302 of the Penal Code, containing accusations of murder and decoity were denied by the appellant, claiming innocence and a fair trial.

The prosecution in order to establish the crime allegedly in the charge produced as many as 11 witnesses. After closure of the prosecution side the appellant was examined under section 342 Cr.P.C, wherein the evidence and accusation put to him were categorically denied by professing innocence. However, neither he opted to make statement on oath as envisaged under section 340(2) of the Code nor produced any witness in his defence.

After hearing the adversaries, the trial court on 20.10.2017 in Sessions Case No.41 of 2017, holding the appellant guilty of the charge, convicted and sentenced him in the terms mentioned in para supra.

5. The appellant, while challenging validity of the impugned judgment on factual and legal infirmities, preferred the instant criminal appeal bearing No.28-I of 2017, which was admitted for regular hearing.

On 16.4.2018, while commencing with the appeal, the counsel for the complainant sought adjournment on the ground that in recent past, he had gone through heart surgery, which request was strongly

opposed by the learned counsel for the appellant on the ground that since 2014 the appellant is behind the bars and requested for hearing him on the said date. Keeping in view the request from both sides, we heard the arguments of the counsel for the appellant and the matter was next fixed on 23.4.2018 for arguments of counsel for the complainant. As such, on 23.4.2018 the arguments were concluded from both the sides.

6. Learned counsel for the appellant inter- alia contended that the impugned judgment is contrary to the facts and law as the learned trial court has based the conviction on a judicial confession of the appellant, which is in admissible as not only the same is ex-culpatory but the requisite formalities as settled by the Apex Court have also not been adhered to. He also maintained that the statement under section 164 of the Code, got recorded by Muhammad Amin is of no significance as neither he has been produced nor his statement has been exhibited in the court and that pointation of place of occurrence is also worthless as the pointation of the place of occurrence allegedly made by the appellant was already known.

Regarding recovery of vehicle, it was maintained that it is of no use for the prosecution as it does not connect the appellant in any manner. The counsel as the appellant, while arguing the evidence of C.D.R, submitted that the same has not been proved in view of the settled principle of proving a document and that since the prosecution

has failed to establish that the said SIM numbers being in use of the appellant or co-accused have not been proved at all, as such said C.D.R is of no worth to the case of prosecution connecting the appellant with the said data. To support his arguments the learned counsel for the appellant has relied upon the judgments reported as 2018 M L D 12, 2017 Y L R 515, 2015 Y L R 2076, 2016 Y L R 1291, 2017 S C M R 986, 2017 S C M R 898, 1987 P Cr.L J 884, 1985 P Cr.L J 829, PLD 1982 Karachi 975, 1992 P Cr. L J 2119, 2016 Y L R 2212,2016 S C M R 274.

7. On the other hand, at the very outset, the counsel for the complainant questioned the maintainability of the instant appeal filed before this Court on the ground that since the conviction has not been recorded under the Offence of the Hudood Ordinance, therefore, the appeal instead of filing before this Court should have been filed before the Hon'ble Peshawar High Court. In this regard he has relied upon the judgments reported as PLD 2002 SC 534 and 2009 P Cr. L J 747.

Counsel for the complainant continuing his arguments on merits strenuously rebutted the arguments advanced by counsel for the appellant and urged that the judicial confession of the appellant is voluntary and true and while recording the same, P.W.3 Ajmal Shah, Judicial Magistrate, has complied with all the codal formalities, which has rightly been relied upon by the trial court, while recording conviction and sentence. He also maintained that the statement of Muhammad Amin is material in all respect, which has been proved by

the prosecution by tangible evidence, thus the same could be read in view of section 265-J of the Code read with Article 46 of the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as "Order of 1984"). He emphasized upon the C.D.R, so collected during the course of investigation, which lead the police personal to reach the appellant being one of the culprits. He further referred to the pointation of place of occurrence, to be admissible and material, having corroborative value. Lastly, he prayed for dismissal of the appeal, while relying upon the judgments reported in 1995 SCMR 1365,2013 P.L.R 612, 2012 P Cr. L J 588, 2010 S C M R 55, 2004 Y L R 1088, 2010 P Cr. L J 1011, PLD 2007 S.C 202, 2010 P Cr. L J 192, 2014 P Cr. L J 1036,PLD 2005 S C 168, PLD 2006 S C 219 and 2010 SCMR 1090.

8. Learned Assistant Advocate General KPK adopted the arguments of the learned counsel for the complainant and with all vehemence supported the judgment impugned herein, by maintaining that the learned trial court has rightly convicted and sentenced the appellant.

9. Priorily, before going into the merits of the instant appeal, we would like to earnestly decide the question of jurisdiction, raised by the learned counsel for the complainant, who has challenged the jurisdiction of this Court on the ground that since the conviction and sentence has not been recorded under the Hudood Ordinance, but under section 302(b) of the Penal Code, therefore, appeal is competent

before the Hon'ble High Court but not before this Court. We are clear in mind that if a conviction and sentence is either passed under the Hudood Ordinance or in case not proved due to non fulfillment of requisites as contemplated under sections 7 & 16 of the Hudood Ordinance, the punishment is directed to be awarded under section 20 of the Hudood Ordinance. For convenience, section 20 of the Hudood Ordinance is reproduced herein below :-

> **"20. Punishment for haraabah liable to tazir. Whoever commits haraabah which is not liable to the punishment provided for in section 17, or for which proof in either of the forms mentioned in section 7 is not available, or for which punishment of amputation for death may not be imposed or enforced under this Ordinance, shall be awarded the punishment provided in the Pakistan Penal Code, for the offence of dacoity, robbery or extortion, as the case may be"**

To step ahead, we would also like to refer to section 24 of the Hudood Ordinance, which reads as under:-

> **"24. Application of Code of Criminal Procedure, 1898.— (1) The provisions of the Code of Criminal Procedure, 1898 shall apply, mutatis mutandis, in respect of cases under this Ordinance:**
>
> **Provided that, if it appears in evidence that the offender has committed a different offence under any other law, he may, if the Court is competent to try that offence and to award punishment therefore, be convicted and punished for that offence.**
>
> **Provided further that an offence punishable under section 9 or section 17 shall be triable by a Court of Session and not by a Magistrate authorized under section 30 of the said Code and an appeal from an order under either of the said sections {or from an order under any other provision of this Ordinance which imposes a sentence of imprisonment for a term exceeding two years} shall lie to the Federal Shariat Court".**

Provided further that trial by a Court of Session under this Ordinance shall ordinarily be held at the headquarters of the Tehsil in which the offence is alleged to have been committed.
(2) To provisions of the Code of Criminal Procedure, 1898, relating to the confirmation of the sentence of death shall apply, mutatis mutandis, to confirmation of sentences under this Ordinance.
(3) The provisions of sub-section (3) of section 391 or section 393 of the Code of Criminal Procedure, 1898 shall not apply in respect of the punishment of whipping awarded under this provision.
(4) The provisions of Chapter XXIX of the Code of Criminal Procedure 1898, shall not apply in respect of punishments awarded under section 9 or section 17 of this Ordinance"

The bare perusal of the aforementioned section 24 of the Hudood Ordinance, clearly gives us an understanding that the appeal against conviction and sentence rendered either under specific offences of Hudood ordinance or under Penal Code, but imposing a sentence of imprisonment for a term exceeding two years, shall lie only to the Federal Shariat Court.

The Hon'ble Supreme Court of Pakistan came across a similar proposition of jurisdiction, thus in view of section 20 of the Hudood Ordinance, Hon'ble Full Bench of the Apex Court, in the case **of Muhammad Abbas and another (1984 SCMR 129)** expounded the following principle, which is reproduced for ready reference;

> **"The next objection was in regard to the competency of the reference before the Federal Shariat Court, as according to learned counsel the reference for confirmation of the death sentence on a murder charge could lie only before the High Court. In this connection, he pointed out that in fact an appeal (Criminal Appeal**

> **No.171 of 1983) had already been preferred before the High Court and was still pending there. As the trial by the Court of Session under the provision of the Ordinance was competent, the appeal would lie only before the Federal Shariat Court in view of the fourth proviso to section 20 (1) and a reference for confirmation of the death sentence to that Court would be competent under subsection (2) of the said section. The objection, too, had been rightly rejected by the Federal Shariat Court."**

Similarly, the Division Bench of the Lahore High Court in the case of **Ghazzanfar Ali Vs. The State (2010 Y L R 657)** and then Karachi High Court on the foot steps of the aforementioned judgments rendered and re-affirmed the aforesaid dicta in the case of **"Ijaz and mothers Vs. the State" (2016 P.Cr.L.J 130).** The Hon'ble Division Bench of Peshawar High Court in the case of **"Khushdil Vs. The State" (2017 Y L R 835),** once again, while placing reliance upon the judgments (para supra) delivered the judgment by holding that irrespective, of the conviction and sentence passed under the Penal Code or under the offence of Hudood Ordinance, appeal shall lie before Federal Shariat Court as cognizance of an offence by the Court of trial shall determine the jurisdiction rather the ultimate verdict.

10. In so far as the judgment referred by the learned counsel for the complainant in the case of **Muhammad Tariq (2009 P.Cr.L.J 747)** is concerned, the same has been rendered by the Hon'ble Single Bench, wherein reliance has been placed upon the case **of Attaullah Vs. Abdul Razzaq and another (PLD 2002 S.C 534).** On examination and perusal of the aforesaid judgments, we believe that the judgments rendered in

the case of **Muhammad Abbas and another Vs. The State (1984 SCMR 129)** has precedence upon the case of **Attaullah Vs. Abdul Razzaq and another (PLD 2002 S.C 534)** as in the earlier mentioned case, the numerical strength of Hon'ble Judges is more than the later. Henceforth, instant appeal is competent.

11. Undeniably, it is a case of blind murder, which has been witnessed by none. P.W.6 Zahir Ullah (complainant) reached the place of occurrence and found the dead body of the deceased on the crime scene, whereof he deposed to have no clue of the murderer and even did not suspect anybody to be involved. One of the surprisingly element of this unfortunate episode of the crime is that the murder had been committed with the purpose of dacoity but astonishingly, the question arises as to why the dacoit would take extra fatigue during the course of dacoity and murder to take out the registration book of the car in question and put it on the chest of the deceased while leaving, which aspect has not been explained at any stage by the prosecution. More so, another mysterious aspect of the case is that after snatching the vehicle from the deceased, on the very next day, the aforesaid car was recovered lying abandoned in the graveyard of the District Kohat, as taken into possession by police station Jarma of district Kohat.

P.W.6 Zahir Ullah (complainant) on 4.4.2014, after the arrest of accused Kaleem Ullah got recorded supplementary statement, wherein he nominated the appellant as the culprit on the basis of self intuition but nothing else. The supplementary statement made by him has no legal worth and cannot at all be considered as incriminating evidence because nomination of the appellant after his arrest, glaringly appears to be an after thought act, which has always been disapproved by the Apex Court by holding that supplementary statements are always afterthought and of no credence, particularly in the case of capital charge. In this regard reliance can be placed upon the judgment of **Kashif Ali Vs. The Judge ATC and others (PLD 2016 SC 951).**

12. As the instant case is un-witnessed and the appellant or any other co-accused have not been nominated as felon by any eye witness, therefore, it is judged that this case in absence of any ocular evidence, hinges upon circumstantial evidence. The prosecution mainly rests its case upon the judicial confession of appellant, statement of one Muhammad Amin allegedly recorded under section 164 of the Code, C.D.R, recovery of snatched cellular set, medical evidence, extra-judicial confession made during pointation of the place of occurrence by the appellant and last but not least the recovery of snatched vehicle.

13. Initially, while discussing the circumstantial evidence so collected by the prosecution, we would like to refer to the yard sticks

settled by the Hon'ble Supreme Court of Pakistan for appraisal of the circumstantial evidence, which follows as under:

i) The circumstantial evidence must be of impeachable character and reliable for conviction.
ii) The circumstances must be so inter linked, which must make out a string of unbroken events.
iii) One end of chain of events shall touch dead body and the other, the neck of the accused.
iv) Any missing link shall destroy the entire case.
v) The court must take extra care and caution while relying upon circumstantial evidence about its credibility.
vi) It must be ensured that no dishonestly was committed by the I.O while collecting such circumstantial evidence.
vii) The circumstantial evidence must be admissible and proved in the court.

(SEE; Naheed Akhtar Vs. the State (2015 Y L R 1279) and Hashim Qasim and another Vs. the State (2017 SCMR 986)

The prosecution has mulled upon the retracted confessional statement of appellant, maintaining that it can solely be based for holding the appellant guilty of the charge. There is no cavil in the proposition that the retracted judicial confession can be made basis for awarding conviction and sentence but to be on safer side, if the case is merely based on the circumstantial evidence, then the judicial confession must be corroborated with some impeachable, independent corroborative evidence, particularly, in a case where the accused has to be held responsible for the capital charge. Thus, the alleged judicial confession of the appellant, has been examined in isolation as well as

in view of the corroborative pieces of evidence to extend premium to the prosecution.

On scanning of the questionnaire (Ex.PW.3/2), confessional statement (Ex.PW.3/3), Certificate (Ex.PW.3/4) and order for police (Ex.PW.3/5) , it appears that P.W.3 Ajmal Shah, Judicial Magistrate had committed fatal irregularities, which has rendered the confessional statement in admissible as such no explicit reliance could be placed on such evidence, particularly, when a judicial confession is a retracted one.

The touch stone of a judicial confession can be tested on the following points;

a) Voluntarily without any promise or coerciveness.
b) Admissible and proved in all respect before the court.
c) True and
d) Consistent, having co-herence to the other facts and circumstances.

Coming to the voluntariness of the judicial confession, allegedly made by the appellant, we have cautiously examined the testimony of P.W.3 Ajmal Shah, Judicial Magistrate and perused aforesaid questionnaire, confessional statement, certificate and order for police minutely, so put forth in respect of judicial confession, which depicts that the questions of the form (Ex.PW.3/2) before recording confessional statement has not been reduced into writing by P.W.3

Ajmal Shah, Judicial Magistrate in his own hand writing, which he was obliged to do so. He has also not given sufficient time of reflection before recording statement under section 164 of the Code as it was incumbent upon him to have had given sufficient time of reflection with three intervals, henceforth by not doing so, P.W.3 Judicial Magistrate failed to observe the pre-cautions held to be necessary before recording a confessional statement. Moreover, the certificate (Ex.PW.3/4) issued by him as envisaged under section 364 (2) of the Code, lacks the time of reflection, recording confessional statement of the appellant in his language i.e *pushto*, warning that if he records or does not record the judicial confession, he would not be handed over to police again and that he himself is acquainted with *pushto* language.

Looking into the judicial confession from another angle, even, if, the order for police file (Ex.P.W.3/5) dated 5th April, 2014 is taken and considered as a certificate, even then, it does not show that sufficient time of reflection was given. According to the said Order for police, 15 (fifteen) minutes with three intervals as a whole were given to think over before recording judicial confession, which is absolutely insufficient. The said order also does not show that P.W.3 Ajmal Shah, Judicial Magistrate is himself acquainted with *pushto* language.

Above all, the order for police (Ex.PW.3/5), demonstrates that after recording of the alleged confessional statement of the appellant, he was handed over to Naib Court for remanding him to

judicial lock up. Although during cross-examination, he denied such fact, which amounts to denial of his own said Order for police (Ex.PW.3/5) dated 5.4.2014, which has not only made the statement of P.W.3 Ajmal Shah, Judicial Magistrate unreliable but worthy of no credence too, as such no explicit reliance can be placed thereupon. In view of the discussion made herein before, we are of the firm opinion that confessional statement is neither voluntary nor admissible in evidence as held by the Hon'ble Supreme Court of Pakistan in the case of **Hashim Qasim and another Vs. The State reported in 2017 SCMR 986), Noor Ahmad and others Vs. The State (2017 Y L R 515), Kabir Shah Vs. The State(2016 YLR 1291), Qaisar Ali Vs. The State (2016 Y L R 1903), and Asif Mehmood Vs. The State (2005 SCMR 515).**

14. Now adverting to the test of the confessional statement with regard to truthfulness, consistencies and having coherence to the facts and circumstances, it is relevant to highlight that in the confessional statement allegedly made by the appellant, it was confessed that he stood by near Nusray bridge, aboard in the car of deceased and on the way Tariq took pistol from him, murdered the taxi driver Sharif, where-after dead body was thrown out side the car. According to the confessional statement, the appellant along with Tariq went to Kohat and handed over the vehicle to Muhammad Amin and that co-accused Tariq gave him mobile set of the driver and Rs.1000/- as fare.

Whereas, the statement of Muhammad Amin allegedly recorded under section 164 of the Code belies the confessional statement of the appellant with regard to car in question. He maintained that when he saw blood stains upon the clothes of his maternal uncle co-accused Tariq, he became suspicious on finding no wound on his person and when co-accused Tariq stated to have snatched the said car so as to sell it, he refused to give him shelter, **who left in the said car towards Jarma,** henceforth, the alleged confessional statement is contrary to the so called corroboratory evidence of Muhammad Amin. Thus in such view of the matter, we are of the firm believe that it would be un-safe to rely upon the said untrue and inadmissible judicial confession of appellant to hold him guilty of the capital charge. More so, there is also no mention in the judicial confession that registration book was left on the dead body of the deceased, while leaving the crime scene, which suggests us to believe, that the story narrated in the alleged confession is improbable, which does not fit within the circumstances of the prosecution story.

15. Learned counsel for the appellant emphasized that the confessional statement is ex-culpatory, thus being an inadmissible confessional statement, the same cannot be relied upon. Having given a due care and caution to the aforesaid alleged confessional statement, we are not persuaded to the argument advanced by him that the said confession is ex-culpatory as he has implicated himself by participating

in the alleged crime, however, we have observed that while making such confession, the appellant has given a very meager role to himself and has shifted the entire burden of committing murder of the deceased and taking away the motor car to co-accused Tariq, without any gain, merely against one thousand rupees as fare for himself, which is impossible.

16. Another piece of evidence, whereupon the prosecution rest its entire case is the statement of Muhammad Amin under section 164 of the Code but we are surprised to observe that how come such statement could be stressed upon to believe, and make reliance as a corroborative piece of evidence. The statement of Muhammad Amin cannot, at all be read in evidence, firstly, for the reason that said witness has not stepped into the witness box to affirm the facts narrated in his alleged statement recorded under section 164 of the Code, secondly, while deposition of P.W.3 Ajmal Shah, Judicial Magistrate, who allegedly recorded his statement under section 164 of the Code also did not mention of appearance of Muhammad Amin before him and recording his statement.

Above all, while appellant being examined under section 342 of the Code was also not confronted with any question to offer his explanation with regard to the statement of Muhammad Amin recorded under section 164 of the Code. Muhammad Amin is stated to be the nephew of co-accused Tariq, who has not been produced by the

prosecution before the court, whereof inference can comfortably be drawn as enshrined under Article 129(g) of the Order of 1984 that in case said witness does not appear or his evidence is withheld for one or the other reason, such witness would testify against the prosecution and in favour of the appellant.

17. Before dilating our view, upon the touch stone of appraisal of such evidence, we have anxiously given a thorough thought to section 265-J of the Code and Article 46 of the Order of 1984, in view of the dictum expounded in case of **Abdul Haleem and another Vs. The State (PLD 1982-Karachi-975),** wherein it has been held that such statement cannot be made basis for conviction unless notice in writing is served upon the accused and a fair opportunity of cross-examination is provided to the accused with the dicta that stating by an investigating officer that such notice was served, would not be sufficient for a fair consideration under the criminal administration of justice, as it would give rise to serious criticism for no-compliance of the requisite formalities as of such factum proof is required, otherwise such statement suffice, at all be of no significance.

Admittedly, said Muhammad Amin has not been produced before the trial court as such in view of section 265-J, such statement cannot be taken into account as incriminating piece of evidence, credible enough to warrant conviction. For ready reference section 265-J of the Code is reproduced as under;

> **"Section 265-J; Statement under section 164 admissible. The statement of a witness duly recorded under Section 164, if it was made in the presence of the accused and if he had notice of it and was given an opportunity of cross-examining the witness, may, in the discretion of the Court, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Qanun-e-Shahadat Order, 1984."**
>
> **(Emphasis)**

In this case, the statement of Muhammad Amin recorded under section 164 of the Code has not been produced and exhibited through any prosecution witness as such, on this score alone being worthless, has no evidentiary value and sanctity.

In view of the above discussion, we believe that neither the statement of Muhammad Amin recorded under section 164 of the Code has been proved by not producing him or tendering and placing such statement on record nor the same can be held to be true and corroborative in nature, rather, the same appears to be contradictory, belying the entire version of prosecution.

Importantly, another piece of evidence is CDR, whereupon the prosecution relies the most. The same is also of no importance on various counts. Initially, it was the duty of the prosecution to have had received the C.D.R with an endorsement of the Cellular Company concerned, having stamp and signature thereupon of the concerned authorized officer, then while taking into possession the CDR, through a recovery memo, at least a mushir should have been associated from the Cellular Company to independently prove the recovery or at least,

recorded the statement of representative of the Cellular Company to the effect of issuance and receipt of C.D.R but no such evidence have been collected and pre-cautions observed. The perusal of CDR also demonstrate that there is not even a single signature of authorized officer of the said Company, thus, it cannot be safely relied upon in any manner. It can be doubted that the investigating officer has himself generated such CDR or the same have been issued by the Company concerned.

Furthermore, neither there is any transcription, pertaining to the conversation of alleged crime nor proof of issuance of the SIM number in question allegedly used either by the appellant or by co-accused in their names. Even if, for the sake of discussion the CDR is believed to be true and correct, which is not the case, even then the appellant cannot be held responsible unless the recovery of Cellular set is proved without any shadow of doubt, as during arrest and making recovery of the mobile set Nokia 103, no independent witness was associated amongst the passengers or any outsider, when the appellant was de-boarded from the Coach, thus by deliberately not complying with the provisions of Section 103 of the Code, the recovery has become unreliable and doubtful. Addedly, P.W.6 Zahir Ullah, while lodging FIR or subsequently has failed to give the details of the stolen mobile set Nokia 103, regarding its make, colour or IMEI number etc, which could make the subsequent recovery of said mobile relevant to the

crime. It may also be worth noted that the alleged stolen mobile set has not been put to an identification test to make the recovery readable as incriminating article connected with the felony charge herein. Therefore, such evidence is also unworthy and not confidence inspiring, which can be made basis for holding the appellant guilty of offence.

The autopsy report (Ex.PW.2/1) issued by P.W.2 Dr.Niaz Ali, is also no help to the prosecution in respect of connecting the appellant, as autopsy report can not be used as corroborative piece of evidence, rather, the same can be seen to affirm the use of kind of weapon, type and duration of injury sustained, which at the best can be used as a confirmatory evidence and for contradicting the ocular evidence but for no other purpose, as held in the case of **Hashim Qasim and another Vs. The State (2017 SCMR 986)**

18. In so far as the extra judicial confession made by the appellant in the presence of P.W.6 Zahir Ullah, while making pointation of the place of alleged occurrence is concerned, the same is inconsequential for not being admissible and worthy of credence. The pointation of the place of occurrence cannot be considered as discovery of new and fresh fact as contemplated under Article 40 of the Order of 1984, rather, the aforesaid pointation is hit under Articles 38 and 39 of the said enactment because the place of occurrence, was already known and inspected by P.W.7 Abdul Rahim and other officials in the presence of P.W.3 Zahir Ullah (complainant) while preparing sketch

plan of place of occurrence, so making pointation of the place of occurrence at a subsequent stage by the appellant in no terms can be believed to be discovery of new facts. Reliance is placed upon the case of **Zia ur Rehman Vs. The State (2000 SCMR 528) and Hashim Qasim and another Vs. The State (2017 SCMR 986).**

19. Be that as it may, the said statement of P.W.6 Zahir Ullah(complainant) by no definition and interpretation of law and procedure can be held to be an extra judicial confession as the same was not at all made by the appellant as a free man rather admittedly during custody of police the alleged extra judicial confession was made, which has no sanctity in the eyes of law as voluntariness and truthfulness cannot be found in such like so called extra judicial confession. Even otherwise, the extra judicial confession has already been treated as weak type of evidence requiring strong and independent corroboration to prove such factum as held in the case of **Azeem Khan and another Vs. Mujahid Khan and others (2016 SCMR 274).**

The recovery of stolen car is also fruitless in the case of prosecution as it was found lying abandoned in the grave-yard, whereof, the prosecution has not offered any explanation as to why and who left the car over there. Neither any prosecution witness has clarified the mystery nor such explanation can be gathered or found in the alleged confessional statement of the appellant or in the statement

of Muhammad Amin. On the contrary, it belies both the aforesaid statements. Apart from that, we did not find any evidence, whereby the appellant can be connected with the said alleged stolen car, thus, such recovery has no nexus with the appellant, therefore, the same being immaterial cannot be given weightage in favour of the prosecution.

20. After in depth analysis and reappraisal of the evidence, we have arrived at the conclusion that not only the prosecution has miserably failed to prove the charge but the conclusion drawn by the trial court has also been found to be erroneous and based on flagrant reasons.

For what has been discussed hereinbefore, the appeal is allowed, impugned judgment dated 20.10.2017 is set aside and the appellant is acquitted of the charge. He shall be released forthwith, unless required in any other case.

SHAUKAT ALI RAKHSHANI
JUDGE

MEHMOOD MAQBOOL BAJWA
JUDGE

Announced in open Court on 2nd May,2018
at Islamabad, 9.30 A.M/
M.Akram/