IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE FAZAL ILAHI KHAN CHIEF JUSTICE
MR.JUSTICE DR.FIDA MUHAMMAD KHAN
MR.JUSTICE CH. EJAZ YOUSAF

CRIMINAL APPEAL No.27-I/1998 L.W.
CRIMINAL MURDER REFERENCE No.11/I/1999

Muhammad Ashraf son of Muhammad Asghar, Caste Behari,resident of Nai Abadi, Sarai Alamgir, Tehsil Sarai-Alamgir,Distt: Jhelum.	--	Appellant

Versus

The State	--	Respondent
Counsel for the appellant	--	Ch. Naseer Ahmed Tahir Advocate.
Counsel for the State	--	Mr.Muhammad Sharif Janjua, Advocate
No.date of FIR and police station	--	No.428 dt: 24.12.1996 P.S.Sarai-Alamgir
Date of institution	--	19.3.1998
Date of hearing	--	17.5.2000
Date of decision	--	4.10.2000.

JUDGEMENT

CH. EJAZ YOUSAF, J:- This appeal is directed against judgment dated 21.1.1998 passed by the learned Additional Sessions Judge, Jhelum whereby appellant Muhammad Ashraf was convicted under section 302(b) PPC and sentenced to death. He was also directed to pay compensation of Rs.1,50,000/- to the father of the deceased as required under section 544-A Cr.P.C..

2. Briefly stated, the prosecution case as gathered from the record is that on 24.12.1996 at 11.15 a.m. report Exh.PD, was lodged by one Muhammad Sarmad Qureshi son of Muhammad Boota with Liaqat Ali, ASI, police station Sarai Alamghir, wherein it was alleged that on 23.12.1996 at 6.45 p.m. the complainant had sent his daughter, namely, Mst.Nargis Shaheen, aged about 8 years, to the shop of Muhammad Afzal (P.W.5) for fetching milk. Since she did not come back for about half an hour, therefore, the complainant got worried and he in order to enquire about his daughter went to the shop of said Muhammad Afzal. Since the shop was closed, therefore, the complainant went to the shop of one Afzal Butt, which too, was closed. Complainant, therefore, went to the shop of Munawwar and enquired from him about his daughter, who too, showed his ignorance. Complainant as such came back to his house and after disclosing the entire facts to his wife again contacted P.W.5 Muhammad Afzal who disclosed that she had come to his shop, but since milk was not available, therefore, he had asked her to get the same from another shop. Afterwards, the complainant and residents

of the Mohallah kept on searching the girl, but she could not be found. On 24.12.1996 at 9.30 a.m. complainant received information that dead body of a girl was lying in a well situated near the Government Girls School Rajar, whereupon complainant went there and saw that it was the dead body of Mst. Nargis Shaheen. He, therefore, took out the dead body from the well with the help of given up PW Safeer Hussain and PW Abdul Razzaq and others and found that dead body was having injury on the head, which indicated that she was done to death. It was alleged in the report by the complainant that since her daughter was murdered by some body therefore, proceedings in accordance with law be initiated. On the stated allegations formal FIR bearing No.428 was registered under section 302 PPC at police station Sarai Alamghir and investigation was carried out in pursuance thereof. In the course of investigation, the dead body was examined and injury statement Exh.PK, was prepared. The dead body was sent for postmortem examination. A pair of sleepers Exh.P.5/1-2, taken out from the well, were also taken into possession. It would be worthwhile to mention here that nothing about the culprit/culprits was learnt uptil 24.1.1997 when in view of the statement made by Muhammad Shafique and P.W.11 Liaqat Ali under section 161 Cr.P.C. regarding the confessional statement allegedly made by the accused regarding commission of the offence, the appellant was arrested on 24.1.1997. He during investigation made disclosure and led the police to the recovery of a petti i.e. Art. P.2 allegedly worn by the deceased at the time of her death. It was found buried in a drain situated in front of the house of one Muhammad Shafique. The said patti was taken into possession

vide recovery memo Exh.PH. On 27.1.1997 appellant also made disclosure and got recovered the last worn shalwar of the deceased Art. P.3 and bucket Art.P.4 from the well in question which were taken into possession vide recovery memo, Exh.PJ. Later on, these articles were identified to be those of Mst.Nargis Shaheen deceased by her parents vide identification memo Exh.PH/1 and Exh.PJ/1. On the completion of investigation the appellant was challaned to the Court for trial.

3. Charge was accordingly framed to which the accused/appellant pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegations levelled against the accused/appellant produced 16 witnesses, in all. P.W.1 lady doctor Mst.Samina Asghar, W.M.O. DHQ,Hospital, Jhelum, had on 24.12.1996 conducted postmortem examination of the deceased and found as under:-

> "It was a dead body of eight years old girl wearing pink colour shirt with yellow piping. Shirt was wet. Eyes were closed and mouth was half opened. There was bluish dis-colouration of lips.Post mortem staining was present at the back.Rigor mortis was developed.The following injuries were found present on the dead-body:-
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> 1. Scratch mark 2x3 cm on lateral aspect of right knee.
> 2. 1x1 cm scratch mark on anterior aspect of middle of left lower leg.

3. 1x1/2 c.m vertical wound in the middle of the eye-brow with inverted margin. It was deep to bone.

4. Scratch mark 2x2 cm over right cheek bone adjacent to lateral margin of right eye. No evidence of violence was seen on the dead body.

Cranium and spinal cord.

Skull. Multiple fracture of right half of frontal bone. Multiple fracture of prital bone. Blood was collected under the scalp over the fractured area.

Three vaginal swabs were taken by the doctor and made into sealed parcel for onward transmission to the office of Chemical Examiner for detection of semen. In the opinion of lady doctor,the head injury was the cause of death. However,she deferred her final opinion regarding cause of death till the receipt of reports. Later on, however,on receiving report of the Chemical Examiner i.e. Ex.PB,she expressed her opinion that there was a sexual contact. The probable time, according to her, elapsed between the injury and death was immediate and between death and postmortem examination it was 12 to 18 hours. P.W.2 Muhammad Arshad,Constable deposed that on 28.11.1996 Saleh Muhammad Moharrir/Head Constable had handed over to him one sealed parcel and a sealed envelope for onward transmission to the office of the Chemical Examiner,Rawalpindi which he delivered, in the said office, intact. P.W.3 Syed Tahir-ul-Hassan had identified the dead body of Mst.Nargis Shaheen at the time of postmortem examination. P.w.4 Muhammad Sarmad is the complainant. He at the trial, reiterated the version contained in the F.I.R and deposed that when his

deceased daughter had gone to fetch milk, she was wearing "patti" used in the school uniform and she was also carrying a bucket. He added that when dead body of the deceased was taken out from the well, she was wearing only a pink colour frock and the shalwar was not on her body. He further deposed that later on, one sleeper,shalwar of the deceased and the bucket, were also recovered from the well which were identified by him to be of the deceased. He is also a marginal witness of the recovery memo Ex.PE vide which these articles were taken into possession by the police. In the course of his cross-examination he stated that the sleeper,bucket and shalwar of the deceased were recovered from the well after about 4/5 weeks. P.W.5 Muhammad Afzal is a shop-keeper. According to him, on 23.12.1996 at about 7.00 P.M Mst.Nargis Shaheen deceased had visited his shop in order to purchase milk. She was carrying a small bucket. Since the witness had no milk with him at the relevant time,therefore,he asked the deceased to proceed ahead. -P.W.6 Saleh Muhammad,ASI on 24.12.1996 was posted as Moharrir Head Constable at police station Sarai Alamgir. On the same day Liaqat Ali,ASI had handed him over three sealed parcels and three sealed envelopes, sent by the lady doctor for keeping the same in safe custody which he kept in the malkhana till 28.12.1996 whereafter,one sealed parcel and a sealed envelope was handed over by him to Muhammad Arshad for onward transmission to the office of Chemical Examiner Rawalpindi. He deposed that two sealed parcels alongwith sealed envelopes were handed over by him to Liaqat Ali for onward transmission to the office of the Chemical Examiner, Lahore as well as to the office of the Pathologist,intact.

P.W.7 Abdul Majid,Patwari,deposed that on 29.12.1996 he had inspected the site and taken rough notes on the basis whereof he on 3.1.1997 had prepared the site plan i.e. Ex.PF and Ex.PF/1 in duplicate. P.W.8 Liaqat Ali deposed that on 28.12.1996 he was entrusted with two sealed parcels and envelopes for onward transmission to the office of the Chemical Examiner and the Pathologist, Lahore which he delivered, intact. Raja Saeed Akhtar, P.W.9 deposed that he was resident of village Rajar. In the night between 23rd and 24th December 1996, at about 11/12 mid-night, he was going from his residence to Nai Abadi. When he reached near the well situated near the land of Haji Manzoor,he saw the appellant,who was coming from the side of the well. After exchanging Assalam-o-Alaikum, the witness told him that he was going to his father in law's house at village Rajar and in turn the appellant disclosed that he was coming from the house of one of his friends. P.W.10 Muhammad Shafique is a witness of the extra judicial confession allegedly made before him by the appellant. He deposed that on 17.1.1997 at 3.00 p.m. appellant visited his house and disclosed that on 23.12.1996 at 7.00 p.m., Mst. Nargis Shaheen had met him at railway track and told him i.e. the appellant that she had gone to the shop of Master Afzal to purchase milk, but she could not get the same. As per witness, the appellant further disclosed to him that he i.e the appellant took the deceased to street No.3 on the pretext of providing milk to her where, in a deserted house owned by one Rafique Butt he attempted to commit zina with her. The witness further disclosed that according to the appellant, Mst.Nargis Shaheen raised alarm and threatened him i.e. the appellant that she shall make a complaint to her

parents whereupon firstly, the appellant took her to a deserted well and thereafter to a tree. Appellant also thought to take her to a canal, but finally took her to the well situated near the Primary School Rajar and threw her therein. Witness further deposed that the appellant while making the confession was repentant and therefore requested him to get himself pardoned. P.W.11 Inayat Ali is another witness of extra judicial confession. He too, deposed that on 17.1.1997 at 4.30 P.M the accused Muhammad Ashraf came to his dera and confessed before him that on 17.1.1997 the appellant had met Mst. Nargis Shaheen in the evening, who was on her way back from the shop of Master Afzal. Since she was not able to get milk from the said shop the appellant on the pretext of providing her milk took her to the deserted house situated in street No.3 and attempted to commit zina with her and on the alarm being raised by her asked her to keep quiet. In the meantime, appellant heard announcement regarding dis-appearance of Mst.Nargis Shaheen on the loud-speaker. Thus he became frightened and thought that in case Mst.Nargis Shaheen is let off she would convene a punchayat the appellant would be taken to task. He as such took her to the well situated near the school of village Rajar and threw her therein. P.W.12 Safdar Hussain, ASI had on 24.12.1996 on the receipt of complaint Ex.PD, incorporated contents thereof into the formal FIR,Ex.PD/1. P.W.13 Abdur Rehman,Constable had on 24.12.1996 escorted the dead body of Mst.Nargis Shaheen to the mortuary for postmortem examination. He deposed that after the postmortem examination, Medical Officer had handed him frock of the deceased Article.1,three sealed parcels and three sealed envelopes

alongwith a carbon copy of post moretem examination report which he produced before the investigating officer,who in turn, took the same into possession vide recovery memo,Ex.PG. The witness identified his signatures on the said recovery memo. P.W.14 Abdur Razzaq is a relative of the complainant. He deposed that on receiving the message regarding disappearance of deceased Mst.Nargis Shaheen,he had gone to the house of the complainant Sarmad Qureshi, on 24.12.1997, in the evening. In his presence 2/3 school going boys came and told that dead body of a girl was lying in a well. Whereupon, he in the company of complainant visited the said well and on arrival of the appellant took out the dead body. On 21.9.1996 he again joined the investigation. In his presence appellant made disclosure and then led the police to the recovery of "patti" Article P.2. He is a marginal witness of recovery memo,Ex.PH,vide which the above mentioned patti was taken into possession by the police. He further deposed that on 27.1.1997 appellant again led the police to the recovery of shalwar Article P.3 and bucket Article P.4 from the well where from dead body of Mst.Nargis Shaheen was recovered. He is also a marginal witness of recovery memo Ex.PJ, vide which the above mentioned Articles where taken into possession by the police. He had also witnessed the recovery of a pair of nylon sleeper vide Ex.PE, which were taken into possession by the police at the time of the recovery of the dead body.P.W.15 Mst.Shamim Akhtar is mother of the deceased. She while corroborating the statement of complainant in all material particulars deposed that when Mst.Nargis Shaheen went to fetch milk,she was wearing a pair of sleepers, red colour

Frock and a shalwar alongwith a white colour "patti" of school uniform. She was also carrying a small Kamandal (bucket).She deposed that on 26.1.1997 she had identified "patti" Article P.2 to be that of the deceased in consequence whereof the investigating officer had prepared the identification mark Ex.PH/1 which bears his signatures. On 27.1.1997 she had also identified shalwar Article P.3, of the deceased and the bucket Article P.4. She deposed that in pursuance of above, identification memo Ex.PA/1 was prepared by the investigating officer which bears his signatures. P.W.16 Liaqat Ali, ASI, is the investigating officer of the case. He deposed that on 24.12.1996 he was posted at police station Sarai Alamgir. After registration of the case he had examined the dead body and prepared the injury statement Ex.PK, inquest report,Ex.PL, sent the dead body for postmortem examination, took out a pair of sleepers from the well, recorded statements of the P.Ws under section 161 Cr.P.C. effected the recoveries of patti Article P.2, bucket Article P.4 and shalwar of the deceased Article P.3, got the same identified by the parents of the deceased vide identification memos Ex.PG/I and Ex.PH/I, got prepared the site plan and also took into possession the sealed phial said to contain swabs as well as the envelopes and handed the same over to moharrir for onward transmission to the office of Chemical Examiner.

5. On the conclusion of the prosecution evidence the accused/appellant was examined under section 342 Cr.P.C. wherein he denied the charge and pleaded innocence. In answer to the question why this case against him he stated that it was a blind murder which took place in the night hours and

since the culprit was not traceable, therefore, police arrested him in order to show "karwai". In answer to the question "as to why the PWs deposed against him he stated that since they were related to the complainant party, therefore, they falsely implicated him. He, however, failed to lead evidence in his defence or to appear as his own witness in terms of section 340(2) Cr.P.C.

6. After hearing the arguments of the learned counsel for the parties, the learned trial Court convicted the appellant and sentenced him to the punishment as mentioned in the opening para hereof. However, he was acquitted of the charges under sections 10 and 11 of the offence of Zina (Enforcement of Hudood) Ordinance, 1979.

7. We have heard Mr.Ch.Naseer Ahmad Tahir, Advocate, learned counsel for the appellant and Mr.Muhammad Sharif Janjua, Advocate, learned counsel for the State and have also gone through the record of the case with their assistance.

8. Ch.Naseer Ahmad Tahir, Advocate, learned counsel for the appellant has raised the following contentions:-

(i) That it has been claimed by P.W.9 Muhammad Shafique that when appellant in order to confess his guilt. visited him on 17.1.1997 he i.e. the appellant was served a cup of tea whereas the very fact that the day of 17th January, 1997 fell in the holy month of Ramazan having been denied by the said witness the learned trial Court ought to have disbelieved his statement..

(ii) That extra judicial confession allegedly made by the appellant before Muhammad Shafique P.W.10 and Inayat Ali P.W.11

being a very weak type of evidence could not have formed basis of conviction of the appellant.

(iii) That the recovery of incriminating Articles was foisted on the appellant, therefore, it was of no avail.

(iv) That P.W.9 Raja Saeed Akhtar has claimed that he has seen the appellant at 11/12 p.m. in the fateful night near and around the well, wherefrom dead body of the girl was recovered, but his statement was not believable because he had no occasion to go through the deserted way and that too, in the odd hours.

(v) That imposition of death sentence in the case which wholly rests upon the circumstantial evidence was neither warranted nor could be sustained.

Lastly, it was also pleaded that extreme penalty of death recorded against the appellant by the learned trial Court in view of his tender age was not justified.

9. In order to supplement his first contention that since the day of 17th January, 1997 fell in the holy month of Ramazan and the very fact was denied by P.W.10, therefore, his statement ought to have been disbelieved by the learned trial court, the learned counsel for the appellant vehemently urged that P.W.10 Muhammad Shafique has, at the trial, stated that on 17th January,1997 when the appellant, for the purpose of confessing his guilt, visited him, he, i.e . the appellant was served a cup of tea. Learned counsel for the appellant maintained that since P.W.10 in the course of his statement, at the trial, took the stand that the day of 17th January,1997 did not fall in the month of Ramazan whereas, factually, it was so, therefore, his statement should have been disbelieved by the learned trial court. In order to substantiate his contention learned counsel for the appellant placed on record

a copy of an extract from the diary published by PNS Bahadur wherein 7th Ramazan-ul-Mubarak has been shown as on 17th January,1997. He has also filed an application under section 112 of the Qanun-e-Shahadat Order,1984 praying therein that judicial notice of the above fact be taken.Mr.Muhammad Sharif Janjua Advocate, learned counsel for the State has though candidly conceded that the day of 17th January,1997 fell in the month of Ramazan and that he would have no objection if judicial notice of the fact is taken by the Court yet, has submitted that if the day on which appellant allegedly confessed his guilt before P.W.10 actually fell in the month of Ramazan and a cup of tea was served by P.W.10 to the appellant even then it would not effect merits of the case because firstly; no where it has come on record that the appellant was regularly observing fasts and secondly; if a portion of P.W.10's statement is found to be false even then it does not mean that his entire statement was unbelievable.

In order to ascertain as to whether or not there is substance in the contention raised by the learned counsel for the appellant we have ourselves minutely gone through the record of the case and have also perused the document annexed with the application filed under section 112 of the Qanun-e-Shahadat Order,1984 . A perusal of the extract from the diary issued by the PNS Bahadur shows that 17th January,1997 in fact, was a day which fell in the holy month of Ramazan and while taking judicial notice of the very fact we are constrained to observe that though denial of the fact in question at the part of P.W.10 was not warranted yet, it does not necessarily imply that the deposition of P.W.10, in entirely, was not

believable because the maxim of "falsus in uno falsus in omni-bus" is not a rule of universal application and at times, Court has to sift the grain from the chaff in order to reach the truth. Likewise, the rule that the integrity of a witness is indivisible too, cannot be accepted because, in case, if it is proved that the witness was not coming out with the truth on a particular point even then, it cannot be said that his entire statement was false. In such a situation, it would not be proper for the Court to discard statement of the witness outrightly but those portion s of his statement which find corroboration from other independent sources/evidence should be taken into account. In this view we are fortified by the following reported judgments:-

(i)	Haq Nawaz and others Vs.The State	2000 SCMR 7
(ii)	Muhammad Ahmad Vs.The State	1997 SCMR 89
(iii)	Ahmad Khan Vs.Nazir Ahmad	1999 SCMR-803
(iv)	Muhammad Asghar and another Vs.The State	PLD 1994 SC-301
(v)	Sardar Khan etc.Vs The State	1998 SCMR-1823
(vi)	Tawab Khan Vs.The State	PLD 1970 SC-13

The contention has, therefore, no force.

10. As regards the next contention of the learned counsel for the appellant that since extra judicial confession made by the appellant before P.W's 10 and 11,was a weak evidence, therefore, it could not have formed basis for appellant's conviction. It may be pointed out here,that no doubt, an extra judicial confession has always been considered and regarded as a weak type of evidence because it can be obtained rather cultivated easily yet, the fact

remains that validity of a confession is not dependent upon its kind and sort. Time and again it has been laid down by the Superior Courts that if the Court believes a confession, judicial or extra judicial, retracted or unretracted, to be voluntary and true, then accused can be convicted on it s sole basis. It is entirely a different matter that since it is not difficult to procure such type of evidence ,therefore, the Courts have always considered the same as dubious and shady piece of evidence and have thus emphasized the necessity of great care and caution in acting upon it. Otherwise, as a matter of law, no corroboration of a confession is needed. The rule of law is that the confession is a relevant fact and it is for the Court to determine its value keeping in view the circumstances of each case. However, as laid down by the Hon'ble Supreme Court of Pakistan in Sarfraz Khan's case,1996 SCMR-188,an extra judicial confession, before it could be made basis of conviction, would require 3-fold proof i.e that the confession was actually made,it was truly made and that it was voluntarily made. It is also well settled that conviction can be based on retracted extra judicial confession if it is corroborated by subsequent discoveries.

We may observe here that the extra judicial confession made by the appellant was proved to be voluntary and true at the trial and it was duly corroborated by the recovery of incriminating articles including last worn clothes i.e shalwar and patti of the deceased as well as the bucket. Further the medical evidence, particularly to effect that the deceased before her death was subjected to zina, the Chemical Examiner report and the fact that appellant at the time of occurrence was seen near and around the well,

render material corroboration to the confession,thus it was rightly believed by the learned trial court. The contention of the learned counsel for the appellant in this respect too, has therefore, no force.

11. In furtherance of his next contention that since the recovery of incriminating articles was foisted on the appellant, therefore, it was of no avail. The learned counsel for the appellant vehemently contended that since nothing was recovered at the instance of the appellant and the recovery of the incriminating articles particularly the patti, shalwar allegedly worn by the deceased and the bucket being carried by her at the time of her death, was fabricated by the prosecution in order to beaf-up its case therefore, it could not have been taken as incriminating pieces of evidence against the appellant. In order to judge, as to whether or not there is substance in the argument, we have ourselves carefully gone through the record of the case. As per prosecution version the deceased girl, when disappeared, was wearing a white colour "patti", which according to the witnesses, was a part of her uniform. As per P.W.16 Liaqat Ali the appellant on 26.1.1997 during investigation made disclosure that he can get recover the "patti" and pursuant to the above he allegedly led the police to the house of one Muhammad Ameen, in front whereof, the patti in question was found buried in a drain under-neath the mud. It was accordingly taken into possession vide recovery memo Ex.PH. Ex.PH, shows that the appellant, while throwing the deceased girl in the well, had kept the patti with him and had subsequently buried the same at the place wherefrom it was recovered. To our mind, the time and place of recovery of the patti in quest ion itself is

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indicative of the fact that it could not have been foisted on the appellant because the deceased girl disappeared on 23.12.1996,her dead body was found in the well and recovered therefrom on the next date i.e 24.12.1996. It was for the first time on 26.1.1997 that the appellant as stated above, during investigation disclosed that he had buried the "patti" in front of the house of Muhammad Ameen wherefrom it was subsequently recovered. Record shows that along with the dead body only a pair of sleepers i.e . Ex.P.5/1-2 was recovered. Therefore, the presumption would be that had the patti in question been recovered by the police along with the dead body, recovery thereof would have been certainly shown by the police because by that time neither the complainant had shown his suspicion against any person or persons including the appellant nor was there any occasion for the police to fabricate before hand such piece of evidence and that too, for the sake of none. Another fact which cannot be lost sight of is that the occurrence is unseen. The only person involved in the incident other than the deceased was the murderer and if the prosecution version is true, then, only the applicant could have had exclusive knowledge of the incident as well as the fact that as to where clothes and other articles belonging to the deceased were lying. Therefore, recovery of the "patti" at his instance cannot be doubted.

12. As regards the recovery of shalwar and bucket the prosecution version is that these two articles were also recovered at the pointation and instance of the appellant on 26.1.1997 from the same well, wherefrom the dead body was recovered. A perusal of Ex.PJ, recovery memo of the above

articles shows that these articles were thrown in the well by the appellant and were tied with a stone so that it may not come on the surface. That is why, perhaps, it was not possible for the police to recover these articles along with the dead body. Ex .PJ further shows that elastic string of the trouser was also found broken therefore, the possibility that the very fact might have prompted the appellant to dispose the same of separately, cannot be ruled out. This view finds support from the fact that Ex.PA, the post mortem report issued by P.W.1 lady Dr.Mrs.Samina Akhtar, who had on 24.1.1997 examined the dead body, confirms that shalwar was not available on the dead body at the relevant time. Further Ex.PG which is the recovery memo of the clothes and swabs further shows that only a frock was handed over to the police by the lady doctor. Therefore, the presumption would be towards truthfulness of the prosecution version that articles in question were recovered at the instance and pointation of the appellant, who had exclusive knowledge of the fact that it were lying in the bottom of the well. It would be worthwhile to mention here that witnesses of the recovery are independent persons of the locality who have neither any enmity against the appellant nor motive to falsely implicate him therefore, their statements cannot be doubted. The contention therefore, has no force.

13. In order to substantiate his next contention that since the claim of Raja Saeed Ahmad i.e P.W.9 to have seen the appellant in the fateful night near and around the place of occurrence was not believable, therefore, his statement could not have been relied upon. The learned counsel for the appellant emphatically contended that it has been claimed by P.W.9 that he

had in the night between 24.12.1996 and 25.12.1996 seen the appellant near the well wherefrom dead body of the girl was recovered. Learned counsel submitted that claim of the appellant in this regard was not correct because as per record he i.e the witness at the relevant time was on his way to the house of his father-in-law situated in village Rajar at about 11/12 mid night. Learned counsel for the appellant maintained that since appellant had no occasion to proceed to the house of his father-in-law in the odd hours of night and that too, through a deserted passage where alternatively, a safe passage was available therefore, his statement was not worthy of credence. We seen no force in this contention of the learned counsel for the appellant as well, because it has been sufficiently explained by the witness that it was his routine to sit and chat with his friends in the shop of one Shafique situated at Serai Alamgir and on 24.10.1996 too, he remained there till 10.30 P.M and on coming back when he was told by his wife that he i.e the witness was summoned by his father-in-law, he immediately proceeded towards village Rajar. As to the second limb of argument in the contention that as to why the witness had chosen to go through the deserted passage? It may be pointed out here that explanation offered by the witnesses in this regard too, is available on record. It has been stated by P.W.9 that since it was cold at night therefore, he did not opt to ride motorcycle and decided to go on foot and since the passage in question was short therefore, he preferred to use the same. To us, the explanation offered by P.W.9 is quite satisfactory.

14. As regards the next contention of the learned counsel for the appellant that imposition of death sentence on the appellant in the instant case which wholly rests upon circumstantial evidence was not warranted, it may be mentioned here that the contention appears to have been raised perhaps under a misconception. There is no prohibition in law that in a murder case conviction cannot be based on circumstantial evidence. In fact, it is not the type but sufficiency and quality of the evidence which matters. In a number of cases, including the following, imposition of death sentence has been approved by the Hon'ble Supreme Court of Pakistan purely on the basis and in appreciation of circumstantial evidence:-

1. Khubaib Ahmad Vs.The State-1992 SCMR 398.In which case evidence of last seen together with extra judicial confession, corroborated by medical evidence and recovery of dead body of the victim at the instance of the accused was believed.

2. Nazir Ahmad and others Vs.The State-1994 SCMR 58 wherein the Hon'ble Supreme Court of Pakistan in appreciation of circumstantial evidence i.e extra judicial confession corroborated by strangulation marks found on the dead body and recovery of dead body from the place where, accused had stated that they had thrown it, was pleased to uphold conviction.

3. Muhammad Aslam and others Vs.The State and Daulat Ali Vs. Muhammad Aslam and others-1999 SCMR-845. In which case a Full Bench of this Court on the basis of extra judicial confession of the accused persons corroborated by the recovery of crime weapons at the

instance and pointation of the accused persons from their house and medical evidence to the effect that deceased before her death was subjected to zina and the fact that dead body was recovered from the house of the appellants awarded death sentence to both the appellants. It was upheld by the Hon'ble Supreme Court of Pakistan.

In the last mentioned case the Hon'ble Supreme Court of Pakistan was rather pleased to repel the contention that conviction could not have been based on the circumstantial evidence. Relevant discussion reads as follows:-

> "Lastly, the learned counsel submitted that if it is presumed that the charge under section 302,PPC is proved, this is not a case where capital punishment should have been given to the appellant. In the circumstances of the case where the whole case is based on the circumstantial evidence which according to the learned counsel is not very strong, the life imprisonment might have been sufficient."
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> This contention is not acceptable because if the evidence of the prosecution is insufficient, it would have been a case of acquittal, but after perusal of the record we are of the view that the guilt of M.Aslam is proved by a number of circumstances. The dead body of Mst.Tahira was found in his own house for which he lodged a misguiding report in the Police Station. Certain articles of the deceased were found buried in a ditch in the room. He has himself pointed to the blood-stained chhuri buried by him in the courtyard of his house. He remained in hiding after the occurrence up to 10.5.1993 on which date he himself admitted his guilt before Sabir Hussain where

> from he was duly arrested by the police. Keeping all these pieces of evidence in view, the charges against M.Aslam are proved to the hilt and once we accept this evidence against him there is no mitigating circumstances whatsoever in the present case. He has brutally murdered a young girl after subjecting her to his sexual lust and then tried to misguide the law enforcing agency by claiming that his own daughter had committed suicide, therefore, he deserves no leniency and the full dose of sentence under section 302 PPC, is fully justified."

We are, therefore, unable to subscribe to the contention of the learned counsel for the appellant.

15, A careful perusal of the evidence would reveal that, in the instant case, prosecution has been successful in establishing guilt of the appellant. It has been proved that the deceased girl while on her way back from the milk shop was induced and taken away by the appellant to a deserted house where, appellant tried to satisfy his lust. However, having been threatened by the deceased girl that she would disclose the incident to her parents as well as the fact that in the meantime there was announcement on the loud-speaker regarding her disappearance the appellant decided to kill her and ultimately murdered her by throwing her, in the well. The learned trial Court in believing the prosecution version has primarily relied upon the statements of P.Ws 10 and 11 before whom the appellant had allegedly confessed his guilt. Both these witnesses are independent witnesses of the locality and have neither animous against the appellant nor have they any motive to falsely implicate him. The prosecution version finds support from the medical evidence to the extent that the deceased was subjected to zina and

had multiple fracture of right half of frontal bone on the skull besides, other injuries. Fracture of frontal bone of the skull might have occurred when she was thrown in the well and her head struck against the wall or it may be due to her collision with the wooden planks, which as per Exh.PF i.e. the site plan, were fixed 4/5 feet above the well and had covered half of the orifice. The Chemical Examiner's report lends further support to the prosecution version. It is also corroborated by the recovery of "patti" and shalwar of the deceased as well as the bucket, at the instance and pointation of the appellant. It would be pertinent to mention here that all these articles were subsequently identified by the witnesses to be of the deceased. Statement of P.W.9 who had seen the appellant near and around the well in question, in the odd hours of night on the day of occurrence, further strengthens the prosecution case. Another fact worth consideration is that the complainant or for that purpose other witnesses have had no motive to falsely implicate the appellant. And instant is also not a case of substitution of the accused, therefore, it does not appeal to reason as to why legal heirs of the deceased would let go the real culprit and instead make the appellant scapegoat, just for nothing. We are, therefore, of the opinion that appellant was rightly convicted for the offence.

16, Adverting to the last contention of the learned counsel for the appellant that since the appellant was a raw youth of tender age, therefore, imposition of the extreme penalty of death on him in the circumstances of the case, was not warranted. We may observe here, that in all cases of Qatl-e-amd normal penality is death as qisas. Therefore, once it is established that

an offender is guilty of Qatl-e-amd then in the absence of extenuating or mitigating circumstances he cannot be dealt with leniently. However, in doing so, other provisions of law especially contained in Chapter XVI of the Pakistan Penal Code cannot be ignored. Section 306 PPC which is reproduced hereinbelow for ready reference and convenience provides that Qatl-e-amd shall not be liable to Qisas if an offender is a minor or insane:-

> **S.306.Qatl-I-amd not liable to qisas:-** Qatl-e-amd shall not be liable to qisas in the following cases, namely:-
>
> (a) when an offender is a minor or insane:
>
> Provided that, where a person liable to qisas associates with himself in the commission of the offence a person not liable to qisas with the intention of saving himself from qisas, he shall not be exempted from qisas."
>
> (b) when an offender causes death of his child or grand child how low-so-ever and
>
> (c) when any wali of the victim is a direct descendant how low-so-ever, of the offender."

It appears that the learned Court below has not examined the case from this standpoint. In order to prove that the appellant was immuned from the mischief of section 306-A PPC it was incumbent on the prosecution to prove that appellant at the time of occurrence was an adult. Likewise, it was obligatory for the trial Court to be alive to the situation in determining nature and quantum of sentence.

17. Though record is silent as to what was age of the appellant at the time of occurrence yet, in his statement recorded under section 342 Cr. P.C it has been mentioned as 17/18 years. Since the statement in question was recorded on 12.1.1998, therefore, on 23.12.1996 the appellant was definitely below

the age of 18 years and thus was not an "adult" within the meaning of section 299(a) PPC, therefore, his case squarely falls within the ambit of section 308 PPC, which reads as follows:-

> **Sec.308 Punishment in qatl-e-amd not liable to qisas,etc.**(1) Where an offender guilty of qatl-e-amd is not liable to qisas under section 306 of the qisas is not enforceable under clause(e) of section 307, he shall be liable to diyat:
>
> Provided that, where the offender is minor or insane, diyat shall be payable either from his property or by such person as may be determined by the court:
>
> Provided further that where at the time of committing of qatl-e-amd the offender being a minor, had attained sufficient maturity or being insane, had a lucid interval, so as to be able to realize the consequences of his act, he may also be punished with imprisonment of either description for a term which may extend to fourteen years as ta'zir:
>
> Provided further that where the qisas is not enforceable under clause(c) of section 307 the offender shall be liable to diyat only if there is any wali other than offender and if there is no wali other than the offender, he shall be punished with imprisonment of either description for a term which may extend to fourteen years as ta'zir."
>
> (2) Notwithstanding anything contained in sub-section (1) the court having regard to the facts and circumstances of the case in addition to the punishment of diyat, may punish the offender with imprisonment of either description for a term which may extend to fourteen years, as ta'zir."

In this view, we are fortified by the observations of the Hon'ble Supreme Court of Pakistan made in the case of Muhammad Afzal alias

Seema vs. The State reported as 1999 SCMR 2652 wherein it has been observed as under:-

> "Moreover, though the term "minor" has not been defined in Chapter XVI of PPC the term "adult" has been defined in the said Chapter in section 299 PPC to mean "a person who has attained the age of eighteen years". Again, Qisas, it is well established, can be exacted from an adult, sane offender and not from a minor, as a minor is not liable to Qisas as is apparent from the provisions of section 306 PPC and it is for that reason that section 308 PPC provides punishment of diyat where the offender is a minor and the case of Qatl-e-amd. It necessarily follows that if the offender is a minor and the prosecution seeks tazir punishment, it has to establish by producing evidence that the minor had attained sufficient maturity to realise the consequences of his act."

18. The upshot of the above discussion is that conviction recorded against the appellant Muhammad Ashraf son of Muhammad Asghar by the learned Additional Sessions Judge, Jhelum vide judgment dated 21.1.1998 is maintained. However, his sentence is altered from death to fourteen years rigorous imprisonment keeping in view the facts and circumstances of the case, especially that he at the time of occurrence was not an "Adult" but as is evident on record had attained sufficient maturity to realise the consequences of heinous act done by him. He shall be liable to diyat as well, which as per first proviso to section 308 PPC is payable either from his property or by such person as determined by the Court. Since it is not ascertainable from the record that the appellant has any property wherefrom

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diyat money could be paid or there is any person who may be made responsible to pay diyat on his behalf, therefore, we deem it appropriate to direct the trial Court to hold inquiry in this regard and determine the mode and source by which diyat should be paid. Benefit of section 382-B, Cr. P.C. is allowed to the appellant.

Criminal Murder Reference No.11/I/1999 is not confirmed and disposed of in the above terms.

(Ch. Ejaz Yousaf)
Judge

(Fazal Ilahi Khan)
Chief Justice

(Dr.Fida Muhammad Khan)
Judge

Announced on 4th October,2000
at Islamabad

(Fit for reporting)

ABDUL RAHMAN/

JUDGE