

IN THE FEDERAL SHARIAT COURT

(Appellate/Revisional Jurisdiction)

PRESENT

MR.JUSTICE ALLAMA DR.FIDA MUHAMMAD KHAN

MR. JUSTICE SH. NAJAM UL HASAN

JAIL CRIMINAL APPEAL NO.18-I of 2015

Muhammad Ashraf son of Allauddin,
Caste Barakzai, Resident of Killi Trate,
District, Pishin.

(Now confined in Central Prison Mach)

Appellant

V E R S U S

The State		Respondent
For the appellants	:	Mr. Javed Aziz Sindhu, Advocate
For the State	:	Mr.Abdul Latif Kakar,Addl. P.G Baluchistan
For the complainant/petitioner	:	Mr.Rizwan Ejaz,Advocate
No. Date of F.I.R Police Station	:	No.07/2013, dt.19.1.2013 Levies Headquarters Pishin
Date of Judgment of trial Court	:	20.8.2015
Date of institution of the appeal	:	01.9.2015
Date of hearing	:	28.1.2016
Date of decision		10.2.2016

CRIMINAL REVISION NO.3-I-2015

Fazal Muhammad and eight others Petitioners

Versus

1. Muhammad Ashraf and		Respondents
2. The State		
For the petitioner	:	Mr.Rizwan Ejaz,Advocate
Date of Institution in this Court	:	5.10.2015
Date of hearing	:	28.1.2016
Date of decision	:	10.2.2016

JUDGMENT

SH.NAJAM UL HASAN, J. - Through this judgment we are deciding Jail Cr.Appeal No.18-I-2015 filed by appellant Muhammad Ashraf through Superintendent Central Prison Mach and Criminal Revision No.3-I-2015 filed by the complainant Fazal Muhammad and eight others for enhancement of sentence of Muhammad Ashraf, respondent, from life imprisonment to that of death sentence. Both these matters have arisen out of the same judgment dated 20.8.2015 passed by the learned Incharge Sessions Judge, Pishin whereby the appellant Muhammad Ashraf was convicted under section 396 PPC in case FIR No.7/2013 dated 19.1.2013 under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979 read with section 394/34 PPC registered at Thana Levies Pishin. He was convicted under section 396 PPC and was sentenced to life imprisonment with fine of Rs.200,000/- or in default thereof to further undergo two years S.I. Benefit of section 382-B Cr.P.C was extended to appellant by the learned trial court.

2. The brief prosecution case is that on 19.1.2013, the complainant Fazal Muhammad got registered FIR No. No.7/2013 in which it was stated that his brother Safar Muhammad (deceased of this case) was plying a Mazda car bearing No.AAB-468 on rent. That on 19.1.2013 at 5.30 p.m a person came to his brother at Dub Cross and hired the vehicle for taking a sick patient to the hospital for a consideration of Rs.1000/-. His brother went on his car along with the said person. Later on, at 7.00 p.m the complainant was informed that his brother Safar Muhammad was found lying in injured condition. Some unknown dacoits have snatched his vehicle and while causing him injury left him on the road and took away his car. The injured was shifted to hospital who later on died on the same day.

2A. During investigation it transpired that one Bismallah,P.W.2, who was also a driver was present along with the deceased at Dab Cross when the appellant Muhammad Ashraf hired the car and services of the deceased for a consideration of Rs.1000/-. In his presence the deceased took the appellant in his car at 5.30 p.m. On the next day, he came to know about the occurrence in

which the car of the deceased was taken away by the accused while causing him fire arm injury on his neck which resulted in his death. Similarly one Sahib Jan,P.W.3, also made a statement before the police during investigation that he was going to his Orchard on a motorcycle when he was stopped by the appellant Muhammad Ashraf and he requested for a lift up-to Dab Cross as he was to hire a taxi for taking a sick person to the doctor. Sahib Jan gave the lift and dropped the appellant at Dab Cross. The I.O inspected the spot, prepared site plan, he took into possession one crime empty and blood stained earth from the place of occurrence in presence of the witnesses. The appellant/accused was arrested by the police of P.S Killa Saifullah while he was driving the stolen car. On his search an unlicensed pistol was recovered and as such, case FIR No.3/2013 was registered against him under section 13-E Arms Ordinance,1965 on 20.1.2013. He was arrested and later, during investigation he disclosed the present occurrence. He was arrested in the present case FIR No.7/2013 after obtaining permission of Illaqa magistrate Killa Saifullah on 30.1.2013. Later on, on his request he was produced before the Illaqa Magistrate P.W.6 on 8.2.2013 where

he got his confessional statement recorded. He admitted the occurrence and confessed his crime. The injured was medically examined by the doctor P.W.7 on the very same day of occurrence i.e 19.1.2013. His medico legal report was prepared indicating that he received one fire arm injury on his neck. He died at the same time when he was being shifted to the Ward. Post Mortem examination was not conducted on the request of the complainant. The case was investigated by P.W.8 Muhammad Younas, Naib Resildar. He recorded the formal FIR, prepared the site plan, took into possession crime empty and blood stained earth from the place of occurrence, got the copy of MLR from the doctor and arrested the appellant/accused after obtaining orders from the Illaqa Magistrate Killa Saifullah as the appellant was arrested in case FIR No.3/2013 dated 20.1.2013 registered under Arms Ordinance at Police Station Killa Saifullah. He also took into possession the car and the pistol recovered from the appellant/accused by the police of P.S Killa Saifullah on 20.1.2013. The crime empty and the pistol were sent to the Fire Arms Expert for comparison report. Ultimately challan was submitted against the appellant in the court. Charge was framed against the

appellant under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance, 1979. He pleaded not guilty and faced the trial.

3. The complainant appeared as P.W.1 and verified the contents of FIR, P.W.2 Bismillah was the witness of last seen. He saw the deceased and the appellant together and thereafter the deceased was found injured and ultimately died. P.W.3 Sahib Jan made a statement that he gave lift to the appellant on the date of occurrence up-to Dab Cross on his motorcycle. Muhammad Ameen and Muhammad Siddique P.W.4 and P.W.5 are the recovery witnesses. P.W.6 Muhammad Naeem Davi, Judicial Magistrate, Pishin recorded the confessional statement of the appellant and he verified the proceedings which he conducted while recording the confessional statement. P.W.7 is a doctor who examined the injured deceased just after the occurrence and found the fire arm injury on the neck of the deceased as fresh and fatal. P.W.8 investigated the matter and after fulfilling formalities submitted the challan for the offence of 'Harrabah' in court. While making statement under section 342 Cr.P.C the appellant denied the whole occurrence. He opted to appear as his own witness under section

340(2) Cr.P.C and denied the occurrence but admitted his arrest by the police of P.S Killa Saifullah on 20.1.2013 and stated that later on he was involved in the present case due to land dispute with the complainant. He did not produce any defence witness.

4. The learned trial court while finding the case not fit for Hadd convicted the appellant under section 396 PPC and sentenced him to life imprisonment. He was to pay a fine of Rs.200,000/- and in case of default to further undergo two years R.I. Benefit of section 382-B Cr.P.C was extended to the appellant vide impugned judgment dated 20.8.2015. The appellant filed the present appeal against his conviction and sentence through Superintendent Central Prison Mach and at the same time the complainant along with legal heirs of the deceased filed a criminal revision for enhancement of the sentence of respondent from life imprisonment to death.

5. Mr.Javed Aziz Sindhu, Advocate, learned counsel for the appellant has strongly emphasized that the occurrence was not seen by any witness. The appellant was not named as an accused in the FIR. The appellant was arrested in

another case and remained in police custody of P.S Killa Saifullah for ten days and thereafter arrested in the present case. That no witness to verify the arrest of the appellant was produced during the trial. That as per prosecution case the stolen car and the pistol, weapon of offence, was recovered from the appellant by the I.O in case FIR No.3/2013 registered under Arms Ordinance at P.S Killah Saifullah on 20.1.2013. That no witness of such recovery of car or pistol was produced in court during trial and the prosecution has only relied on the documents of case FIR No.3/2013 taken into possession by the I.O through recovery memo. The learned counsel further states that the retracted judicial confession of the appellant has no value as the same was recorded after a delay of twenty days of occurrence and after eight days of his arrest. The confessional statement was made by the appellant after he was tortured by the police, that the medico legal and death certificate of deceased does not provide any strength to the prosecution case. Learned counsel strongly emphasized that absence of fire arm expert report to verify that the weapon recovered was the same through which the empty recovered from the spot was fired makes the recovery of

weapon useless, that there is no post mortem report and in absence of any statement of deceased to the doctor or anyone else, the prosecution remains unable to prove case against the appellant beyond reasonable doubt.

In support of his contention learned counsel has relied upon the following case laws:-

- 1) PLJ 1999 SC 269 (Muhammad Bashir Ahmad alias Bashir Vs. The State)
- 2) PLD 1994 FSC-24 (Dilbar and another Vs. The State)
- 3) 2005 M.L.D 1620 (The State and others Vs. Rahim Dad and others)
- 4) PLD 1978 S.C 21 (Naqibullah and another Vs. The State)

6. On the other hand, learned counsel for the complainant who was also representing the petitioner in Cr.Revision No.3-I-2015 states that the occurrence took place after 5.30 p.m when the deceased and the appellant went on a car from Dab Cross in presence of P.W.2 Bismillah. At 7.00 p.m the complainant was informed that his brother the deceased of this case was found in injured condition and he was shifted to the D.H.Q hospital at Pishin. He was later on shifted to Sandman Provincial Hospital Quetta and his Medico-legal report was prepared at 9.40 p.m by the Dr.P.W.7. He died where he was being shifted to Ward in Hospital. The doctor while appearing as P.W.7 admitted that the fire

arm injury on the neck of deceased was fresh at the time of medical examination and death, at 9.40 p.m on 19.1.2013, so the time of occurrence is rather corroborated by medico-legal report. The learned counsel states that the confessional statement of the appellant/respondent was recorded by the Judicial Magistrate after fulfilling all the legal requirements. In answer to the question by the learned Magistrate regarding the torture the appellant denied any kind of tortured by any one and stated that he was making statement with his free will without any pressure. After recording confessional statement the appellant was sent to Judicial Lock-up and later on tried. He was convicted by the learned trial court on 20.8.2015 i.e after 2 ½ years of the occurrence. During this period the appellant never made any effort to say that the confessional statement was obtained under threat or coercion. It was the first time when he appeared under section 342 Cr.P.C after more than two years of his confession and disowned the judicial confessional statement, such a circumstance rather indicates that the appellant has retracted from his confession just to save his life under instruction. Learned counsel states that the arrest and recovery of stolen car from the

appellant just after six or seven hours of the occurrence by the police of P.S Killa Saifullah from a far of place is a circumstance which clearly indicates the involvement of the appellant in commission of robbery and murder of deceased. The recovery of pistol and the recovery of crime empty from the place of occurrence provides some support to the prosecution case, that the statements of P.W.2 and 3 establishes the identity and fully implicated the appellant in this crime. The appellant has rightly been convicted by the learned trial court. In support of his arguments the learned counsel has relied upon the case reported as (i) 2011 P.Cr.L.J-48 (Siraj Ahmed Vs. The State) and (ii) 1998 P.Cr.L.J-1381 (Abdul Mujeeb Vs. The State).

7. While arguing the revision for enhancement of sentence the learned counsel states that the respondent/accused has committed a very heinous offence. The prosecution has proved the case of robbery and murder against the accused/respondent through circumstantial and other evidence there is no mitigate circumstance available in the prosecution case for lesser sentence so

the appellant was entitled to normally penalty of death sentence under section 302(b) PPC he has prayed for enhancement of sentence to death.

8. The learned Additional Prosecutor General Baluchistan has also supported the arguments of the learned counsel for the complainant and has prayed for enhancement of sentence to death under section 302(b) PPC.

9. We have heard learned counsel for the parties and have also gone through the record and evidence recorded by the learned trial court.

10. The occurrence took place on 19.1.2013 after 5.30 p.m when the deceased Safar Muhammad went along with the appellant on his taxi in presence of Bismillah, P.W.2. P.W.2 knew the appellant and identified him in court and clearly stated that the appellant was the one who hired the taxi of the deceased for a consideration of Rs.1000/, they went together in blue Mazda Car No.AAB-468. That the deceased while leaving informed him that the taxi was hired for Rs.1000/-and he was to pick and take a patient to hospital along with the appellant. P.w.3 Sahib Jan provided lift to the appellant upto Dab Cross on his motorcycle at the relevant time. Even he identified the appellant in court. The

FIR was registered at 8.20 p.m when the injured was shifted to the hospital by the Levies Officials. The medical examination of the deceased indicates the presence of fire arm injury on his neck. His condition was precarious and the injury was fresh so, it is clear that the deceased was injured by fire arm after 5.30 p.m and before 7.00 p.m when the complainant was informed about the occurrence. The appellant was arrested in case FIR No.3/2013 registered under section 13(E) of Arms Ordinance at 2.00 a.m on 2.1.2013 by the police of Killa Saifullah. He was arrested while he was driving the stolen car No.AAB-468 of the deceased. On search a pistol was recovered from him. The record indicates that he was arrested after six or seven hours of occurrence of this case so such a circumstance rather supports the prosecution case. The appellant remained unable to give any explanation of having custody of stolen car of deceased just after few hours of the occurrence at a place which is at a considerable distance. During investigation the appellant opted to make a confessional statement before a Magistrate. He was produced before the Magistrate and the learned Magistrate satisfied himself that the confession was made voluntarily by asking many

questions to the appellant. The appellant rather stated that he was not tortured by any one and he is making a voluntarily statement. The learned Magistrate appeared in court as P.W.6. He was thoroughly cross-examined but nothing notable in favour of appellant was brought on record. The hand cuff of the appellant was removed before he made confessional statement. He was given chance to think and after fulfilling the requirements of section 164 and 364 Cr.P.C the learned Magistrate recorded the confessional statement of the appellant. The statement was sealed and produced in court which was verified by the Magistrate.

11. The contention of the learned counsel for the appellant that the judicial confession was recorded after delay and as such has lost its credibility, is not acceptable in the present case. The appellant was arrested on 30.1.2013 and just after eight days the confessional statement was recorded by the Judicial Magistrate. No mark or injury on the person of appellant was observed by the Magistrate. Similarly no such mark or injury was shown by the appellant to the Magistrate to indicate torture, on the question of learned Magistrate the

appellant denied any kind of torture by any one, after making such confessional statement the appellant was sent to judicial lock up. The recovery of stolen car and the pistol from the appellant just few hours after the occurrence by a different police provide corroboration to the confessional statement. FIR No.3/2013 under section 13-E Arms Ordinance, 1965 was registered after few hours of the present occurrence of robbery , the contents of the said FIR cannot be ignored as the same is an official record clearly mentioning the time of its registration, as 2.00 a.m on 20.1.2013 i.e just after few hours of the occurrence.

The name of the appellant along with number of stolen vehicle is duly mentioned in the FIR. On search a pistol was recovered from the possession of appellant. The appellant remained unable to give any explanation for having possession of this stolen vehicle of the deceased or to explain as to how the deceased received fire arm injury when he was last seen alive with the appellant only few hours back when he and the deceased was together in the said car.

The statement of the deceased was not formally recorded but the doctor has admitted while appearing in court that the deceased informed the occurrence of

robbery in which he received fire arm injury. Statements of P.W.2 and P.W.3 fully support the prosecution case and provide sufficient corroboration to the confessional statement of the appellant. The non-availability of FSL report is a circumstance which goes against the prosecution but in presence of other incriminating evidence and material, it does not affect the prosecution case. The appellant has taken the stance of false involvement due to land dispute but did not produce any defence witness or documents in this respect.

12. The net result is that the prosecution has built the case against the appellant on the basis of circumstantial evidence, evidence of last seen of the deceased with the appellant and thereafter he was found injured having fire arm injury and his car was found missing, evidence regarding the recovery of the stolen car from the appellant just after few hours of the occurrence, the medical evidence confirming the time of occurrence, the weapon of offence and the cause of death, the prosecution has also relied on the retracted judicial confessional statement.

13. The matter of recording judicial confession after delay has been settled by the Hon'ble Supreme Court of Pakistan in the case of *Ahmad Hassan and another Vs. The State* reported as *PLJ 2001S.C 584* it has been held.-

- **--Ss.302/34---Qanun-e-Shahadat (10 of 1984), Art.41---Appreciation of evidence---Delayed confession---Delay in recording of confession by itself cannot render confession nugatory if otherwise it is proved on record to have been made voluntarily---**

It is also well settled that sole retracted judicial confession can be made a ground for conviction if such judicial confession is made, voluntary and is of confidence inspiring and has not been obtained under coercive measures. Reliance is placed on the case of *Dadullah and other Vs. The State* reported as 2015 SCMR-856. In the case of *Wazir Khan Vs.The State* reported as 1989 SCMR-446, it has been held that;

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

14. The judicial confession is accepted at higher pedestal than the extra judicial confession mainly because the judicial confession has to be recorded by a Judicial Officer after fulfilling the requirements mentioned under sections 164, 364 Cr.P.C and Chapter 3 of Vol.3 of High Court Rules and Orders. After fulfilling such requirements judicial confession is presumed to be genuine and is admissible in evidence against the accused who made the same but if at some latest stage the same is retracted then the court can seek corroboration from other unimpeachable source to convict the accused.

15. In the present case as mentioned above, besides the retracted judicial confession of the appellant, there is evidence of last seen. The medical evidence confirming the time of occurrence, the weapon used and the cause of death, all these things provides strong corroboration to the judicial confession of the appellant. No doubt, the appellant appeared as his own witness under section 340(2) Cr.P.C to prove his version but he remained unable to produce any material or evidence leading to his false involvement in this case. He remained unable to give any explanation for having possession of stolen car of

deceased just after few hours of occurrence and the victim who was with him only few hours back was found injured on the road having fatal fire arm injury.

16. As the proof mentioned in section 7 of Offences Against Property (Enforcement of Hudood) Ordinance,1979 required for conviction under section 17(4) of Offences Against Property (Enforcement of Hudood) Ordinance,1979 is not available in this case, so under section 20 of Offences Against Property (Enforcement of Hudood) Ordinance,1979 the appellant is liable to be convicted for the offence mentioned in P.P.C. The appellant is found fully involved under section 394 PPC. He was found solely responsible for committing robbery and murder and as such cannot be convicted under section 396 PPC. For conviction under section 396 PPC minimum five accused persons are necessary, *So, in the circumstances the conviction of the appellant under section 396 PPC is converted into one under section 394 PPC but his sentence of life imprisonment is upheld. His sentence of fine is reduced from Rs.200,000/- to Rs.50,000/- and in default he shall further undergo S.I for three months.* As the appellant was charged for committing '*Harrabah*' during

which he committed murder, under Ist Proviso of section 24 of Offences Against Property (Enforcement of Hudood) Ordinance,1979, he can be convicted under section 302(b) PPC, without framing new charge. The appellant is also ***convicted under section 302(b) PPC*** for committing murder of Safar Muhammad deceased in the process of robbery. The appellant was a young man of 20/22 years of age. He has got no previous record and the matter as to how murder was committed is based on his sole confessional statement, so, while taking lenient view he is sentenced to **life imprisonment under section 302(b) PPC. He shall pay compensation of Rs.50,000/- to the legal heirs of the deceased as required under section 544-A Cr.P.C and in default of payment of compensation he shall further undergo two months S.I. All the sentences of imprisonment shall run concurrently. Benefit of section 382-B Cr.P.C is extended to the appellant.**

With this alteration in conviction and sentence, the jail criminal appeal

No.18-I-2015 is ***dismissed.***

17. As discussed above, no ground for enhancement of sentence is made out.

So the revision petition No.3-I-2015 is also *dismissed in limine*.

MR.JUSTICE SH.NAJAM UL HASAN

MR.JUSTICE DR.FIDA MUHAMMAD KHAN

**Announced on 10.02.2016
At Islamabad/
M.Akram/**

APPROVED FOR REPORTING.

MR.JUSTICE SH.NAJAM UL HASAN