IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
JUSTICE MRS. ASHRAF JAHAN
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

CRIMINAL APPEAL NO.01/I OF 2017

ADNAN RASHEED SON OF ABDUL RASHEED
RESIDENT OF KOTLA AGROR P.O.OGHI
DISTRICT MANSEHRA … APPELLANT

VERSUS

1. GUL NAWAZ S/O NIAZ MUHAMMAD
   CASTE TANOLI, R/O KOTLI P.O OGHI
   TEHSIL OGHI, DISTRICT MANSEHRA

2. ZULFIQAR ALIAS DORA S/O HAZRAT ALI KHAN
   CASTE QURAISH, R/O BANGASH BANDA
   TEHSIL OGHI, DISTRICT MANSEHRA

3. MUBARIK ZEB S/O GHULAM SARWAR
   CASTE SWATI, AND

4. GUL MUHAMMAD ALIAS GULLA SON OF
   KHANI ZAMAN CASTE GUJJAR,
   BOTH RESIDENT OF SHAMDHARA,
   TEHSIL OGHI, DISTRICT MANSEHRA

5. THE STATE … RESPONDENTS

COUNSEL FOR THE APPELLANT	…	MR. MUHAMMAD SHUAIB ABBASI ADVOCATE
COUNSEL FOR THE RESPONDENTS NO.1 TO 4.	…	MALIK MIANDAD KHAN, M/S. MUHAMMAD SARFARAZ RAJPUT AND SAEED AHMED AWAN, ADVOCATES.
COUNSEL FOR THE STATE	…	MR. ARSHAD AHMED KHAN, AAG, KHYBER PAKHTUNKHWA
FIR NO. AND POLICE STATION	…	NO.139 OF 2015 P.S. OGHI, MANSEHRA
DATE OF JUDGMENT OF TRIAL COURT	…	10.11.2016
DATE OF PREFERENCE IN FSC	…	03.01.2017
DATE OF HEARING	…	20.09.2017
DATE OF DECISION	…	20.09.2017

APPEAL UNDER SECTION 417 OF THE CODE OF CRIMINAL PROCEDURE, 1898 (ACT V OF 1898) READ WITH SECTION 24 OF THE OFFENCES AGAINST PROPERTY (ENFORCEMENT OF HUDOOD) ORDINANCE, 1979 (VI OF 1979).

JUDGMENT:

Mehmood Maqbool Bajwa, J: Respondents No.1 to 4 after facing trial in case F.I.R. No.139 of 2015 initially registered under Section 302, 324 read with Sections 34 of The Pakistan Penal Code, 1860 (Act No.XLV of 1860), which offences were later on substituted by an offence under Section 17(4) of The Offences against Property (Enforcement of Hudood) Ordinance, 1979 (VI of 1979), (hereinafter called "Ordinance VI of 1979") were acquitted through judgment dated 10.11.2016 handed down by the learned Sessions Judge Torghar (at Oghi).

2. Being aggrieved of the said conclusion, the appellant-Adnan Rasheed (P.W.3) (complainant of the crime report) has called in question the legality and validity of judgment by way of present appeal.

3. Facts in brief for the disposal of present appeal are that Adnan Rasheed (PW-3) son of Abdur Rasheed (deceased) got F.I.R bearing No.139 of 2015 (Ex.P.W.10/1) registered against unknown assailants with the accusation that on the intervening night of 29th and 30th of March, 2015, he alongwith his brother Faizan Rasheed (PW-4) and sister Kiran Bibi were sleeping in the corner room of his house while his father Abdur Rasheed (deceased) alongwith mother Pari Afza were sleeping in another room. At

about 2:10 A.M. (night), two unknown persons while scaling over the boundary wall entered in the house and went to the room where his parents were sleeping, upon which her mother raised hue and cry due to which he as well as his brother, Faizan Rasheed (PW-4) woke up and came in Veranda. His mother, as per contents, also came outside the room who made offer to the unknown assailants to take away whatever they want. Meanwhile, one of the assailants made fire with 30 bore pistol aiming at his father who sustained injury on his chest resulting in his death at the spot. Faizan Rasheed, his brother (P.W.4) made an attempt to overpower the said accused who with an intent to commit Qatl-e-Amd of his brother made fire causing injury on his left thigh and right hand. Companions of the accused as per version present outside the house also made firing. The accused inside the house made their escape good. The complainant party could not identify the assailants due to load-shedding.

Statement (Ex.P.W.1/1) of the complainant was reduced into writing by Muhammad Javed Khan, SHO (PW-1) who after getting information about the occurrence reached at the spot. The said SHO prepared injury statement of Faizan Rasheed (Ex.PW-1/2) and deceased Abdur Rasheed (Ex.PW-1/3). He also prepared inquest report (Ex.PW-1/4), sent the injured, Faizan Rasheed (PW-3) and dead body of the deceased to the local hospital

for medical treatment and post-mortem examination. The Station House Officer found a 30 bore loaded pistol lying on the path outside the house, which later on was taken into custody through recovery memo (Ex.PW-5/3) by Inspector Jehanzeb Khan (Investigating Officer) (PW-5).

The Investigating Officer (PW-5) also took into possession blood through cotton from the spot by two different memos, also secured five empties of 30 bore pistol (P2) through recovery memo (Ex.PW-5/3). During the investigation he also took into custody chaddar and glove lying at the spot vide memo (Ex.PW-5/3). The said Investigating Officer also took into custody four empties of 30 bore pistol lying outside the house witnessed through memo (Ex. PW-5/3). After arrest of the respondents No.1 to 4, judicial confession of respondents No.1 and 3, i.e., Gul Nawaz and Mubarik Zeb was recorded by Muhammad Sohail, Judicial Magistrate, Mansehra (PW-9).

4. Recovery of weapons of offence was effected from respondents No.2 to 4. During the course of investigation, it was concluded that the pistol lying on the path outside the house is owned by Gul Nawaz, respondent No.1.

5. After usual investigation and observing codal and legal formalities, Report under Section 173 of The Code of Criminal Procedure, 1898 (Act V

of 1898) (Hereinafter call "The Code") was submitted against respondents No.1 to 4 and one Zaboor, declared proclaimed offender.

6. Dr. Niaz, Principal Medical Officer (PW-2) medically examined Faizan Rasheed (PW-4) on 30.03.2015 and noted following injuries on his body:

"1. An entry wound measuring 1 cm dia was noted of the left side thigh middle region bleeding noted.

2. Corresponding exit wound was noted on medial aspect of left thigh.

3. An entry wound in dia was noted on the right hand dorsally and corresponding wound is noted on the right hand medially.

4. Corresponding wound noted on the overlying clothing.

Cause of injury was firearm injury."

The said injured after providing first aid was referred to District Headquarter Hospital, Mansehra. Exhibit PW-2/1 is the copy of medico-legal certificate.

On the same day, the said Medical Officer conducted autopsy on the dead body of Abdur Rasheed and noted following injuries:

"1. An entry wound 1 cm in dia was noted on the left side of chest 01 inch below the left nipple and slightly medially.

2. An exit wound measuring one and half cm in dia was noted on the right side chest posteriorly in the middle region. Bleeding from both wound noted. Hole is noted on the overlying Qameez."

Copy of postmortem report is Exhibit PW-2/2. Probable time between injuries and death was instantaneous while time between death and postmortem was noted 03 to 06 hours approximately.

7. The respondents No.1 to 4 when formally charged under Section 17(4) of The Ordinance VI of 1979, did not plead guilty and claimed to be tried.

8. The prosecution in order to prove its case produced Muhammad Javed Khan, SHO (PW-1), Dr. Niaz (PW-2), Adnan Rasheed, complainant (PW-3), Faizan Rasheed (Injured) (PW-4), Jehanzeb Khan, Inspector-Investigating Officer (PW-5), Muhammad Tariq, Moharrir-Head Constable (PW-6), Dildar Constable (PW-7), Chanzeb-Constable (PW-8), Mohammad Sohail, Judicial Magistrate, Mansehra (PW-9), Khanvez, Sub-Inspector (PW-10), Sher Mohammad (PW-11), Mohammad Afzal (PW-12) and Dildar Constable (PW-13).

The learned Special Public Prosecutor after giving up certain witnesses closed prosecution evidence.

9. The respondents No.1 to 4 while making statements under Section 342 of the Code denied the whole incriminating evidence and while pleading innocence alleged their false implication. The respondents neither appeared as witness nor produced any evidence in defence.

10. The learned Trial Court after hearing the arguments recorded judgment of acquittal assailed by way of present appeal.

11. The learned Counsel for the appellant while questioning the legality and validity of the judgment contended that there was sufficient and ample evidence to prove the guilt of respondents No.1 to 4 beyond shadow of doubt but the conclusion is result of mis-reading and non-reading of evidence. Elaborating the argument, it was contended that Gul Nawaz and Mubarik Zeb (respondents No.1 and 3) made judicial confession duly recorded by Mohammad Sohail, Judicial Magistrate, Mansehra (PW-9), sufficient by itself to prove the culpability of not only the respondents No.1 and 3 but also the respondents No.2 and 4, i.e., Zulfiqar alias Dora and Gul Mohammad alias Gulla. Making reference to the confessional statements of the said respondents (Ex.PW-9/3-Ex.PW-9/6), it was contended with vehemence that the statements, which are true and voluntarily were sufficient not only to prove the guilt of the said respondents but also inculpatory evidence against respondents No.2 and 4 but the said aspect was totally ignored by the learned Trial Court.

Continuing the arguments, it was submitted that recovery of pistol lying outside the house of the deceased as well as complainant witnessed through recovery memo and copy of license of respondent No.1, Gul Nawaz was a turning point in the investigation due to which it became possible to trace out the respondents, being assailants. It was further stated that Zulfiqar,

respondent No.2 got recovered 30 bore pistol through recovery memo (Ex.PW-5/10) while Mubarik Zeb, respondent No.3 led to the recovery of weapon of offence as is evident from (Ex.PW-5/12) and Gul Mohammad, respondent No.4 after pointation got recovered 30 bore pistol vide memo (Ex.PW-5/19). Further contended that the pistols recovered from respondents No.2 to 4 and owned by respondent No.1 alongwith the empties secured from the spot through recovery memo (Ex.PW-05/03) were sent for expert opinion and the reports of Forensic Science Laboratory (Ex.PW-05/27) and (Ex.PW-5/28) are in positive.

Making reference to the another report of Forensic Science Laboratory (Ex.PW-5/2), it was submitted that the finger impressions on the weapons of offence owned by respondent No.1 and recovered from respondents No.2 to 4 were sent for comparison and as per report, the finger impressions of the respondents No.1 to 4 taken during the course of investigation as well as on weapons of offence were found similar and identical. Further contended that Gul Nawaz, Zulfiqar and Mubarik Zeb, respondents No.1 to 3 during the course of investigation pointed out place of occurrence as is evident from memo (Ex.PW-5/9). Contended that Gul Mohammad, respondent No.4 also pointed out the place of occurrence witnessed through pointation memo (Ex.PW-5/16) which provides

corroboration to the case of the prosecution but the said aspect was totally ignored by the learned Trial Court. Argued that the conclusion drawn by the learned Trial Court is result of mis-reading and non-reading of evidence. To substantiate the contentions, help was sought from the dictum laid down in "ATLAS KHAN Vs. THE STATE" (1995 P.Cr.L.J. 1996), "AMAL SHERIN and another Vs. THE STATE" (PLD 2004 Supreme Court 371) and "MUSLIM SHAH Vs. THE STATE" (PLD 2005 Supreme Court 168).

12. Controverting the arguments, the learned Counsel representing the respondents while defending the impugned judgment contended that it is a case of no evidence as the respondents No.1 to 4 were not nominated in the F.I.R. Submitted that the deceased Abdur Rasheed was serving as Superintendent in the office of Frontier Constabulary and due to the office held by him, there was pressure upon the local Police resulting in false implication of the respondents. Submitted that implication of the respondents No.1 to 4 was result of malice in fact on the part of Mohammad Javed Khan, SHO (PW-1) and Jehanzeb Khan, Inspector-Investigating Officer (PW-5). To substantiate the contention, reference was made to the conclusion drawn by the learned Trial Court showing its concern over the conduct and efficiency of the said witnesses with further direction to the competent authority to initiate disciplinary proceedings against them.

It was further submitted that there is no direct evidence in order to connect the respondents No.1 to 4 in the occurrence.

Replying the arguments with reference to the evidentiary value of the judicial confession allegedly made by respondents No.1 and 3 and making reference to the statement of Mohammad Sohail, Judicial Magistrate (PW-09), it was contended that in view of the replies given in cross-examination by the said witness admitting that both the respondents were brought together who were made sit together on the dice and their handcuffs were not removed is sufficient to give an irresistible conclusion that the confession is sponsored and as such no implicit reliance can be placed upon it.

Making reference to the statements of complainant (PW-3) as well as injured, Faizan Rasheed (PW-4), it was argued that both the witnesses are not in agreement with each other on the material aspects of the case and conscious improvements were made by them with reference to number of the assailants entered in the house of deceased. Continuing the arguments, it was submitted that the statements of both the witnesses cannot be believed, relied and acted upon as there are material contradictions in the said statements. Referring to the recovery memos through which 30 bore pistols

were statedly recovered on the pointation of respondents No.2 to 4, it was submitted that the said recoveries are fake and fabricated and as such no implicit reliance can be placed upon the positive reports of Forensic Science Laboratory (Ex.PW-5/27-Ex.PW-5/28). Questioning the evidentiary value of the another report of Forensic Science Laboratory (Ex.PW-5/2), concluding that the finger impressions on the weapons of offence are of the respondents, it was contended that the said evidence was procured which even otherwise, cannot provide corroboration to the prosecution case. To substantiate the contentions, the learned Counsel representing the respondents sought help from the rule of law enunciated in "MUHAMMAD ISRAR and 5 others versus THE STATE" (1998 P.Cr.L.J. 383) and "Shirimati SEETAN versus THE STATE" (1988 P.Cr.L.J. 939).

Relying upon the Ratio expounded in "Haji BASHIR KHAN Vs. REHMAT GUL and 3 others" (2016 P.Cr.L.J. 568) and "MUHAMMAD ESSA Vs. The STATE" (2016 P.Cr.L.J. 853), it was contended that findings of acquittal cannot be lightly interfered unless and until are result of mis-reading and non-reading of evidence.

13. The learned Law Officer adopted the arguments advanced by learned Counsel for the appellant.

14. Heard adversaries and perused the record.

15. Prior to dealing with the respective contentions of adversaries with reference to evidence adduced, it is desirable to highlight the yardstick for interference in the judgment of acquittal. Moot point was examined by the Apex Court in "GHULAM SIKANDAR AND ANOTHER Vs. MAMARAZ KHAN AND OTHERS" (PLD 1985 Supreme Court 11) and it was held at Pages-18 & 19 as follow:

> *"(1) In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. This approach is slightly different than that in an appeal against conviction when leave is granted only for the re-appraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well-accepted presumptions : One initial, that, till found guilty, the accused is innocent; and Two that again after the trial a Court below confirmed the assumption of innocence.*
>
> *(2) The acquitted will not carry the second presumption and will also thus loose the first one if on points having conclusive effect on the end result the Court below: (a) disregarded material evidence; (b) mis-read such evidence; (c) received such evidence illegally.*
>
> *(3) In either case the well-known principles of re-appraisement of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observances of some higher principle as noted above and for no other reason.*
>
> *(4) The Court would not interfere with acquittal merely because on re-appraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If*

however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualised in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."

Same rule of law was enunciated in "RAHIMULLAH JAN Vs. KASHIF and another" (PLD 2008 Supreme Court 298), "MUHAMMAD TASAWEER Vs. Hafiz ZULKARNAIN and 2 others" (PLD 2009 Supreme Court 53), "Captain ABDUL RAHIM Vs. NAEEM SAGAR and others" (2009 SCMR 288), "THE STATE and others Vs. ABDUL KHALIQ and others" (PLD 2011Supreme Court 554) and "MUHAMMAD ZAMAN Vs. The STATE and others" (2014 SCMR 749).

Case law cited at bar by the learned Counsel for respondents also highlight the same parameters.

16. Keeping in view the above yardstick, we would like to examine the evidence adduced by the prosecution keeping in view the arguments advanced.

17. Case of the appellant-prosecution from which the present appeal has arisen is not based on direct evidence and rests upon circumstantial evidence.

In order to act upon the circumstantial evidence regarding the guilt of accused facing the trial, following principles are required to be kept in view.

(i) Facts so established must be consistent with the guilt of accused.

(ii) Circumstances must be conclusive and conclusion of guilt to be drawn must or should be established.

(iii) Suspicious, however, strong would not be substitute of proof.

(iv) Chain of evidence must be complete in all respect leaving no reasonable ground about the innocence of the accused.

(v) Evidence must have made one un-broken chain. One end must touch the crime and other neck of the accused.

(See: "Sharad Birdhichand Sarda V. State of Maharashtra" (AIR 1984 SUPREME COURT 1622), "IMRAN alias DULLY and another Vs. The STATE and others" (2015 SCMR 155), and "AZEEM KHAN and another V. MUJAHID KHAN and others" (2016 SCMR 274).

18. Evidence has to be scanned keeping in view the yardstick enumerated.

19. The prosecution in order to prove its case banked upon the following type of evidence.

(1) Evidence of Adnan Rasheed, complainant (P.W.3) and Faizan Rasheed, injured (P.W.4) implicating respondents No.1 to 4 by way of supplementary statements.

(2) Judicial confession (Retracted) of respondents No.1and 3.

(3) Pointation of place of occurrence (without any recovery) by respondents.

(4) Taking into custody 30 bore pistol from the path outside the house of deceased statedly owned by respondent No.1 having same number as mentioned in the licensed produced by said respondent.

(5) Recovery of weapons of offence on the pointation of respondents No.2 to 4.

(6) Recovery of SIMs and cells of respondents No.1 and 2 alongwith call date.

(7) Positive reports of Forensic Science Laboratory (Ex.P.W.5-27 and 28) concluding that the crime empties secured from inside and outside the house of deceased and appellant were fired from the weapons used by respondents No.1 to 4.

(8) Affirmative report of Forensic Science Laboratory (Ex.PW-5/2) suggesting the availability of finger impressions of respondents No.1 to 4 on thirty bore pistols used by them in the occurrence.

20. It is an admitted fact that the respondents No.1 to 4 were not named in the crime report. It specifically finds mentioned in it that the occurrence was

committed by some unknown accused as their identification was not possible in view of load-shedding.

The complainant, Adnan Rasheed (PW-3) in his direct statement deposed that he implicated the respondents No.1 to 4 in his supplementary statement. Faizan Rasheed (PW-4) who undeniably is injured witness also highlighted the mode of implication of the respondents in the similar manner. The evidence is not required to be examined in depth in view of the well-settled proposition of law regarding the evidentiary value and binding force of supplementary statement. There is no cavil with the proposition of law that no implicit reliance can be placed upon the supplementary statement which at the most can be equated as a statement under Section 161 of the Code. Reliance is placed upon "FALAK SHER alias SHERU Vs. THE STATE (1995 SCMR 1350) "AKHTAR ALI and others V. THE STATE" (2008 SCMR 6), "NOOR MUHAMMAD V. THE STATE (2008 SCMR 1556) and "KASHIF ALI Vs. The JUDGE, ANTI-TERRORISM, COURT NO.II, LAHORE and others" (PLD 2016 Supreme Court 951).

21. Admittedly, the complainant and Faizan Rasheed (P.W.3, P.W.4) had no personal information regarding the involvement of respondents No.1 to 4 as a culprit. Record reveals that respondent No.1 was implicated in view of

the evidence collected during the course of investigation regarding stated similarity of number of pistol taken into custody lying outside the house of deceased alongwith the license in the name of respondent No.1. Nothing is available on record even to suggest the culpability of the respondents No.2 to 4 at the time of investigation prompting the Investigating Officer (PW-05) to associate them in the investigation and stamping them as an accused.

22. Though it was contended that Faizan Rasheed (PW-4) is the injured eye-witness to which argument no exception can be taken but the argument would not advance the plea of appellant because the injuries sustained by him though prove his presence at the spot but cannot be taken as affirmative proof of the credibility of said witness which has to be tested independently. We are fortified in our view by law laid down in "NAZIR AHMAD Vs. MUHAMMAD IQBAL and others" (2011 SCMR 527).

23. Even otherwise, the statements of complainant (PW-3) and injured witness (PW-4) on certain aspects are contradictory and as such no implicit reliance can be placed upon it. We have noted that Adnan Rasheed (PW-3) in earlier part of his examination-in-chief stated that two persons scaled over the wall while in the middle of his statement he deposed that companions of the accused who were outside the room also made firing. The injured (PW-4) at the very outset stated in his statement that some persons were found

standing outside the room of his father while two persons were standing in front of his room.

24. There is glaring contradiction in the statements of complainant and injured with reference to number of accused as referred. Without going into further discussion, suffice it to say that it was impossible for both the witnesses to know the number of accused in load-shedding.

If it was possible, why the witnesses remained unable to indentify respondent No.1who is relative of the witnesses as admitted by injured (P.W.4) though relationship was questioned by complainant (P.W.3). The respondent No.1is also village fellow of complainant party which is admitted fact.

In the circumstances, we are unable to endorse the arguments advanced by the learned Counsel for the appellant as well as learned Law Officer with reference to the credibility of the witnesses.

25. Case of the prosecution also rest upon the judicial confession statedly made by respondents No.1 and 3 recorded by Muhammad Sohail, Judicial Magistrate (PW-09).

26. In order to act upon the judicial confession, three-fold proof is required. (1) That in fact it was made. (2) That it was voluntarily, and (3) It was truly made.

27. Perusal of the confessional statements of Gul Nawaz, respondent No.1 and Mubarik Zeb, Respondent No.3 (Ex.PW-9/3 and Ex.PW-9/6) clearly demonstrates that the mode and manner of the occurrence reflected in the confessional statements cannot be reconciled. Perusal of the confessional statement of the Respondent No.1, i.e., Gul Nawaz reveals that he while pointing out the house of deceased left the said place and went to his house and after hearing the report of firing he came to the spot. The fact was not endorsed by Mubarik Zeb in his confessional statement who first of all maintained that he was persuaded by Zulfiqar, (respondent No.2) to commit dacoity in the house of deceased but he did not submit before the said respondent and left for his house but again at about 10:00 P.M. on telephonic call of the said respondent, he again came, joined the rest of the respondents and later on occurrence was committed. The said respondent though did not disclose the presence of respondent No.1 at the spot at the time of occurrence but he also did not specifically mention that the respondent No.1 left the place after pointing out the residence of the deceased. According to the statement of Respondent No.1, Respondent No.2

on query made by the Respondent No.1 informed him that he made firing. Mubarik Zeb in his stated confession though stated that firing was made by Zulfiqar, Respondent No.2 but according to him he made only one fire and it was Zaboor (proclaimed offender) who also made firing. Admittedly in the occurrence more than one shots were fired by the assailants as is evident from prosecution case reflected in the ocular account as well as medical evidence and as such there is no option with us but to reach a conclusion that the confession of both the accused does not reflect the mode and manner of the occurrence as suggested by the prosecution. There is also a difference of opinion between the respondents regarding the meeting point of proclaimed offender. Likewise, the statement of Gul Nawaz, Respondent No.1 is totally silent regarding the meeting point of the respondents before this Court. According to respondent No.3, Mubarik Zeb, he on the call of Respondent No.2 went to his shop despite earlier denial where Respondents No.2 and 4 were already present but the same fact was not disclosed by respondent No.1.

28. The purpose and object of dacoity as reflected in the statements of both the Respondents was to give relief to the Respondent No.1 who was under debt. It is not understandable that the person who was under obligation of one Baji after showing the house of deceased left the place and

Respondents No.2 to 4 having no compulsion committed occurrence in order to rescue Gul Nawaz, Respondent No.1. There is nothing on record to suggest any relationship of Respondents No.2 to 4 with Respondent No.1. Though it can be argued on behalf of appellant that the Respondents No.2 to 4 were friends of Respondent No.1 but this presumptive argument would not advance the plea of appellant in order to reach the conclusion that confessional statements rings true and voluntarily in nature. At least the man (Respondent No.1), who was the victim of threats of creditor, if any, should have remained at the place of occurrence. It does not appeal to the reason that Respondents No.2 to 4 permitted the Respondent No.1 to leave the place of occurrence particularly when they got no interest, whatsoever. In the circumstances, we are constrained to reach the conclusion that the confessional statement attributed to Respondents No.1 and 3 cannot be said to be true and voluntarily.

29. According to the complainant (P.W.3), first of all fire was aimed at his father who fell down after receipt of injury and then upon Faizan Rasheed (P.W.4) who caught hold of the accused. The injured (P.W.4) turned the table by adding in cross-examination that firing in his father's room was made after firing upon him.

Perusal of direct statement of the complainant (P.W.3) suggests that one of the assailants made fire but stance of injured (P.W.4) is different who stated that he tried to catch hold of one of those persons and in cross of scuffle firing started.

Confessional statement of Respondent No.1 when scanned clearly reveals that it was Respondent No.4 who made fire while in his statement Mubarik Zeb attributed firing to two persons.

Confessional statement of Mubarik Zeb also suggests that first of all deceased became victim of firing and after that Faizan Rasheed (P.W.4) received injuries when he caught hold of Zaboor.

Admittedly, confessions made are contradictory in nature, cannot be reconciled with prosecution case, giving only adverse impression about the genuineness of said statements.

30. It is an admitted fact that makers of stated confession were produced in handcuffs before the Judicial Magistrate (P.W.9).

The certificates appended by the Magistrate (P.W.9) are nowhere suggestive that their handcuffs were removed. The learned Judicial Magistrate admitted this fact in cross-examination. We are conscious that in the next breath he stated that fact was mentioned in the order made on the same day for placing the same on the police file, copy of which is Ex.PW-9/8 but the explanation offered has least impressed us for the simple reason

that fact must have been mentioned in the certificates particularly when all others pre-cautionary measures taken were mentioned.

31. We are unable to understand the compulsion of learned Judicial Magistrate (P.W.9) to make separate order placing the same on the police file as deposed by him suggesting adoption of precautionary measures including the removal of handcuffs of respondents No.1 and 3. When the pre-cautions taken by him were incorporated in the certificates appended with confessional statements, neither there was any occasion nor legal justification to record separate order and that too for placing the same on the police file. It is un-usual and novel practice adopted by learned Judicial Magistrate.

We are positive in our mind that it was conscious, intentional but belated attempt on his part to rectify the irregularity going to the root of the case but same by no stretch of imagination would be sufficient to cure the omission, sufficient to cast serious doubt about the genuineness of confessional statements. While dealing with this aspect, provision of free atmosphere from all types of fear and compulsion to the makers of confession has to be kept in view. Reference may be made to the dictum laid down in "AZEEM KHAN and another Vs. MUJAHID KHAN and others" (2016 SCMR 274)

How persons in handcuffs even in the absence of police officials and Naib Court as deposed by learned Magistrate (P.W.9) can gather impression that they are free and independent to make any statement in order to satisfy mandate of their conscience?

32. The respondents No.1 and 3 in their respective statements recorded under Section 342 of The Code though admitted that they were taken into the court but categorically denied that they ever made any confession.

The respondents retracted the confession.

33. We are not un-mindful of the proposition of law that confession, judicial or extra judicial, whether retracted or not can be basis for recording conviction but Court has to satisfy itself that it was true and voluntarily made. (See MUHAMMAD AMIN V. THE STATE (PLD 2006 S.C. 219).

Discussion made in preceding paragraphs cast serious doubt about the genuineness of confessional statements and as such what to speak of its evidentiary value against other respondents (respondents No.2and 4), same cannot be believed, relied and acted upon even against its makers.

34. Though we are in agreement with the contention of learned Counsel for the appellant that confessional statement can be believed and acted upon and conviction can be recorded but nevertheless the argument would not advance the plea of appellant in view of the failure of the prosecution to

produce convincing evidence regarding truthfulness of the confessional statement.

Rule of law laid down in "MUSLIM SHAH Vs. THE STATE" (PLD 2005 Supreme Court 168) relied upon by the learned Counsel for the appellant in the circumstances of the case would not advance the plea of appellant. We have also gone through the rule of law expounded in "ATLAS KHAN Vs. THE STATE" (1995 P.Cr.L.J. 1996), but keeping in view the discussion made above, the rule of law banked upon by the learned Counsel for the appellant is distinguishable on facts.

Pursuant to above, no implicit reliance can be placed upon the confessional statements of respondents No.1 and 3 in order to prove their culpability.

35. Proposition of law canvassed by learned Counsel for the appellant keeping in view the provisions of Article 43 of The Qanun-e-Shahadat Order, 1984 (President Order No.10 of 1984) (hereinafter called "Order 10 of 1984") regarding the evidentiary value of confessional statement regarding culpability of co-accused though cannot be questioned but in view of the evidence led by the prosecution and discussed, how the same can be used as a circumstantial evidence against respondents No.2 and 4. It is worth

mentioning that during the course of investigation, effort was made by the Investigating Officer to get the confessional statements of Respondents No.2 and 4 recorded but it remained an unsuccessful attempt.

36. Viewed from whichever angle, no implicit reliance can be placed upon the confessional statements statedly made by Respondents No.1 and 3 not only against the makers but also against the Respondents No.2 and 4.

37. Grievance of the appellant as canvassed by learned Counsel for the appellant ignoring the evidence led by prosecution by the learned Trial Court regarding pointation of place of occurrence by the respondents as is evident from pointation memos (Ex.PW-5/8 and Ex.P.W-5/6) would not advance plea of appellant.

38. Perusal of the pointation memos does not suggest any recovery during that process and as such the same cannot provide any corroboration being inadmissible evidence. Reliance is placed upon "MUHAMMAD RAMZAN Vs. THE STATE" (PLD 1957 (W.P.) Lahore 956), "NAEEM AKHTAR and others Vs. THE STATE" (1993 Pakistan Supreme Cases (Crl.) 845) and ZIAUL REHMAN Vs. THE STATE (2000 SCMR 528).

39. Recovery of weapons of offence on the pointation of Respondents No.2 to 4 and affirmative reports of Forensic Science Laboratory (Ex.PW-5/27-Ex.PW-5/28) were also heavily relied upon by the learned Counsel for the appellant. The adversary questioned the recovery of weapons of offence and also disputed the binding force of the reports. This aspect of evidence will also not improve the case of appellant for two-fold reasons. First, the positive reports as pointed out by itself cannot prove the culpability of the Respondents because it appears that crime empties as well as weapons of offence statedly owned by Respondent No.1 and got recovered by Respondents No.2 to 4 were sent together on 22.04.2015 though the crime empties as well as weapon of offence allegedly owned by Respondent No.1 in view of the stated similarity of number of pistol mentioned in the license were taken into custody by the Investigating Officer on 30.03.2015. It is not understandable why the crime empties and the pistol statedly owned by Respondent No.1 were kept at Police Station and were not sent immediately. Sending the weapons of offence and the crimes empties together cause serious doubt about evidentiary value of reports and in the circumstances no reliance can be placed upon the said reports.

Even otherwise, recovery of weapons of offence coupled with positive reports of Forensic Science Laboratory is corroborative in nature which by

itself would not be sufficient to prove the guilt of Respondents No.1 to 4. There is no such confidence inspiring evidence to which these reports can provide corroboration.

40. There is another documentary evidence led by the prosecution in the shape of another report of Forensic Science Laboratory (Ex.PW-5/2). It has come in the evidence of prosecution that after arrest of Respondents No.1 to 4 their fingerprints were obtained and the weapons of offence, attributed to Respondent No.1 and got recovered by Respondents No.2 to 4 also had finger impressions of said Respondents which were sent for comparison resulting in receipt of affirmative report but nevertheless the report which is a corroborative piece of evidence would not be sufficient to advance the plea of prosecution in order to suggest perversity of the conclusion assailed by way of present appeal.

41. Matter can be examined from another angle as well. Mode and manner of recovery of pistol statedly owned by Respondent No.1 and its safe custody is also under serious doubt in view of contradictory stance.

According to the complainant (P.W.3) pistol was lying outside the house on the path which he handed over to the police.

However, Javed Khan, S.H.O (P.W.1) narrated different version regarding picking the weapon by him. Same fact was deposed by Jehanzeb Khan, Inspector-Investigating Officer (P.W.5).

It is further to be noted that according to Investigating Officer (P.W.5) Head Proficient was called who procured finger prints. It is not known at what time and from which place the said official came? Nothing is available on record to suggest the safe custody of said pistol during this period.

According to the Investigating Officer, pistol was sealed after obtaining finger prints. In the circumstances, there may be finger prints of more than one person on the said weapon. Report of Forensic Science Laboratory (P.W.5/2) does not suggest any such thing.

42. Recovery of mobile phones and SIMs from respondents No.1 to 4 through recovery memos (Ex.P.W.5/4-Ex.P.W.5/33) is another piece of evidence heavily relied upon on behalf of appellant further banking upon call data collected during the course of investigation through recovery memo (Ex.P.W.13/1).

Perusal of recovery memo (Ex.P.W.5/33) reveals that Gul Muhammad did not produce cell and SIM personally and it was his father who produced the same.

One can well imagine the evidentiary value of this recovery in the circumstances.

Jehanzeb Khan, Inspector-Investigation Officer (P.W.5) in cross-examination admitted that he did not obtain any report about the ownership and registration of SIMs collected. While replying another question he also admitted that from SIMs No.0340-8616413 and 0346-9624761 there was no inter-se contact.

SIM number 0340-86161413 was recovered from respondent No.1 while SIM No.0346-9624761 was produced by respondent No.2.

The witness further stated that as per call data, there was contact between respondents No.1 and 2.

Contact between the said respondents, if any, by itself would not be sufficient to improve the case of prosecution in the absence of detail of conversation.

The evidence as such though heavily relied upon looses its significance.

43. Argument by learned Counsel for the appellant that the appellant got no motive to implicate the respondents No.1 to 4 falsely would not advance his plea as the prosecution was under legal compulsion to produce convincing and corroborative evidence in order to prove culpability of respondents but the prosecution failed to produce such type of evidence.

44. Viewed from whichever angle, we are of the considered view that evidence led by prosecution was insufficient, not worthy of credit, inadmissible and as such the view concluded by learned Court is neither perverse, arbitrary nor artificial and speculative.

By no stretch of imagination it can be said to be result of mis-reading and non-reading of evidence.

Evidence adduced by prosecution neither fulfills the yardstick enumerated to make interference in the judgment assailed concluding acquittal nor satisfy the criteria to act upon the circumstantial evidence.

45. Epitome of above discussion is that while endorsing the judgment impugned, we dismiss the appeal.

JUSTICE MRS. ASHRAF JAHAN

MR. JUSTICE MEHMOOD MAQBOOL BAJWA

Dated, Islamabad the
20 September, 2017
M.M Akhlaq