IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE AGHA RAFIQ AHMED KHAN
MR. JUSTICE SYED AFZAL HAIDER
MR. JUSTICE SHAHZADO SHAIKH

JAIL CRIMINAL APPEAL NO.176/I OF 2006

Muhammad Rafique alias Feeqa son of Muhammad Yousaf,
Caste Rajpute, resident of Pul Aik, Naikapura, Sialkot.

.... Appellant

Versus.

The State .... Respondent

CRIMINAL REVISION NO.6/I OF 2007

Inam Ullah son of Hassan Din Caste Jat
R/o Pul Aik, Pasrur Road, Tehsil and District Sialkot

Petitioner

Versus

1. Muhammad Rafique son of Muhammad Yousaf Caste Rajput
R/o Pul Aik Naikapura, Sialkot.

2. The State .... Respondents

Counsel for appellant	....	Mr. Muhammad Yousaf Zia, Advocate
Counsel for the petitioner	....	Mr. Muhammad Saliheen Mughal, Advocate
Counsel for State	.....	Mr. Muhammad Irfan Malik, Additional Prosecutor General
FIR No. Date and Police Station	.....	536/05, 13.11.2005 Saddar, Sialkot
Date of Judgment of trial court	.....	27.03.2006
Date of Institution J.Cr.A. No.176/I of 2006	.....	03.07.2006
Date of Institution of Revision	....	13.03.2007
Date of hearing	.....	21.02.2011
Date of decision	.....	08.03.2011

JUDGMENT

SYED AFZAL HAIDER, Judge.- Muhammad Rafique, appellant through the instant Jail Criminal Appeal No. 176/I of 2006 has challenged judgment dated 27.03.2006, delivered by learned Additional Sessions Judge Sialkot, whereby he was convicted under section 302 of Pakistan Penal Code and sentenced to life imprisonment. The appellant was also convicted under section 377 of Pakistan Penal Code and sentenced to five years rigorous imprisonment with a fine of Rs. 10,000/- and in default of non payment of fine to further undergo a period of six months simple imprisonment. It was also directed that the accused will "pay compensation in the sum of Rs. 1,00,000/- to the legal heirs of the deceased and in default of payment of compensation, he shall further undergo six month S.I". The sentences on both counts were directed to run concurrently. The accused was granted the benefit of section 382-B of the Code of Criminal Procedure.

2. Complainant Inam Ullah P.W.3, preferred Criminal Revision No. 6/I of 2007 wherein he prayed for enhancement of sentence of

accused/respondent Muhammad Rafique and also prayed for his conviction under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentence according to law.

INCIDENT AND INVESTIGATION

3. Brief facts of the case were narrated by complainant Inamullah in his oral statement before PW.11 Abdur Rashid S.I. of Police Station Sadar Sialkot on 13.11.2005 which was duly recorded by him. The complainant, a school teacher by profession and posted at Noor Pura Primary School, stated that he went to perform his duty on 12.11.2005 and his son Muhammad Ahsan aged 11/12 years, student of 7th class in Government High School No.2, also left for his school. His son did not return home in the afternoon whereupon he undertook his search but without any success. Next day on 13.11.2005, he alongwith Muhammad Younus and Muhammad Sharif again resumed search of his minor son. As they reached Dera Sapaal near Hussain Pura, they encountered a crowd. On enquiry they found the people had gathered around a cadaver. He identified the corpse as dead body of his son Ahsan who had been apparently

murdered with some sharp edged weapon by some unknown person. The complainant left the dead body under the care of his companions and proceeded to the police station to lay information of the crime.

4. Abdul Rashid S.I. recorded statement, Ex.P.C. of the complainant and after incorporating the necessary foot note sent the same to the Police Station through Muhammad Khalid 50/C for formal registration. A formal FIR No.536/05, Ex. PC/2 was registered by Muhammad Arshad, ASI at the Police Station Saddar, Sialkot under section 302 PPC.

5. Investigation ensued as a consequence of the registration of crime report. Investigation was initiated by Abdul Rashid, S.I. P.W.11 who rushed to the spot same day and inspected the place of occurrence. He prepared rough site plan of place of recovery of dead body which was Ex.PK. and took into possession blood stained earth from the spot vide recovery memo Ex.PE. He also wrote down statements of witnesses under section 161 of the Code of Criminal Procedure and prepared application for postmortem Ex.PL, injury statement Ex.PM as well as Inquest Report

Ex.PN was prepared. The dead body of deceased Muhammad Ahsan was handed over to Muhammad Khaliq, Constable No.1549 for post-mortem examination. The Investigating Officer also took into possession the last worn clothes of deceased i.e. Shirt P-1, Pant P-2 and Chappal P-3 vide recovery memo Ex.PG. Post mortem report was produced before him by Muhammad Hanif Constable PW.2. The Investigating Officer deposited all the articles with Moharrir of the Malkhana for safe custody which he had received from Muhammad Hanif Constable alongwith blood stained earth. On 14.11.2005 the complainant submitted an application Ex.PD before the SHO whereafter the Investigating Officer put on record the supplementary statement of Inam Ullah complainant. The complainant also produced Ch. Allah Rakha and Shah Zaman before the Investigating Officer who jotted down their statements which disclosed that an extra judicial confession had been made before them by the accused. On 22.11.2005 he arrested accused Muhammad Rafique from Akbarabad chowk, Sialkot in the presence of PWs Muhammad Iqbal and Akbar. On personal search of the accused, a school identity card P4, belonging to Ahsan deceased, was recovered and

taken into possession vide recovery memo Ex.PF. On 26.11.2005 the accused, while in custody reportedly made disclosure about the place of occurrence where he committed murder of minor Muhammad Ahsan.

6. After finalisation of investigation of the crime information an investigation completion report under section 173 of the Code of Criminal Procedure was submitted by local police in the court requiring the accused to face trial. The learned trial court, after receipt of police report, framed charges against the accused under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with section 377 of Pakistan Penal Code as well as section 302 of Pakistan Penal Code. The accused did not plead guilty and claimed trial.

PROSECUTION CASE BEFORE TRIAL COURT

7. The prosecution, in order to prove its case, produced as many as 11 witnesses at the trial. The gist of deposition of the witnesses is as under:-

i. Tahir Saleem, draftsman appeared at the trial as P.W.1 and stated that on 15.11.2005 he inspected the place of occurrence and took

rough notes on the same day. He prepared the site plan and handed over the same to the Investigating Officer on 18.11.2005.

ii. Muhammad Hanif No. 942/LHC appeared as P.W. 2 stated that Muhammad Khaliq, Head Constable No.1549 escorted the dead body of the minor victim for post-mortem examination. The doctor handed over to him last worn clothes i.e. shirt, pant and chappal of the deceased which articles were given to the Investigation Officer in the presence of witnesses.

iii. Inam Ullah, complainant appeared as P.W.3. He endorsed the contents of his crime report.

iv. Muhammad Younis P.W.4 supported the prosecution version.

v. Muhammad Akbar appeared at the trial as P.W.5 deposed that on 12.11.2005 at about 4.00.p.m. he alongwith Muhammad Iqbal (given up P.W) was present at Chowk Talab Sheikh Maula Talab Bukhsh when he saw Muhammad Rafique accused taking the deceased on a Chand Gari Rickshaw toward Kingra Morr. The witness informed Inam Ullah, complainant about this fact on 14.11.2005.

vi. Saleem Ullah, Constable No. 1254 was examined as P.W.6 before the trial court. He stated that Muhammad Rafique accused in his presence made disclosure about the occurrence and led the police to the spot for recovery of crime weapon. The accused, allegedly disclosed further that he could point out the place of occurrence where the deceased was murdered after he had committed sodomy with him. Saleem Ullah is also a witness of the alleged recoveries made on the pointation of accused.

vii. Muhammad Khalid Javed, Head Constable No.582 appeared as P.W.7 stated that on 13.11.2005 the Investigating Officer entrusted him with a sealed parcel of blood stained earth which was retained by him in the Malkhana. On 22.11.2005 he handed over the same to Muhammad Afzal, Constable No.292 for onward transmission to the Office of the Chemical Examiner, Lahore. He also received a sealed parcel containing Churri on 26.11.2005 which was handed over to Muhammad Afzal, Constable No.292 on 16.12.2005 for being deposited in the Office of Chemical Examiner, Lahore.

viii. Ch. Allah Rakha appeared as P.W.8 stated that on 17.11.2005 he alongwith Shah Zaman P.W was present in his grocery shop situated at Quaid-e-Azam Street near Pul Aik, Sialkot City when accused Muhammad Rafique came to him and made confession about the murder of Muhammad Ahsan deceased.

ix. Muhammad Afzal, Constable No.292 appeared as P.W.9 and stated that Khalid Javed Moharrar of the Malkhana handed over to him the sealed parcel containing blood stained earth on 22.11.2005 and weapon of offence i.e. Churri on 16.12.2005 which were duly deposited in the Office of the Chemical Examiner Lahore intact.

x. Dr. Munawar Hayat Uppal, Medical Officer, Allama Iqbal Memorial Hospital, Sialkot had conducted post-mortem on the dead body of Muhammad Ahsan deceased. He appeared at the trial as P.W.10. He disclosed the details of injuries found on the dead body of deceased.

xi. Abdul Rashid, S.I. appeared as P.W.11. He was the Investigating Officer whose role and performance has already been mentioned in an earlier paragraph of this Judgment.

DEFENCE PLEA AT THE TRIAL

8. The learned trial court, after close of the prosecution evidence, examined accused Muhammad Rafique under section 342 of the Code of Criminal Procedure wherein the latter took up the plea of innocence. He made a detailed statement in response to Question No. 10: "Why this case against you and why the P.Ws have deposed against you?" The statement is as under:-

> "I am a poor man, football stitcher by profession. I used to work under the command and control of Muhammad Akbar, P.W.5, who was my Thakedar (contractor) and maker of footballs, who works for Anwar Khawaja Industries, Sialkot. Said Muhammad Akbar did not pay my wages which extends up to Rs. 10,000/-. I demanded my arrears (balance amount) from said Muhammad Akbar but he did not pay heed to my repeated demands. I complained it to the owner of the factory who scolded Muhammad Akbar to solve my grievance. On my complaint to the owner of factory Muhammad Akbar P.W. was annoyed with me.
>
> "As the murder of Muhammad Ahsan deceased (nephew) of Muhammad Akbar P.W was blind murder which was witnessed by nobody. Muhammad Akbar

tried to kill two birds with one stone by involving me falsely in this case and by getting rid of my wages as footballs stitcher under him.

"Neither I took the deceased on motorcycle Rishawa with me nor Muhammad Akbar P.W.5 and Muhammad Iqbal (given up P.W) had seen me. The story of last seen evidence on 12.11.2005 at 4.00.p.m. at Talab Sheikh Maula Talab Bukhsh had been fabricated by Muhammad Akbar P.W. with the connivance of other P.Ws and I.O. Abdul Rasheed, S.I.

"All the prosecution witnesses are closely related to each other. P.W.4 Muhammad Younas and P.W.5 Muhammad Akbar are real brothers of complainant Inam Ullah, P.W.3. Muhammad Iqbal given up P.W the witness of last seen and Allah Rakha P.W.8 the alleged witness of extra judicial confession are also closely related to the above said three brothers, Muhammad Iqbal given up P.W. is cousin of their mother and Allah Rakha P.W.8 is their first cousin (taya-zad).

"As all the star witnesses of this case are chips of the same block, deposed against me falsely and malafidely. Muhammad Akbar P.W.5 played a pivotal role to connect me falsely in this case due to my wages dispute with him. The story of last seen evidence and extra judicial confession had been maneuvered and engineered by the above said P.W.5 with the connivance of Abdul Rasheed, S.I. (I.O. of the case)."

The accused did not make statement on oath under section 340(2) of the Code of Criminal Procedure nor produce any evidence in his defence.

REASONS FOR RECORDING CONVICTION

9. The learned trial judge after completing codal formalities of the trial returned a verdict of guilt against the accused. Conviction and sentence followed as noted in the opening paragraph of this Judgment. Hence the present appeal against conviction and sentence. The Revision Petition for enhancement of sentence, moved by complainant, is also before us.

10. The gist of the reasons that found favour with the learned trial court for convicting accused have been summed up in paragraph 33 of the impugned judgment which are as follows:-

> "There is nothing on record to reveal that the complainant or PWs have any enmity with the accused. The prosecution through circumstantial evidence, evidence of extra judicial confession, recovery evidence and medical evidence succeeded to prove that the accused Muhammad Rafique has committed the murder of the deceased Ahsan son of the complainant on 12.11.2005 after committing sodomy with him. Hence the accused Muhammad Rafique is awarded sentence of life imprisonment (R.I). Since the accused himself has appeared before PW.6 for extra judicial confession and he has been involved through supplementary statement,

hence keeping in view of this situation he is awarded life imprisonment instead of death."

11. Learned trial Court, in paragraph 25 of the impugned judgment, observed that the case depended upon:-

i. Circumstantial evidence,

ii. Evidence of extra judicial confession,

iii. Medical evidence and

iv. Recovery evidence.

The reasons may be summed up as follows:-

i. There was no dispute as regards the death of victim by violence. The time and place of occurrence were also not in dispute;

ii. School identity card was recovered from the pocket of accused immediately upon his arrest;

iii. Crime weapon and blood stained Churri were recovered on the pointation of accused;

iv. Injuries 1 through 8 were caused by sharp edged weapon whereas injury No.9 through 15 were the result of sodomy prior to his murder;

v. Positive report of Chemical Examiner about the presence of semen;

vi. Opinion of doctor that the victim was "sodomised before the murder."

vii. Absence of semen grouping and lack of medical certification about potency of accused were not sufficient to exonerate the accused;

viii. The accused raised a defence plea but failed to prove it;

ix. Accused did not make a statement on oath under section 340(2) of the Code of Criminal Procedure;

x. The accused failed to produce owner of Anwar Khawaja Industries Limited to establish that a protest against the complainant was lodged by accused whereupon complainant was scolded.

xi. The absence of enmity of witnesses against the accused;

xii. Extra judicial confession made by accused and of course;

xiii. The last seen evidence established that deceased was seen with accused by witnesses".

The learned trial court however observed that since the accused had himself appeared before PW.6 to make an extra judicial confession and further that he had been involved through a supplementary statement of the complainant, so under the circumstances instead of capital punishment, the accused was awarded life imprisonment.

12. The accused, during his statement without oath, had expressed an apprehension that the prosecution had cited Muhammad Akbar as a witness with whom he had a pecuniary dispute. The accused asserted that he was a football stitcher and worked for Muhammad Akbar PW.5 who supplied footballs to Anwar Khawaja Industries Sialkot. His wages amounting to Rs.10,000/- had not been paid by PW.5 to him. The accused had consequently referred this monetary dispute to the owner of Industry

who reprimanded Muhammad Akbar PW.5 and asked him to make payment to accused. In this back ground learned trial court observed that owner of the factory, to whom the dispute was referred, was not produced in defence by the accused and consequently it was observed that the accused had failed to discharge the burden of proof. The learned trial court proceeded to observe:-

> "In view of the principle laid down in 2005 SCMR 810, when a defence plea is raised by the accused, the burden to prove the same lies upon him but in this case the accused has neither made this statement on oath under section 340(2) Cr. P.C. nor has examined owner of Anwar Khawaja Industries who allegedly scolded Muhammad Akbar PW.5 on the complaint of accused Muhammad Rafique. The accused Muhammad Rafique has badly failed to prove that he has been involved in this case on the basis of version recorded by him under section 342 Cr. P.C."

ARGUMENTS OF CONTENDING PARTIES

13. We have gone through the file and perused the record with the able assistance of learned counsel for the contending parties. The evidence available on file including statement of appellant has been perused. The

relevant portion of the impugned judgment have been scanned. Points urged by the contending parties have been noted.

14. Learned counsel for the appellant has raised the following points for our consideration:-

i. That the instant case is a blind murder and there is no direct evidence available on record and consequently the court must examine the prosecution evidence with care and caution;

ii. That it is a case of circumstantial evidence and in such a situation all the links of the story must not only be fully established but should lead conclusively to the guilt of accused;

iii. That the recoveries in this case are fabricated. Churri, allegedly stained with human blood was recovered on 26.11.2005 vide memo Ex.PA. It has neither been attested by any independent witness from public nor is there any report of the Serologist that the allegedly recovered churri, on the pointation of appellant, was stained with human blood. The prosecution has however placed on record Ex.PS, a report of the Serologist

that the earth was stained with human blood. Absence of such a positive report qua the crime weapon renders the alleged pointation and recovery meaningless;

iv. The story that the I.D. Card of the deceased was recovered from the custody of appellant at the time of his arrest on 22.11.2005 vide memo Ex.PF is also a concoction;

v. That neither any Rickshaw Chand Gari was recovered nor it was proved that the appellant owned or possessed or ever used to ply such a vehicle;

vi. That the site plan Ex.PA of the place of occurrence, made by Draftsman PW.1 on 18.11.2005, and the site plan Ex.PK prepared by Investigating Officer PW.11 is dated 13.11.2005 did not show any heap of brick at the place of occurrence but the third site plan Ex.PP, prepared on 26.11.2005 by the same Police Officer PW.11, all of sudden introduced a heap of bricks from where the Churri, weapon of offence was recovered allegedly on the pointation of appellant. This is an instance of clear

padding with ulterior motive to create an additional link to falsely connect the appellant with murder caused by a sharp-edged weapon i.e, the Churri;

vii. That the medical evidence does not connect the appellant either with the commission of un-natural offence or the crime of murder. It was also urged that the Medical Officer PW.10 stated that he was not certain about the element of penetration. The doctor presume that since he had seen blood around the anal region so he imagined that there was penetration;

viii. That the evidence relating to extra-judicial confession coming from Chaudhry Allah Rakha, PW.8, the cousin brother of complainant, cannot be believed as neither the appellant was apprehended by him nor was he interested in the welfare of accused to help him in resolving the issue; and lastly

ix. It was urged that in cases without direct evidence and weak circumstantial evidence, phony recoveries and cooked up extra-judicial confession, it is not safe administration of justice to maintain conviction.

15. Learned counsel for the complainant, who is also representing PW.3 Inam Ullah complainant-cum-petitioner in Criminal Revision No.6/I of 2007, canvassed the proposition that the prosecution version has been fortified by the extra-judicial confession coupled with the evidence of last seen provided by PW.5 Muhammad Akram. Reliance was also place on medical evidence which indicated that the deceased suffered 15 injuries with sharp edged weapons. He asserted that in order to satisfy his lust the appellant has acted in an atrocious manner. Learned counsel also placed reliance on the recovery of School Identity Card of deceased from the pocket of appellant. Reliance was also placed on recovery of blood stained Churri and the pointation of place of occurrence by the appellant. Lastly it was urged that the circumstantial evidence leads to the only inference that appellant committed a gruesome murder for which capital punishment is the only sentence that is called for under the law. It was also asserted that there are no extenuating circumstances and the reason given by learned trial court in awarding alternate punishment is contrary to legal principles.

16. Learned Deputy Prosecutor General on the other hand stated that it was a cruel murder and there was no reason for the complainant to falsely nominate the appellant. Reliance was placed on Articles 20 through 22 of Qanun-e-Shahadat Order, 1984 to assert that the evidence produced by prosecution is relevant and hence admissible. However the learned counsel did neither support the plea of enhancement of sentence nor of conviction of appellant under section 12 of Ordinance VII of 1979. He said that he would be content if the conviction and sentence recorded by the learned trial court was maintained.

EXTRA JUDICIAL CONFESSION

17. Extra judicial confession has been held to be a weak type of evidence with the result that in itself it cannot become the basis of conviction unless it is corroborated independently by strong piece of evidence. However in the following precedents "reliable, trustworthy and beyond reproach extra-judicial confession made by accused" was relied upon for recording conviction. Reference 2000 YLR 541. See also 2004 SCMR 204 and 1998 MLD 944.

18. The Courts, as a matter of abundant caution, do not accept extra-judicial confession when it is made before two persons in one sitting, or when there is a joint confession by more than one accused or it is made while accused is in police custody. It is also not worth relying when the person before whom it is made is of no consequence and can neither help the accused nor he is in a position to wield effective influence over the aggrieved party/complainant.

19. There is however another view adopted by some Muslim jurists. A confession made before a court of law is accepted as a genuine confession but a confession outside the court has no value because refusal to accept the extra-judicial confession amounts to retraction and conviction cannot be based upon a retracted confession. Some Muslim Jurists however accord value to an extra-judicial confession if made in the presence of witnesses. It may therefore be observed that it is not at all safe administration of justice to set a premium on an extra judicial confession in cases which entail capital punishment particularly when it has been denied by the maker.

20. According to Imam Abu Hanifa the confession must be made before a Court. Thus extra-judicial confession would not be valid and evidence will be accepted on that score because if the accused confesses before the Court then the offence is deemed to have been proved by his confession and not by the testimony of witnesses. In case he refuses to confess before the Court, his refusal will be considered as that of the extra-judicial confession. However according to Imam Malik and Imam Shafii extra-judicial confession is valid if authenticated by two witnesses. But Imam Ahmad considers it valid when it is witnessed by four witnesses. If the confessor retracts the extra-judicial confession, Imam Malik considers it a withdrawal of his confession but Imam Shafii does not consider it withdrawal unless the confessor contradicts himself in his confession. (Ibn Qudamah, Al-Mughni, Volume X, Pages 168, 169) It may therefore be inferred that the court should exercise extreme care and caution whenever reliance has to be placed on such a confession. The possibility of padding by prosecution cannot be ruled not particularly when direct evidence is not

available and on account of strong suspicion the complainant group indulges in wadding the prosecution version.

FINDINGS AND CONCLUSIONS

21. Learned trial court, in paragraph 32 of the impugned judgment referred to the case of Elahi Bakhsh Vs. The State 2005 SCMR 810 to recapitulate the principle that when a defence plea is raised by an accused the burden to prove the same lies upon him. In the case of Elahi Bakhsh the plea of the accused was that he had exercised his *legal right of defence of his person and property as provided in sections 101 and 103 of the Pakistan Penal Code* against the robbery committed by deceased and his party and in the ensuing fight which erupted due to mischievous conduct.

22. Sections 76 through 104 in Chapter IV of Pakistan Penal Code enunciate *general exceptions*. The learned trial court has neither referred to any section from the first part of this chapter i.e. from sections 76 through 95 or the second half of Chapter IV which covers sections 96 through 106 and deals with the right of private defence. The learned trial court did not

give thought to the principle relating to burden of proof in criminal cases, enunciated by the Supreme Court, with particular reference to the given situation and facts and circumstances of this case. The point to be kept in mind is that the burden of proof of commission of an offence essentially lies upon the prosecution. The accused is not under legal obligation to prove his defence. It is only in exceptional circumstances that the onus lies upon him to substantiate the defence plea in order to claim benefit conceded by legal provisions. The mere suggestion in cross-examination or his claim advanced in his statement without oath that there existed a monetary dispute between him and the prosecution witness would not be sufficient to convict him because he has not been able to prove his apprehension. The phrase *burden of proof* when read in the context of prosecution version means that the burden of the proof of the ingredients of the offence committed by the accused is on the prosecution. Such a burden does not shift at all but the burden of evidence may shift as and when evidence is introduced by any party. Article 121 of Qanoon-e-Shahadat states that when a person is accused of any offence the burden of proving

the existence of circumstances bringing the case *within any of the general exceptions in the Pakistan Penal Code or within any special exception or proviso contained in any other part of the same code or any law defining the offence,* is upon him, and the Court shall presume the absence of such circumstances. The present case is not covered by Article 121 because the appellant in this case has not claimed any of the exceptions enumerated in Chapter IV of Pakistan Penal Code. However it may be stated that under Article 122 ibid when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. The fact that the accused did not prove the existence of a money dispute between him and the witness would only mean that the Court will not disbelieve the evidence of the prosecution witness merely on this score. However the Court in order to believe the statement of a witness has to keep in view the well known considerations acknowledged judicially.

23. The accused is at liberty to express his apprehension that the complainant or any witness for the prosecution has manoeuvred or conspired to involve him due to malice, ill-will or enmity. He may even

lead evidence to prove his fears. On analysis of section 342 of the Code of Criminal Procedure, it becomes crystal clear that the first part of clause (1) postulates that *"for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him"* the Court may at any stage, without previous warning put such questions to the accused that the court considers necessary. This portion is of course discretionary but the second part of this clause reveals the basic reason why this provision was incorporated in the Code. It states that the court *shall for the purpose aforesaid* question him generally on the case after the witnesses for the prosecution have been examined and *before he is called on for his defence* to enable the accused to explain any circumstance appearing against him in the evidence brought against him by the prosecution. The second part of this clause is mandatory.

24. The words employed at the end of this clause refer to the stage when the accused *is called on for his defence.* The statement without oath is made basically to explain those matters which are brought in evidence against the accused. The accused is entitled to say whatever he likes in

addition to the explanation, that he is required to give, as regards incriminating evidence appearing against him. But if an accused wants to take benefit of any exception, then in view of Article 121 of the Qanun-e-Shahadat Order, 1984, "the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Pakistan Penal Code (Act XLV of 1860) or within any special exception or proviso contained in any other part of the same code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

25. The appellant in this case had neither invoked one or more general exceptions envisaged in the Pakistan Penal Code nor claimed any special plea under any other law. He was therefore not under any legal obligation to prove anything. Learned trial court fell into error by observing that the appellant "badly failed to prove that he has been involved in this case on the basis of version recorded by him under section 342 of the Code of Criminal Procedure." It has been held in the case of 1993 SCMR 1628 that failure on the part of accused to prove his plea raised in defence can

neither reduce the burden of prosecution to prove its case against him beyond all reasonable doubts nor such a circumstance will be taken into consideration in support of prosecution case.

26. Special plea is usually an *affirmative defence*. In criminal cases, according to Black's Law Dictionary, affirmative defence includes insanity, intoxication, self-defence, automation, coercion, alibi and duress. Section 340(2) requires an accused to make statement on oath only when he *does not plead guilty.* Section 342(1) contemplates mandatory questions only after the witness for the prosecution have been examined and before the accused *is called on for his defence.* It, therefore, means that defence plea is always a stage after the accused has pleaded not guilty. At this stages the following points have to kept in view:-

i) That the prosecution is never relieved of the burden of proving the case against the accused beyond reasonable doubts'

ii) The accused may even opt to remain silent because in his view the prosecution has failed to prove the ingredients of the offence or he has

successfully demolished the case of prosecution in cross-examination or has been able to earn benefit of doubt on the touchstone of appreciation of evidence;

iii) He may take a special plea i.e, an affirmative plea or

iv) He may be advised not to make a statement because some basic principle of administration of justice has been violated during the course of trial or that;

v) Some fatal defect has crept in the trial which cannot be cured;

vi) That evidence produced by the prosecution was not legally admissible; or

vii) The witnesses are not credible or they have been established in the cross-examination, to be partisans or interested only in favour of prosecution or.

viii) There are consequential improvements in the prosecution story which reflect adversely upon the conduct of prosecution, or inter alia for that matter or;

ix) There is inexplicable delay during which period the element of consultation and deliberation cannot be ruled out and which has cast serious doubts on the prosecution version;

27. In deciding appeals the basic point to be considered is not whether the impugned judgment is wrong but the question to be seen is whether the conviction is justified on the facts and circumstances of the case. In deciding a civil appeal the appellate court, in order to reverse the finding of fact must be convinced that the finding is wrong but that is not true about criminal appeals.

28. Let us now examine the question of *circumstantial evidence*. The primary rule of universal application in cases depending upon circumstantial evidence was stated in the case of an earlier precedent Sher Muhammad vs. Crown reported as AIR 1945 Lahore 27 wherein it was held:

> "The conviction in a criminal case must rest upon direct or circumstantial evidence and conjectures cannot take the place of proof. Where the evidence against an accused person is only circumstantial, the evidence

must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt. This is another way of saying that where the guilt of an accused person is doubtful he must be given the benefit of that doubt and acquitted. If, therefore, the facts proved are incapable of explanation on any reasonable hypothesis other than that of the guilt of the accused person the Court must act on the hypothesis of guilt and cannot refuse to convict merely because certain other hypothesis which are not reasonable hypotheses are possible.

For the applicability of the rule that where the guilt of an accused is doubtful he must be given the benefit of that doubt and acquitted, the doubt must be such as a reasonable mind entertains and must not be the doubt of a weak and vacillating mind hesitating or shirking to take a decision because there is an infinitesimal possibility of its being mistaken."

29. Evidence, in a criminal case which depends entirely upon circumstantial evidence, must be of a high value and degree and should lead to the guilt of accused. It should be wholly incompatible with the innocence of accused. Circumstantial evidence has to be narrowly examined as is clear from Ayah 26 Surah 12 wherein it was ruled, with

reference to circumstantial evidence in that particular case, that if the shirt was torn from the front, then the complainant had spoken the truth but if the shirt was torn from behind then her allegation was travesty of truth. The principle established was that circumstantial evidence i.e, the ground realities should conclusively indicate that the incident in fact took place the way it had been alleged. The circumstantial evidence has corroborative value alone but in itself it cannot become basis for conviction unless the facts implicate the accused with moral certainty. Such an inference must be free from reasonable doubt.

30. Circumstantial evidence consists of those facts from which a Court is called upon to draw inferences about the existence of a fact in issue. It is, therefore, imperative that the a) circumstances from which conclusions are drawn should be fully established; b) all the facts must be consistent with the hypothesis of the guilt of accused; c) the circumstances should be of a conclusive nature and tendency; d) the circumstances should, to a moral certainty, exclude every other hypothesis except the one proposed to be proved. Certain precedents provide definite guidelines in

order to evaluate the element of circumstantial evidence; eg: e) high quality of evidence is required if inference of guilt is to be drawn; f) existence of an unbroken chain of events, leading upto the culpability of the accused, must be apparent on the face of record; or in other words; g) all the pieces of evidence should be interlaced, intertwined and interwoven in such a manner that their appraisal leads conclusively to the inescapable conclusion that accused has committed the offence.

31. As a matter of abundant caution it may be observed, that Courts inevitably look for proof of the ingredients of the offence in a criminal trial. Circumstances do not substitute proof unless they are established in the manner indicated above. For safe administration of justice the evidence must be corroborated if it is to believed because what matters is the intrinsic worth of evidence. Substantive and direct evidence, therefore, is the safest basis for conviction unless of course strong unbroken links are established by circumstantial evidence.

32. Circumstantial evidence alone cannot form basis of conviction unless it is compatible with any other reasonable hypotheses than the guilt

of the accused person. In view of this judicial practice the duty of Court is to see whether or not the prosecution had succeeded in establishing the case against the accused to a degree of certainty which is required before a person is convicted of a criminal offence. Reference Zahid Hussain Versus The Crown PLD 1954-Lahore 710.

33. A survey of the following precedent on the question of circumstantial evidence as basis of conviction would be useful. The apex Court in the case of State Versus Manzoor Ahmad PLD 1966 SC 664 observed as follows:-

> "Learned counsel appearing for the respondent has urged the necessity of exercising minute care before drawing any inference adverse to his client. It is no doubt true that in a case resting wholly on circumstantial evidence the Court must, as observed by Wills in his Treatise on Circumstantial Evidence, remember that the " Process of inference and deduction are essentially involved-frequently of a delicate and perplexing character liable to numerous causes of fallacy". Mere suspicion will not be sufficient to justify conviction. Before the guilt of the accused can be inferred merely from inculpatory circumstances those circumstances must be found to be

incompatible with the innocence of the accused and "incapable of explanation upon any other reasonable hypothesis than that of his guilt." It is also equally well settled that the circumstances sought to be relied upon must have been established beyond all doubt. But this only means a reasonable doubt, i.e. a doubt such as would assail a reasonable mind and not any and every kind of doubt and much less a doubt conjured up by pre-conceived notions. But once the circumstances have been found to be so established they may well furnish a better basis for decision than any other kind of evidence. As Hewart, I.C.J. observed in the case of Percival Leonard Taylor, James Weaver & George Thomas Donovan (1) "it is not derogation of evidence to say that it is circumstantial."

ii. In the case of MD Nazar Hossain Sarkar and another vs. The State 1969 SCMR 388, the Supreme Court was pleased to observe that in cases which depend entirely upon circumstantial evidence the fundamental rule is that an accused person cannot be found guilty unless all reasonable hypothesis which are consistent with his innocence have been excluded. This case is also reported as 1969 PCr.LJ 956.

iii. In the case of Saira vs. The State reported as PLD 1970 SC 56 It was held that as follows:-

> "In the matter of conviction based on circumstantial evidence alone, the rule is that the facts proved must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The High Court would not be right in maintaining conviction and sentence merely relying on the statements made by the witnesses in their examination-in-chief. Their failure to consider the evidence of each witness in its entirety and the pertinent facts elicited by cross-examination, in fact, would amount to misreading of the evidence, and thus causing miscarriage of justice."

iv. In the case of Advocate General Government of East Pakistan vs. Majid alias Aabdul Majid reported as 1970 SCMR 12 it was held that conviction could be awarded where the evidence established a strong chain of circumstances which could not be explained away on any hypothesis other than the guilt of the accused.

v. In the case of Mohabat vs. The State reported as 1990 PCr.LJ 73 a learned single Judge found that conviction may be based on circumstantial evidence alone but in order to establish an offence by way of circumstantial evidence the four following things are essential:-

> "i. The circumstances from which the conclusions are drawn should be fully established.
>
> ii. All the facts must be consistent with the hypothesis.
>
> iii. The circumstances should be of a conclusive nature and tendency.
>
> iv. The circumstances should, to a moral certainty, actually exclude every hypothesis, but the one proposed to be proved."

vi. In the case of Ch. Barkat Ali vs. Major Karam Elahi Zia 1992 SCMR the Hon'ble author Judge in a case which depended entirely on circumstantial evidence, observed as follows:-

> "There is no direct evidence of the murder. Law relating to circumstantial evidence is that proved circumstances must be incompatible with any reasonable hypothesis of the innocence of the accused. See "Siraj vs. The Crown" PLD 1956 FC 123. The prosecution evidence in this case was of the deceased last seen with the accused and from the latter was recovered a handle of the hatchet blood stained and he

was absent from the forest after the murder. The learned Federal Court held that the evidence was not sufficient and the accused was acquitted. In the case of "Karamat Hussain vs. The State" 1972 SCMR 15 it was laid down that "In a case of circumstantial evidence, the rule is that no link in the chain should be broken and that the circumstances should be such as cannot be explained away on any hypothesis other than the guilt of the accused".

vii. In the case of Abdul Salam and others Vs. The State reported as PLD 2005 Quetta 86 the author judge referred to the Treatise of Wills on Circumstantial Evidence and found that mere suspicion will not be sufficient to justify conviction before the guilt of an accused can be inferred merely from inculpatory circumstances. Such circumstances must be found to be incompatible with the innocence of the accused and incompatible of explanation upon any other reasonable hypothesis than that of guilt. Circumstances sought to be relied upon must have been established beyond doubt but this means a reasonable doubt i.e. a doubt as would assail a reasonable mind.

viii. In the case of Wazir Muhammad and another Vs. The State 2005 SCMR 277 the Supreme Court observed as follows:-

"As mentioned hereinabove no direct evidence is available against the appellants and now the question would be as to whether conviction could have been awarded on the basis of circumstantial evidence or otherwise? Before examining the said aspect of the matter it is to be noted that significance, admissibility and import of circumstantial evidence was examined for the first time in case titled Tahura Vs. Emperor AIR 1931 Ca. 11, in the year 1931 and the following principles were formulated which still hold the field:-

(a) The circumstances from which an inference adverse to the accused is sought to be drawn must be proved beyond all reasonable doubt and must be clearly con with the fact sought to be inferred therefrom.

(b) In order to justify an inference of guilt, the circumstances from which such in inference is sought to be drawn must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt.

(c) No conviction could have been awarded unless these principles are clearly established.

The said view also finds support from the following case:-

Bir Bahadur v. The State AIR 1956 Assam 15: 6 Assam 428: 1956 Cr.L.J. 41; Emperor v. Naibullah AIR 1942 Ca. 524: 43 Cr.LJ 860; In re

Kanakasaabai, AIR 1940 Mad. 1: 41 Cr.LJ 369; Shewram v. Emperor AIR 1939 Sind 209: ILR (1940) Kar. 249, 41 Cr.L.J. 28: Gahar Sheikh v. Emperor, AIR 1947 Ca. 345.

ix. In yet another report from Indian Jurisdiction, the Supreme Court found that in cases based upon circumstantial evidence the inference of guilt could be justified only when all incriminating facts and circumstances have been duly proved and established and also found incompatible with the innocence of accused or guilt of any other person; and lastly

x. In the case of Ibrahim and others Vs. The State PLJ 2009 SC 475, it was held that circumstantial evidence should be like well knit chain whose one end should point to the accused and the other end to the deceased.

34. In order to bring guilt home to the appellant Muhammad Rafique the charge of kidnapping Muhammad Ahsan in order to subject him to unnatural lust and thereafter committing his murder had to be proved by the prosecution. In other words all the ingredients of offences with which the appellant was charged had to be proved beyond reasonable doubt. The burden of proof is always on the prosecution which asserts the

commission of certain offence/offences by a particular person. Burden shifts to the accused only under special circumstance as held in the case of Vijant Kumar & 4 others Vs. The State Trough Chief Ihtesab Commissioner, Islamabad and others PLD 2003 SC 56. Notwithstanding the statement of accused the prosecution has to affirmatively prove the existence of facts leading to the culpability of accused.

35. The evidence of recovery of student identity card of deceased from the pocket of accused at the time of his arrest on 22.11.2005 is a phony recovery. Why should the accused keep the card of the person whom he had killed, in his pocket all these ten days? Was it the intention of the accused that he should be identified *as the* person responsible for this blind murder the moment he was arrested. This card was not a valuable property nor of any use for the accused. This element of recovery appears to have been planted to provide a link between the killer and the victim.

36. The story of extra-judicial confession produced by prosecution is also not worthy of credence for the following reasons:-

i. Ch Allah Rakha PW.8, witness of the alleged extra-judicial confession is a first cousin of complainant. Sher Zaman is the person who was allegedly present at the shop of PW.8 when the accused made the confession. This Sher Zaman did not appear at the trial. He was an independent witness to corroborate the factum of volitional confession, if at all it has to be believed that a person would volunteer to confess in the presence of a stranger. His evidence has been withheld by the prosecution.

ii. PW.8 did neither apprehend the accused at the time he made an extra-judicial confession nor he was produced before the complainant or police.

iii. PW.8 is neither an elected representative of the area nor a Lambardar type of person or a person with special status who could wield influence upon complainant or intercede with police on behalf of and in favour the accused.

iv. PW.8 had no friendly relationship with accused. There was no reason for the accused to take PW.8 into confidence. Why should the accused entrust a vital secret to a person who had no personal interest in his

welfare? Why should PW.8, speak to the complainant on such an emotional issue arising out of a gruesome murder of his minor son?

v. The manner in which the accused went to the shop of PW.8 and opted for a confession does not inspire confidence. Going to Bazar and staying there only for "a period of 2/3 minutes" and making an confession in one sentence in the presence of a stranger, Sher Zaman not produced, is not a convincing link in the story.

vi. The narrative of extra-judicial confession was not mentioned by complainant in his statement before police Ex.PD.

37. The complainant also alleged that Muhammad Iqbal and Muhammad Akbar PW.5 had seen the deceased with accused in a Rickshaw on 12.11.2005 at 4.00 p.m. Muhammad Iqbal was not produced by the prosecution party. PW.5 however stated that *on 13.11.2005, on his return to the village, he came to know that Muhammad Rafique accused had perpetrated murder of Ahsan after committing sodomy with him.* This is a clear improvement because according to complainant the information about extra-judicial confession was communicated to him on 17.11.2005

whereafter, he went to the police and nominated the accused. This witness however states that identity of the culprit was an open secret even on 12.11.2005.Why was then the complainant silent and why did he not disclose this fact to police on 12.11.2005. This witness, it appears, had been produced on purpose to establish the link of *last seen*, but the attending circumstances do not attest to his credibility. Men may lie but the fact will not.

38. Dr. Muhammad Hayat Uppal, PW.10 was not certain about penetration though he stated that the "victim had been sodomized before murder" and this observation was based upon the report of the Chemical Examiner which stated that swabs were stained with semen.

39. We agree with the learned counsel for complainant that the normal sentence in a case of murder is death. If the allegation is proved against the accused the court will not hesitate to award capital punishment. No argument or reason would be required for awarding death in gruesome murder. Awarding life imprisonment case would be travesty of justice. However it is only when alternate punishment is recorded that the court has

to give reason why capital punishment was not awarded. Award of adequate sentence is no doubt the discretion of trial court but this has to be exercised judicially keeping in view the ground realities.

40. Learned counsel for the complainant has also raised the point that the reason advanced by learned trial court in awarding lesser sentence is not covered by *"Mitigating Circumstances."* The word Mitigation according to Black's Law Dictionary, Fifth Edition, means alleviation, reduction, abatement or dimunition of a penalty or punishment imposed by law. It also states that *Mitigating Circumstances* are those which "do not constitute justification or excuse of the offence in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability. Mitigating circumstances which will reduce degree of homicide to man slaughter are the commission of killing in a sudden heat of passion caused by adequate legal provocation." A judge may reduce or order a lesser sentence in consideration of such factors as the past conduct of accused, his family situation, his co-operation with police, genuine repentance, prolonged internment in death cell, suppression

by prosecution of injuries on the person of accused, absence of wickedness on the part of accused, lack of proof of motive by prosecution, inability on the part of prosecution to establish with certainty which accused caused the fatal injury and kindred factors may be considered by court for award of alternate or lesser sentence.

41. We are however not going into the question of enhancement of sentence or conviction of appellant under section 12 of Ordinance VII of 1979 because on the facts and circumstances of this case the appellant has earned benefit of doubt. A few obstinate questions have already assailed our mind after considering all the facts brought on record.

42. Reasonable doubts as regards the mode and manner in which the deceased was murdered have crept in the narrative. The links in the chain of prosecution story are not coupled with each other in a manner to point conclusively towards the guilt of appellant. The prosecution story as asserted collapses the moment a single link is disbelieved. Here at least three links are of no avail i.e, recovery of Churri and the student card as well as the factor of extra-judicial confession.

43. In view of what has been stated above it is not safe to maintain conviction and sentence of the appellant recorded by learned Additional Sessions Judge, Sialkot vide judgment dated 27.03.2006 in Sessions Case No. 9/2006 and Sessions Trial No.1/2006. Consequently Jail Criminal Appeal No.176/I of 2006 is accepted. Appellant Muhammad Rafique son of Muhammad Yousaf is in jail. He is directed to be released forthwith unless required in any other case. Resultantly Criminal Revision No.6/I of 2007 fails and is hereby dismissed.

[redacted]

JUSTICE SYED AFZAL HAIDER

[redacted]

JUSTICE AGHA RAFIQ AHMED KHAN
Chief Justice

[redacted]

JUSTICE SHAHZADO SHAIKH

Announced in open Court
on 08.03.2011 at Islamabad
Mujeeb-ur-Rehman/*

Fit for reporting

[redacted]

JUSTICE SYED AFZAL HAIDER