

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE SHAHZADO SHAIKH
MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE RIZWAN ALI DODANI

JAIL CRIMINAL APPEAL NO.39/I of 2010

Maqsud Ahmad alias Sudi son of Enayatullah ... Appellant
caste Jat, resident of Gali Darekwali, Petitioner
Chohanawala, Noushera Road,
P.S. Baghbanpura, District Gujranwala.

Versus

The State ... Respondent

CRIMINAL REFERENCE NO.1/I OF 2011

The State ... Appellant
Petitioner

Versus

Maqsud Ahmad alias Sudi son of Enayatullah ... Respondent
caste Jat, resident of Gali Darekwali,
Chohanawala, Noushera Road,
P.S. Baghbanpura, District Gujranwala.

Counsel for the appellant ... Mrs. Aneela Ateeq,
Advocate

Counsel for the State ... Ch. Muhammad Sarwar Sidhu,
Additional Prosecutor General

FIR No. Date and ... No.312, dated 21.07.1987,
Police Station P.S. Samberial,
District, Sialkot.

Date of trial Court ... 07.12.1989 ✓

Date of Institution ... 13.04.2010

Date of hearing ... 19.10.2011

Date of decision ... 19.10.2011

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JUDGMENT

SHAHZADO SHAIKH, J:- By this judgment we intend to dispose of Jail Criminal Appeal No.39-I of 2010 filed by appellant Maqsud Ahmad alias Sudi against the judgment dated 07.12.1989 passed by the learned Additional Sessions Judge, Sialkot Camp at Daska in Hudood Case No.39/1988 and Hudood Trial No. /1989 whereby he was convicted under Section 17 (3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced to amputation of his right hand from his wrist and his left foot from the ankle on the basis of confessional statement made by the appellant before trial Court at the time of framing the charge and Criminal Reference No.1/I of 2011 filed by the State against the respondent Maqsud Ahmad alias Sudi son of Enayatullah vide judgment dated 07.12.1989 passed by the learned Additional Sessions Judge, Sialkot Camp at Daska in Hudood Case No.39/1988 ✓

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and Hudood Trial No. /1989 whereby he was convicted under Section 17 (3) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 and sentenced to amputation of his right hand from his wrist and his left foot from the ankle.


2. The brief facts of the case arising out of FIR No.312, dated 21.07.1987 registered at Sumberial, District Sialkot on the written complaint of Malik Muhammad Sabir, Manager Allied Bank of Pakistan, Verowala Tehsil Daska, Branch on 21.08.1987, are that two unidentified persons armed with lethal weapons entered into the Bank Branch and by putting the staff in fear of death, took away a cash of Rs.18000/- and made good from the scene of occurrence on a motor cycle.

3. The learned trial Court convicted the accused/appellant merely on the basis of his confessional statement and cash of Rs.18000/- recovered from the accused at his behest, by the Police on

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25.01.1988, vide a recovery memo attested by Muhammad Sharif son of Soheney Khan and Allah Ditta son of Hassan Muhammad.

4. Shamroze Khan accused has been declared absconder after recording the statement of Rashid Ahmad constable No.180/C of P.S. Samberial on 27.11.1989.

5. As per desire of appellant on 27.11.1989, confessional statement of Maqsood Ahmad alias Soodi was recorded by the trial Court in which he confessed his guilt stating therein that. on 21.07.1987 at about 9:45 a.m. he, alongwith one Khalil, accused, now dead, entered into Allied Bank of Pakistan Limited, Verowala Branch Tehsil Daska, District Sialkot, opened fire with his Kalashanikov and snatched Rs.18000/- from Muhammad Sabir, Manager of the Bank. Shamroz Khan accused was not with him. He has falsely been implicated in this case by the police. 

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6. The learned trial Court had believed the confessional statement of accused, on the basis of which, convicted the appellant as mentioned in opening para 1 of this judgment.

7. Learned counsel for the appellant argued that confessional statement of accused was not made voluntarily, not accordance with law; and trial Court did not fulfill the requirements of law at the time of its recording; the trial Court had not adopted the procedure as laid down under the law which is denial of justice; the recovered amount is planted one as nothing has been recovered from the possession of the accused; no respectable person has been produced by the prosecution who has been cited as a witness of recovery; confessional statement of appellant is result of torture and coercion; the learned trial Judge has not properly informed the appellant regarding consequence of said confessional statement; identification parade of accused was not conducted after fulfilling the legal

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requirements which is very doubtful; the main ingredients for imposing Hadd punishment is Tazkiatul-al-Shahood which is lacking in this case.

8. On the other hand, learned Additional Prosecutor General Punjab has argued that accused had voluntarily confessed his guilt before the trial Court and learned trial Court recorded his confessional statement of fulfilling all legal requirements of law; there was no need for procedural trial in this case; as such test of Tazkiatul-al-Shahood is not necessary in this case; cash amount Rs.18000/- was recovered on the pointation of appellant; the same is material corroboration with the confessional statement of accused; the witness was properly identified during the course of identification parade; the appellant is desperate, dangerous and hardened criminal; and cases of similar nature are registered against him;

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therefore he does not deserve any leniency; "NISAB" regarding "Hadd" punishment is proved from recovered amount.

9. The learned Additional Prosecutor General Punjab for State argued that since, the procedure adopted by the learned trial Court was defective and not according to law; the case may be remanded to the learned trial Court for a fresh trial so that lacunae should be removed.

10. We have heard learned counsel for the appellant as well as Additional Prosecutor General Punjab for state at length and perused the record. We have examined the confessional statement of the appellant in the light of criteria laid down by the honourable apex Court as well as under the law. We have also scanned the relevant portions of the judgment in the light of submissions made before us by the learned counsel for both the parties.

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11. It is clear from the record that appellant was convicted merely on his confessional statement, which has been retracted in appeal. It is clear that at the time of recording his confessional statement all legal requirements were not fulfilled. It seems that no legal assistance was provided, although trial and conviction involved capital sentence. The appellant was not provided opportunity for pondering over consequences of his confessional statement. These deficiencies amount to denial of fair trial and justice. The learned trial Court should have made specific queries from the appellant himself and express assessment should have been recorded, in order to ensure that the confessional statement to be reliable was truly voluntarily made, was self prompted without any torture, or coercion, knowing its consequences for which the appellant was mentally prepared.

12. We will proceed to discuss each point in the light of legal principle and precept. ✓

Section 16 of the Offences Against Property (Enforcement of Huddood) Ordinance, 1979 (Ordinance No.VI of 1979), provides that for "Proof of Haraabah: The provisions of section 7 shall apply, *mutatis mutandis*, for the proof of *haraabah*."

Section 7 of the Offences Against Property (Enforcement of Huddood) Ordinance, 1979 (Ordinance No.VI of 1979), provides for Proof of theft liable to hadd, as follows

- "7. Proof of theft liable to hadd. The proof of theft liable to hadd shall be in one of the following forms, namely:-
- (a) the accused *pleads guilty* of the commission of theft liable to *hadd*; and
 - (b) at least two Muslim adult male witnesses, other than the victim of the theft, about whom the Court is satisfied, having regard to the requirements of *tazkiya Al-shuhood*, that they are truthful persons and abstain from major sins (*kabair*), give evidence as eye-witnesses of the occurrence:

Possibility of suicidal or self-inflicting confession, which may have been sponsored for substitution or for serving clandestine interests, should be eliminated, during course of its recording by the trial court., in order to be sure of its genuineness in all respects. In this case the appellant/accused in one breath exculpated one co-accused, by exclusion, and the other co-accused was declared dead by him, which seem to have been noted without question and confirmation, by the investigation as well as by the trial. ✓

The court should not be content just with mechanical or technical conformance. The judge has to apply prudent mind and apply law to its fullest extent, through the express empowerment extended by the apparently small conjunction "and", used in Section 7, between its sub-sections (a) and (b). If mere confession under section 7 (a), does not satisfy a prudent mind to be sure of fullest justice, the judge can adopt another form or manner of proof provided under (b) of section 7. The law has expressly provided to adopt any *one of the forms* (a and b) provided under section 7.

Coupling power of the conjunction "and" is enabling and not disabling or restrictive in nature. Law has to be interpreted, in its content and within its context, as enabling proposition for its application, with all possible certainty for safe delivery of justice.

In Section 7, the phrase "*in one of the following forms*" needs to be examined further; whether it means *either one form or the other*, i.e., either "(a)... or (b)...". If desired meaning was so plain, then, the following reading, grammatically, should have been "(a)... or (b)....", but instead, it reads as "*in one of the following forms*" (a)...., *and* (b)." It means "(a).... *and* (b)...." are conjoined by the conjunction "*and*", i.e., the two are available, not as either (a) or (b), standing alone. Independently and singly, (a) form and (b) form, do not stand each as separate and absolutely self-consistent but the two conjointly support each other, to achieve the objective so that the process of law and justice does not falter or fail. \

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Even if accused admits his guilt for offence punishable with death or life imprisonment court is required to examine prosecution evidence. Trial court directed to proceed with the trial strictly in accordance with law. [PM 1998 Cr.C. (Pesh.) 499(DB)].

Plea of guilty in a capital case does not authorise the court to convict the accused without recording prosecution or defence evidence. [NLR 1984 Criminal 374].

Confession should not be taken as easy and painless method of disposal of a case, but as an instrument to unearth the truth through truthfulness of the confession, in order to take the case to its judicious disposal.

Maximum counseling should be extended to the person making the confession in all aspects of its course and consequences, as is evident in the Quran and the Sunnah. For example, once Adam (Peace be upon him) *admitted* his forgetfulness, God helped him 'with His words' to plead in the right manner:

"Then Adam *received* from his Lord-Master-Sustainer (Allah)
Words (Guidance),
And He (Allah) relented toward him.
Verily, He (Allah) it is, Who is
The Ever All-Relenting, The Ever All-Merciful". 2-37 ✓

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The Prophet (Peace be upon him) helped the person who wanted to confess to be clear from all doubt whether he actually was guilty of the offence alleged by him against his own self.

Narrated Ibn 'Abbas: When Ma'iz bin Malik came to the Prophet (in order to confess), the Prophet said to him, "Probably you have only kissed (the lady), or winked, or looked at her?" He said, "No, O Allah's Apostle!" The Prophet said, using no euphemism, "Did you have sexual intercourse with her?" The narrator added: At that, (i.e. after his confession) the Prophet ordered that he be stoned (to death). (Bukhari :: Volume 3 :: Hadith 1726 Page 635)

Hadith

Narrated Abu Huraira:

A man came to Allah's Apostle while he was in the mosque, and he called him, saying, "O Allah's Apostle! I have committed illegal sexual intercourse." The Prophet turned his face to the other side, but that man repeated his statement four times, and after he bore witness against himself four times, the Prophet called him, saying, "Are you mad?" The man said, "No." The Prophet said,

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"Are you married?" The man said, "Yes." Then the Prophet said, 'Take him away and stone him to death.' Jabir bin 'Abdullah said: I was among the ones who participated in stoning him and we stoned him at the Musalla. When the stones troubled him, he fled, but we over took him at Al-Harra and stoned him to death. (Bukhari :: Volume 3 :: Hadith 1719 Page 631)

The Prophet (Peace be upon him) allowed retraction literally even at the gallows or even under the guillotine:

Hadith

Narrated Nu'aym ibn Huzzal:

Yazid ibn Nu'aym ibn Huzzal, on his father's authority said: Ma'iz ibn Malik was an orphan under the protection of my father. He had illegal sexual intercourse with a slave-girl belonging to a clan. My father said to him: Go to the Apostle of Allah (peace_be_upon_him) and inform him of what you have done, for he may perhaps ask Allah for your forgiveness. His purpose in that was simply a hope that it might be a way of escape for him.

So he went to him and said: Apostle of Allah! I have committed fornication, so inflict on me the punishment ordained by Allah. He ✓

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(the Prophet) turned away from him, so he came back and said: Apostle of Allah! I have committed fornication, so inflict on me the punishment ordained by Allah. He (again) turned away from him, so he came back and said: Apostle of Allah! I have committed fornication, so inflict on me the punishment ordained by Allah. When he uttered it four times, the Apostle of Allah (peace be upon him) said: You have said it four times. With whom did you commit it? He replied: With so and so. He asked: Did you lie down with her? He replied: Yes. He asked: Had your skin been in contact with hers? He replied. Yes. He asked: Did you have intercourse with her? He said: Yes. So he (the Prophet) gave orders that he should be stoned to death. He was then taken out to the Harrah, and while he was being stoned he felt the effect of the stones and could not bear it and fled. But Abdullah ibn Unays encountered him when those who had been stoning him could not catch up with him. He threw the bone of a camel's foreleg at him, which hit him and killed him. They then went to the Prophet (peace_be_upon_him) and reported it to him. He said: Why did you not leave him alone. Perhaps he might have repented and been forgiven by Allah. (Abu Dawud :: Volume 3: Hadith 1012, Page 377)

In Section 7, words "*pleads guilty*" have been used. In this connection following may be considered.

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"*Pleads guilty*" merely recording of is not enough for convictions. Trial court should record *admissions* as nearly as possible in words of the accused. The accused should also be asked as to *why he should not be convicted* because of his admission of guilty. Case remanded to trial court. [PLJ 1998 Kar. 38].

After pleading guilty the court must ask the accused

why he should not be convicted. On failure to ask the question the conviction was set aside. [PLJ 1991 Cr.C. (Lah.) 242].

But in this case no such question was put.

There are subtle, both common as well as distinct, points involved in terms '*admission*', '*pleading guilty*', and '*confession*'. But these terms are used by many in common practice as if these were synonymous. '*Admission*' is to accept, or acknowledge that something is true, especially unwillingly. '*Confession*' is special admission that one has *done something wrong*, that he feels guilty or bad about, e.g., in Christianity, it is to submit to God or tell a priest what wrong one has done, so that he *can be forgiven*. To '*plead*' is to make urgent and earnest request or *specific plea*, esp. *in response to criminal charge*. '*Guilt*' is *state of having committed a wrong*, esp. *a crime*, which brings bad feeling with responsibility for doing it. The distinctions may, however, be clear in the following:

"A confession is an acknowledgment in express words, by the accused in a criminal case, of the truth of the main fact charged or of some essential part of it."

"The distinction between admissions in criminal cases and confessions by the accused is the distinction In effect between admissions of fact from which the guilt of the accused may be inferred by the Jury and the express admission of guilt itself." William P. Richardson. *The Law of Evidences* 394,at268(3ded. 1928). (Black's Law Dictionary)

Thus, '*pleading guilty*' is earnest and truthful express confession, oral or written, including details about the crime, by ✓

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criminal suspect of guilt, knowing its consequences, in response to a specific criminal charge, with responsibility for having done it.

There are procedural niceties also involved. It may not be always advisable to reject these only on basis of trivial technicalities, as we will examine in following paras also, and let the offender go free. Strong corroboration may be available to prove the offence beyond all reasonable doubt under (b), even if the guilty retracts his 'pleading guilty' made under (a) of section 7.

The law requires that Section 16 has to be read alongwith Section 7, under which "*proof of theft (harabba) liable to hadd*" has to be established, as provided for.

Section 18 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (Ordinance No.VI of 1979), provides as follows:"18....The punishment of amputation or death shall not be imposed or enforced for the offence of *haraabah* in cases in which *hadd* may not be imposed for theft liable to *hadd* and the provisions of section 10 and section 11 shall apply *mutatis mutandis*, to such cases"

Under Section 10, the *cases in which hadd shall not be imposed*, include:

- (c) *(i)"iztirar"* means a situation in which a person is in apprehension of death due to extreme hunger or thirst.
- (d) When the offender, before his apprehension, has, on account of repentance, returned the stolen property to the victim and surrenders himself to the authority concerned.

Under Section 11, the cases in which hadd shall not be enforced, include:

- (a) *when theft is proved only by the confession of the convict, but he retracts his confession before the execution of hadd,*

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In case of Hadd crimes (fixed standard punishment, a person cannot be punished on basis of retracted confession.(Suyuti, Al-Ashbah, p. 67)

(2) In the case mentioned in clause (a) of sub-section (1) the Court may order retrial.

Furthermore, Section 11 of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (Ordinance No.VI of 1979), provides that "(1) Hadd shall not be enforced". "when theft is proved only by the confession of the convict, but he retracts his confession before the execution of hadd. Sub-section (2) of Section 11, provides "in the case mentioned in -clause (a)-of sub-section. (1) the Court-may order *retrial.*"

It is here that importance of use of conjunction "*and*" between sub-sections (a) and (b), becomes more visible. Option of "retrial" may not be advisable, as in this case, after about 24 years, and it may even not be available also, as again in this case, because the Bank Branch has been closed, the Manager (Complainant), the main witness has died. In such, and similar other situations, the conjunction between (a) and (b), in Section 7, saves the judicial process to falter or fail.

In this case, so far section 7 (a) is concerned, the appellant has retracted from 'pleading guilty', and process under section 7 (b), has not been undertaken, nor it is possible now. Furthermore, proviso to section 7, which provided that "the statement of the victim of the theft or the person authorized by him *shall be recorded before the statements of the eye-witnesses are recorded,*" was not complied with, as the trial Court had awarded conviction merely on "confession", which was technically faulty. It is not possible at this stage, as already explained above, because those witnesses/evidence is not now available/existing.

Cases in which *hadd* shall not be imposed, include, a case when the offender has committed theft under *iztirar*, which means a situation in which a person (offender) was in apprehension of death due to extreme hunger or thirst. The record is completely silent about it. There is an economic situation in the country where according to official data, substantial portion of population is living

below the poverty line. Obviously the offender belonged to the socio-economic strata which is sub-merged under the acceptably defined line of poverty. In this connection, following may also be relevant to consider:

Said Umar, "The Hand shouldn't be imputed on stealing of a bunch of dates or grapes and also in the year of famine". (Al-Mussanaf, Abdul Razzaq, Volume 10: Hadith 18990, Page 242)

13. Identification parade of the appellant has not been conducted according to law and formalities of law have not been fulfilled by the supervising authority. The witness who identified the appellant during identification parade could not appear before learned trial Court; hence this identification parade has no legal consequence.

14. Recovery of looted property is also a question mark on the part of the prosecution. It is very strange that after the period of six months same currency notes, which have in fact not been put to identification, have been recovered on the behest of the appellant. It is not believable that the appellant kept entire snatched amount with him and had not given any share to his co-accused. Neither FIR, nor recovery memo mention denomination of currency notes.. Hence recovery memo of snatched amount becomes doubtful and it carries no legal value on the basis of which capital punishment can be awarded to the appellant. In this connection following is relevant:

Recovery. Alleged recovery of currency notes from accused. No identification was conducted regarding the recovered currency notes which was necessary in all circumstances. Recovery of such currency notes was kept out of consideration by the Court. [Recovery]. 1992 PSC (Cr.) S.App.C. 176 (o) ✓

15. FIR No.312, dated 21.07.1987 was registered on written complaint on letter pad of Allied Bank of Pakistan, Verowala Branch, which does not bear forwarding number and date, lodged by Malik Muhammad Sabir, Manager, narrating that two unidentified persons armed with lethal weapons entered into the Bank Branch, while the third one stood *in* the main door. The appellant/accused however, narrated that they were only two persons, including himself. Under the settled law, the confessional statement has to be accepted or rejected in its entirety:

Confession to be accepted or rejected as a whole; the rule applies when there is no other evidence available or the available evidence is not trustworthy. [PLJ 1980 Cr.C. (Pesh.) 125 (DB)].

In this case, if version of Bank Manager is accepted, then it conflicts with that of the accused/appellant.

16. It is the story of prosecution that the accused made good from the scene of occurrence on a motor cycle, without mentioning whether all three of them went on the Motorcycle.

17. As per confessional statement of Maqsud Ahmad alias Sudi. he, alongwith one Khalil, accused, now dead, entered into Allied Bank of Pakistan Limited, Verowala Branch Tehsil Daska, District Sialkot, ✓

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and opened fire with his Kalashanikov and snatched Rs.18000/- from Muhammad Sabir, Manager of the Allied Bank Limited of Pakistan, Verowala Branch Tehsil Daska, District Sialkot. Whereas Muahmmad Sabir, Manager, reported in his written letter that the accused opened fire when they were leaving the Bank Branch. At one place it is stated that the accused had pistol, at another it is stated that they had rifle. The I.O. reported recovery of three empties of 7mm, whereas there is only one mark of pistol bullet on the wall. It is also important to note that the appellant/accused, in his 'confessional statement' has not mentioned anything about making any effort to open the 'safe', whereas the Manager has alleged the same in his written letter.

18. These important contradictions mutually damage written complaint and the 'confessional statement', particularly in the absence of evidence which was needed at the trial. ✓

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19. Since the appellant/accused was in jail, nothing was recovered from his possession, and no independent and dependable witness has been taken in this respect. There was no identification of the recovery, and the identification parade of accused was not conducted as per legal requirements.

In identification mainly general structural features have been mentioned which can fit into innumerable faces, without assigning roles. In the identification parade position of the accused was not changed. The person who identified the appellant/accused, simply touched him without giving giving identified role.

With the confessional statement of accused/appellant, the Police killed more than one birds with one stone, as usual. According to the statement of the accused/appellant if accepted naively on its face value, one Khalil named as co-accused, is declared dead, and another one Shamroze, is totally exonerated that he was not co-accused in the commission of the offence. As the case/investigation gets concluded with such a confessional statement, the Police gets pat, and the two co-accused mentioned in the Complaint, go totally free. Who were Khalil (dead, now) and Shamroze (exonerated by the Accused/appellant). Mystery remains unresolved.

Most unresolved mystery in the investigation is that how the I.O. came to know that accused/appellant was anxious to make the said confession, involved in some other case of some other Police ✓

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Station/area, and in jail/judicial custody. The record has been kept as blind, as the I.O. is dumb himself on this point. There is nothing on record to suggest as to what was the circumstance which appeared in evidence against the accused/appellant that he came to be questioned and he confessed. In this connection following may be considered:

Custody does not necessarily mean custody after formal arrest, but includes a state of affairs in which the accused can be said to have come into the hands of a Police Officer or have been under some form of Police surveillance or restriction on his movements by the Police. (Sections 26 jf and 27, Evidence Act). [AIR 1932 Lah. 609; 1937 Lah. 629; AIR 1940 Lah. 242].

Accused cannot be questioned *unless a circumstance appears in evidence against him*. If such question is put to him and he admits the existence of the circumstance; the statement even if it amounts to a confession cannot be acted upon at the trial. Only that material can be used against the accused which has been obtained in accordance with law, and nothing that is not so obtained is relevant. [PLD 1950 BJ 5].

After the alleged extra-judicial confession, the accused/appellant had no opportunity under section 164 CrPC, separately, as in this case, he had to be produced before the trial Court for judicial confession. Accused/appellant had one less opportunity, at earlier stage,,to retract, if he so wanted. Furthermore,

Confession of accused recorded under section 164, Cr.P.C. whether retracted or not must be supported by ✓

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some connecting evidence as a rule of caution. [2004 SCMR 47(c)].

Elaborate rules have been laid down by the honourable apex Court in such cases. The accused/appellant has to be given an opportunity under section 342 CrPC so that he can reconfirm or retract from the confession, which has not been done in this case:

Confession not put to the accused under section 342, Cr.P.C, *held*, caused prejudice to the accused and conviction was set aside. [PLD 1956 FC 300].

Following is also missing in this case:

..... When maker of statement was not examined during trial, conviction of accused/appellant could not be based on flawed statements recorded under section 164, Cr.P.C.... [2006 PCr. LJ Northern Area Court of | Appeals 1613].

Furthermore, there is no indication, whether the accused was given time to think over before making confession:

No time given for thinking over before making judicial confession, under section 164, Cr.P.C. Accused was taken to the Magistrate by the Police for recording confession at 4 p.m. and his custody was handed back at 4.30 p.m. *Held*, accused has hardly any reasonable time at his disposal to think over before recording his confession; the circumstances cast doubt about the voluntary nature of the confession. [1993 SCMR 1822].

[PLD 1971 Lah. 850 (DB)], ✓

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Since no question was put as to why the accused was making the confession, the motive could not be determined:

When motive for confession is not asked the confession is of little value. [43 Cr.LJ (1942 Pat.) 36(DB)].

If the confession turns out to be off spring of penitence and remorse the same must be rejected. The confession which was recorded: after years after the occurrence was not relied upon. [PLD 1994 Pesh. 102].

Repentance (penitence) is the expression of feeling sorry or regret for having done a wrong, which usually is a pleading for forgiveness and mercy, and not admission of the guilt, being conscious of its conviction and consequences.

Specific mention of conviction was not made:

Admission by accused of accusation, when made to the court, the court should before recording conviction ask the accused why he should not be convicted. When it was not done so the conviction was set aside. [NLR 1991 Criminal 32 (2); PLJ 1991 Cr.C. (Lah.) 117; PLJ 1991 Cr.C. (Lah.) 473(DB)].

[PLJ 1991 Cr.C. (Lah.) 242].

Following are specifically not clear or are missing in the proceedings of confession:

How to judge probative value of confession?

Consider (a) character and duration of custody of the accused/confessor; (b) Whether the confessor was in a position to get advice from relatives or lawyers; (c) ✓

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the quantum of proof available with the prosecution before the confession was made; (d) whether the confession is consistent with the other evidence. Retracted confession must be corroborated by other evidence. [PLD 1960 Push. 74(DB)].

Retracted judicial confession cannot be made basis for recording conviction against accused when it has not been corroborated by any other evidence. [NLR 2006 Criminal FSC 476].

Judicial confession retracted even if found to be voluntary and true still the demand of prudence would be not to make it the sole basis of conviction unless it is corroborated by some circumstance. [PLD 1975 1 Pesh. 230 (DB)]".

20. In view of these observations, we are not satisfied that the prosecution could prove the guilt of the appellant beyond shadow of doubt. We therefore, set aside the conviction and sentence of appellant Maqsud Ahmed alias Sudi son of Enayatullah and accept his appeal. This appeal is allowed. Conviction and sentence of Hadd of amputation of his right hand from wrist and his left foot from the ankle awarded to the appellant Maqsud Ahmed alias Sudi son of ✓

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Enayatullah by learned Additional Sessions Judge, Sialkot, Camp at Daska, vide judgment dated 07.12.1989 is set aside and he is acquitted of the charge. He shall be released forthwith if not required in any other case.

21. The Criminal Reference No.1/I of 2011 moved by the learned trial Court for confirmation of Hadd punishment is not confirmed and answered in the negative.

22. These are the reasons of our short order, dated 19.10.2011.

 *Sd/-*
JUSTICE SHAHZADO SHAIKH

 *Sd/-*
JUSTICE DR. FIDA MUHAMAMD KHAN

 *Sd/-*
JUSTICE RIZWAN ALI DODANI

Islamabad, the
19th October, 2011
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FIT FOR REPORTING.

 *Sd/-*
JUSTICE SHAHZADO SHAIKH