IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE
MR.JUSTICE ZAFAR PASHA CHAUDHRY

JAIL CRIMINAL APPEAL NO.194/I OF 2004

Pervaiz Masih son of Ghulam Masih,Caste Christian, Resident of Nai Abadi,Chungi Gujar Pura,police station North Cantt;Lahore.	--	Appellant

Versus

The State	--	Respondent
Counsel for the appellant	--	Mr.Bilal Saeed, Advocate.
Counsel for the State	--	Mr.Aftab Ahmad Kha Advocate.
No.date of FIR and Police station	--	No.78 dated 10.2.200 P.S.North Cantt:
Date of the order of Trial Court	--	30.3.2004
Date of institution	--	29.6.2004
Date of hearing	--	18.4.2005
Date of decision	--	18.4.2005

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JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 30.3.2004 passed by the learned Additional Sessions Judge, Lahore whereby appellant Pervaiz Masih son of Ghulam Masih was convicted under section 302(b) PPC and sentenced to life imprisonment. He was also ordered to pay a sum of Rs.30,000/- as compensation to the legal heirs of the deceased under section 544-A Cr.P.C. Benefit of section 382-B Cr.P.C. was extended to the appellant.

2. Facts of the case, in brief, are that on 10.2.2002 report was lodged by one Saleem Masih with P.S. North Cantt; District Lahore wherein, it was alleged that on i.e. 9.2.2002 at about 5.00 p.m. the complainant's son namely Shan Masih, aged about 8 years, had gone out of his house, but did not return. He was accordingly searched, but in vain. On 10.2.2002 his dead body was, however, found lying in an abandoned house belonging to one Javed alias Jaidi Pathan in the condition that the deceased was murdered with a sharp edged weapon

by inflicting injuries on his neck. It was suspected by the complainant that though he had no enmity with any body but his son might have been killed by some one, after committing sodomy on him. On the stated allegation formal FIR bearing No.78 dated 10.2.2002 was registered at the said police station under section 302 PPC, and investigation was carried out in pursuance thereof. On the completion of investigation the appellant was challaned to the Court for trial.

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

4. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the appellant produced 15 witnesses, in All. P.W.1 Dilawar Hussain, Constable was on 21.3.2002 entrusted with a sealed parcel said to contain blood stained 'chhurri' for onward transmission to the office of the Chemical Examiner, which he delivered intact, on the same day. P.W.2 Ali Ahmad, Constable, was, on 14.2.2002, entrusted with sealed parcels said to contain anal swabs as well as blood stained earth, which were delivered by him in the

office of the Chemical Examiner, Punjab, Lahore, on the next day, intact. P.W.3 Muhammad Ashraf deposed that on 10.2.2002 dead body of the deceased alongwith his last worn clothes were handed over to him by the doctor. He was declared hostile and was allowed to be cross-examined. In the course of his cross-examination the witness stated that he had handed over the last worn clothes received by him from the doctor to the I.O. P.W.4 Muhammad Afzal, Moharrir Head Constable, deposed that he had kept, in safe custody, the parcels said to contain blood stained earth, 'chhurri' and anal swabs before handing the same over to other witnesses for onward transmission to the office of the Chemical Examiner. P.W.5 Liaqat Ali is a marginal witness of the recovery memo, Exh.PB vide which crime weapon i.e. 'chhurri' was recovered by the police at the instance and pointation of the appellant from the house of one Javaid alias Jaidi. P.W.6 Saleem Masih is the complainant,. He, at the trial, reiterated the version contained in the FIR. P.W.7 Rehmat Masih had identified dead body of the deceased. He is also a marginal witness of recovery memo Exh.PD vide

which blood stained earth was taken into possession by the police from the place where, dead body was found lying. P.W.8 Hameed-ud-Din Chishti, Draftsman, had prepared site plan of the occurrence i.e. Exh.PE and Exh.PE/1. P.W.9 Muhammad Anwar had on the basis of complaint i.e. Exh.PC registered the formal FIR i.e. Exh.PC/1. P.W.10 Ghulam Abbas, ASI deposed that the appellant, while in custody in case FIR No.78/2002, had made disclosure regarding murder of the deceased. P.W.11 Muhammad Arif, ASI while corroborating the statement of P.W.10 deposed that on the said date appellant had, while being interrogated, confessed his guilt regarding killing of the deceased Shan Masih. P.W.12 Gulam Rasool is a marginal witness of the pointation memo of the place of occurrence i.e. Exh.PF. P.W.13 Hussain Haider, S.I, had partially investigated the case. P.W.14 Muhammad Imtiaz had, at the trial, proved the postmortem report i.e. Exh.PJ/ as well as the diagram Exh.PJ/2 made by Dr.Shafique Hussain Zaidi, Demostrator, Department of Forensic Medicine and

Texicology, K.E.Medical College, Lahore. P.W.15 Ashiq Ali, S.I. is the Investigating Officer of the case.

5. On the completion of the prosecution evidence the appellant was examined under section 342 Cr.P.C. In his above statement the appellant denied the charge and pleaded innocence. In answer to the question as to why the PWs deposed against him he pleaded that it was a blind murder and the appellant was falsely implicated in the case by the police in order to cover up their inefficiency as they failed to trace out the real culprit. He, however, failed to lead any evidence in his defence or to appear as his own witness in terms of section 340(2) Cr.P.C.

6. After hearing arguments of the learned counsel for the parties, the learned trial Court convicted the appellant and sentenced him to the punishments as mentioned in the opening para hereof. However, he was acquitted of the charge under section 377 PPC, for want of proof.

7. We have heard Mr.Bilal Saeed, Advocate, learned counsel for the appellant, Mr.Aftab Ahmad Khan, Advocate, learned counsel for

the State and have also perused the entire record with their assistance, carefully.

8. Mr.Bilal Saeed, Advocate, learned counsel for the appellant has, inter-alia, contended that the so-called disclosure/confession made by the appellant while in custody of police being inadmissible in evidence could not have been taken as an incriminating circumstance against the appellant in view of the bar contained in Article 38 of the Qanun-e-Shahadat Order, 1984; that in the absence of direct or substantive evidence, conviction could not have been recorded against the appellant on the basis of the evidence of recovery of 'chhurri' only because the same being evidence of purely of corroboratory nature was not capable to bring home charge against the appellant; that neither Serologist report was exhibited at the trial, so as to prove that 'chhurri' was blood stained nor report qua anal swabs were produced to prove that the motive alleged by the prosecution i.e. that the murder was committed to conceal the offence of sodomy, was true.

9. Mr.Aftab Ahmad Khan, Advocate, learned counsel for the State, on the other hand, while controverting the contentions, raised by the learned counsel for the appellant has submitted that since appellant, while in custody in another case, had made disclosure regarding commission of the offence in the instant case and in pursuance thereof also got recovered the crime weapon from his house, therefore, he was rightly convicted for the offence. He, however, candidly conceded that Serologist and Chemical Examiner's reports were not produced, at the trial. He also found great difficulty in rebutting the argument that the disclosure regarding commission of the offence, allegedly made by the appellant before the police officers, and that too, while in custody of the police was inadmissible.

10. We have given our anxious consideration to the respective contentions of the learned counsel for the parties besides, perusing the record of the case, minutely. Admittedly, the occurrence, in the instant case, is unseen. Neither any body was named in the FIR nor suspected and there was no clue as to who was responsible for the murder uptill

15.6.2002 when the appellant who was already in custody of the police, in some other case, allegedly confessed his guilt and made disclosure to the police regarding murder of Shan Masih. The confession/admission of guilt by the appellant has been mainly relied upon by the prosecution to prove its case though memo in pursuance thereof was neither prepared nor produced at the trial. Learned counsel for the appellant has in view of the bar contained in Article 38 of the Qanun-e-Shahadat Order, 1984 challenged admissibility of the confession allegedly made by the appellant before the police officer.

It may be noted here that as per Article 38 of the Qanun-e-Shahadat Order, 1984 (hereinafter referred to as "the Order") no confession made to police officer can be proved against an accused of any offence whereas, Article 39 provides that, subject to Article 40, no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved against him. Article 40 of "the Order", which is an exception to the rules contained in Articles 38 and 39 of "the Order",

provides that when any fact is deposed to as discovered in consequence of the information received from a person accused of any offence, in the custody of police, so much of such information, whether it amounts to a confession or not, as it relates distinctly to the fact thereby discovered, may be proved. Normally, Article 40 is pressed into service when recovery of any incriminating article, or dead body of the deceased in case of murder, is recovered by the police officer at the instance of an accused and in consequence of the information received from him which, at times, may tantamount to confession as well, but if nothing in pursuance of the information so received is recovered or the information, received is not connected with the recovery made, then such information whether it amounts to confession or not would be inadmissible. Though, it has to be, keeping in view circumstances of each case, decided by a Court as to what portion of the statement of a witness is admissible and no hard and fast rule can, in this regard, be laid yet, it can be safely concluded that if no "fact" in consequence of the information received from the accused is discovered then statement

of the witness would not, to that extent, be admissible because what is allowed to be proved under section 40 of "the Order" is the information received by a police officer or any part thereof which relates distinctly to the fact thereby discovered. Meaning thereby that police officer is not allowed to place on record merely the fact of his having received same information but the information must relate to the discovery of the "fact". In other words the information so received must directly connects the accused with the object recovered. Here it would be advantageous to have a glance at Article 40 of "the Order" which reads as follows:-

> "Article 40. **How much of information received from accused may be proved.** When any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

In the instant case, P.W.10 Ghulam Abbas, ASI has stated that accused was under arrest with Ashiq Ali, S.I. when on 15.6.2002 at about 11/12 o' clock in his i.e. the witness's presence he made confession that he

had committed qatl-e-Amd with 'chhurri' by cutting neck of Shan Masih deceased. P.W.10 has not stated as to whether in pursuance of the above disclosure/confession the crime weapon i.e. "chhurri" was got recovered by the appellant or not and similar is the statement of P.W.11 Muhammad Arif, ASI. P.W.12 Ghulam Rasool has stated that while in custody with Ashiq Ali, ASI, the accused had also stated that he had committed Qatl-e-Amd of Shan Masih with "chhurri'. He has added that the I.O. had, in his presence, prepared the memo of the pointation of place of occurrence i.e. Exh.PF but he, too, is silent with regard to the recovery of "chhurri". Further, in the course of his cross examination he has stated that on the same day accused had made disclosure and got recovered the weapon of offence i.e. "chhurri" from his own house but it is not clear from his statement that the disclosure made by the accused was with regard to the murder or was related to the fact of concealment of "chhurri'. P.W.15 Ashiq Ali, S.I. has stated that during investigation in case FIR No.96 of 2002 accused Pervaiz Masih had made disclosure that he had committed murder of Shan

Masih deceased in case FIR No.78 of 2002. At that juncture, an objection was raised by the learned counsel for the appellant that the above portion of the statement was inadmissible in evidence but the witness went on saying that accused present in the Court had further made a disclosure that he would get recover the weapon of offence used in murder of Shan Masih and on 13.3.2002 he in fact got recovered "chhurri" vide Exh.P.4 from the courtyard of his house. It would be beneficial to reproduce herein below the relevant portion of his statement which reads as follows:-

> "During investigation, of case FIR No.96/2002, the accused Pervaiz Masih had made a disclosure that he had committed murder of Shan Masih deceased of case FIR No.78/2002.
> At this stage, learned counsel for the accused has raised objection that confession before the police is admissible under the law. The accused present in the Court had further made a disclosure that he could get recover the weapon of offence used in the case of murder of Shan Masih. On 13.3.2002, the accused while in my custody and was on physical remand and was under investigation of the present case had pointed out the chhurri Exh.P.4 from courtyard of his/own house from southern side of courtyard of his house and I in the presence of witnesses namely Liaqat Ali and Ghulam Rasool had effected recovery of chhurri Exh.P.4 and the recovery proceeding was incorporated by me in the memo of recovery Exh.PB.
> Underlining is ours.

From perusal of the above portion of P.W.15's statement particularly the underlined parts, it is quite clear that the witness talks about two disclosures; one made before him regarding murder of Shan Masih and secondly with regard to concealment of the weapon of offence, hence, I see force in the contention raised by the learned counsel for the appellant that so far as the disclosure made by him with regard to the murder of Shan Masih is concerned, which amounts to confession otherwise, was inadmissible in view of the clog contained in Articles 38 and 39 of "the Order" as in pursuance thereof no "fact" was discovered. However, subsequent part of his statement which relates to the disclosure regarding concealment of "chhurri' is concerned that was admissible because the weapon of offence was recovered in pursuance thereof. However, we are afraid the evidence of the recovery of crime weapon by itself being evidence of purely of corroboratory nature, in the absence of any direct or substantive evidence, alone, was not sufficient to bring home charge against the appellant, particularly when neither Serologist's report nor Chemical Examiner's reports were

produced or tendered in evidence so as to prove that the "chhurri" was blood stained and if it was so, it had human blood and was of the same group as was of the deceased.

11. It is well-established that unless substantive or direct evidence is available conviction cannot be based on any other type of evidence, howsoever, convincing it may be. Reliance in this regard may be placed on the case of Muhammad Noor v. Member-I, Board of Revenue, Balochistan and others reported as 1991 SCMR 643 wherein the Honourable Supreme Court of Pakistan was pleased to lay down as under:-

> "The answer obviously is in the negative. We say because none of the pieces of evidence relied upon is a substantive piece of evidence and so long a substantive or direct evidence is not available no other type of evidence, howsoever, convincing it may be, can be relied upon or can form the basis of conviction.

In the case of Qalb Abbas alias Nahola v. The State reported as 1997 SCMR 290, the above view was affirmed. Thus, in the circumstances of the case conviction and sentences recorded against the appellant cannot be sustained.

Since it is not possible for a Court of law to record conviction on mere conjectures and hypothesis, therefore, we, in view of above discussion, have been left with no option but to hold that the prosecution has miserably failed to prove its case against the appellant. In this case, there is room for doubt, benefit whereof, must go to the appellant. Consequently, this appeal is accepted. The conviction and sentences recorded against appellant Pervaiz Masih son of Ghulam Masih by the learned Additional Sessions Judge, Lahore vide judgment dated 30.3.2004, are set aside and he is acquitted of the charge. He shall be released forthwith, if not required in any other case.

These are the reasons of our short order of the even date.

(Ch. Ejaz Yousaf)
Chief Justice

(Zafar Pasha Chaudhry)
Judge

Islamabad,dated the
18th April, 2005
ABDUL RAHMAN/**

FIT FOR REPORTING

CHIEF JUSTICE