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IN THE FEDERAL SHARIAT COURT  
(APPELLATE JURISDICTION)

PRESENT

MR. JUSTICE SH. NAJAM UL HASAN, CHIEF JUSTICE  
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

JAIL CRIMINAL APPEAL NO.11-I OF 2016

BAZ MUHAMMAD SON OF GUL MUHAMMAD,  
KAKAR BY CASTE R/O KILLI FAIZABAD,  
PISHIN.

.....APPELLANT

VERSUS

THE STATE.

.....RESPONDENT

COUNSEL FOR THE APPELLANT...

MR. KARIM KHAN YOUSAFZAI,  
ADVOCATE.

COUNSEL FOR THE STATE. ...

MR. YAHYA KHAN, DEPUTY  
PROSECUTOR-GENERAL,  
BALUCHISTAN.

FIR NO. DATE AND  
POLICE STATION ...

22 OF 2003. 19.08.2003, LEVIES  
HURRAMZAI, DISTRICT PISHIN.

DATE OF JUDGMENT  
OF TRIAL COURT ...

31.12.2015

DATE OF PREFERENCE ...

21.06.2016

DATE OF HEARING ...

12.12.2017

DATE OF DECISION ...

12.12.2017

DATE OF JUDGMENT ...

19.12.2017

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JUDGMENT:

Mehmood Maqbool Bajwa, J: Impugn herein judgment dated 31<sup>st</sup> of December, 2015, whereby a learned Additional Sessions Judge, Pishin after trial convicted appellant Baz Muhammad under Section 396 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called The Act) and awarded him sentence of life imprisonment and further to pay five hundred thousand rupees (500,000/-) as compensation under Section 544-A of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called The Code). In default of payment, the appellant was to further undergo six months imprisonment. Benefit of Section 382-B of The Code was extended to him.

2. On 12<sup>th</sup> of December, 2017, after hearing adversaries, we through short order accepted the appeal and while setting aside the judgment assailed, appellant was acquitted.

Hereinafter are the reasons of our conclusion regarding acceptance of appeal.

3. Prosecution case as reflected in the Crime-Report (Ex.P.8-A) bearing No.22 of 2003 registered under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called Ordinance VI of 1979) read with Section 34 of The Act at Police Station Levies Hurrainzai, District Pishin on the complaint (Ex.P.2-A) of Ali Ahmad (P.W.2) is that on 15<sup>th</sup> of August, 2003, three persons, Hisamud-Din, Kalim Ullah and Baz Muhammad (present appellant) engaged taxi

No.PT-0439 owned by his father Niaz Ahmad (deceased) from Quetta to Peshin (Kali Katwan) and committed his murder in the area of Bagair, thrown dead body in the *Churr*. Complainant had no source of information about the occurrence and complaint was drafted as per information received through telephonic call from Police Station City Quetta, according to which Hisam-ud-Din (convicted earlier) came and made disclosure narrating the mode and manner of occurrence also disclosing the name of culprits including present appellant also implicating him.

4. Hisam-ud-Din faced trial and was convicted through judgment dated 7<sup>th</sup> of November, 2003.

Kaleem Ullah, co-accused was acquitted on 1<sup>st</sup> of November, 2007 in view of compromise.

5. The appellant who remained absconder after arrest was sent to face trial, who denied the allegations contained in charge under Section 17(4) of Ordinance VI of 1979.

6. The prosecution in order to prove its case produced Dr. Saleem Ullah (P.W.1), Ali Ahmad, complainant (P.W.2), Ubaid Ullah, Levies Hawaldar, recovery witness of Taxi (P.W.3), Musa Jan, Levies Constable (P.W.4), Maqbool Anwar, Additional Deputy Commissioner (P.W.5), Rehmat Ullah Umrani, Judicial Magistrate-Senior Civil Judge (P.W.6), Shaista Khan, Naib Tehsildar (P.W.7), Muhammad Naeem Khan, Judicial Magistrate (P.W.8) and Abdul Karim, Naib Risaldar-Investigating Officer (P.W.9).

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7. The appellant in his statement recorded under Section 342 of The Code denied the whole incriminating evidence put while pleading false implication.

8. The appellant submitted appeal through jail at Islamabad but through order dated 1<sup>st</sup> of March, 2017, it was transferred at Bench Registry of this Court at Quetta.

9. Heard adversaries and perused the record.

10. At the very outset, it is desirable to add here that though name of appellant finds mentioned in the Crime-Report (Ex.P.8-A) lodged by Ali Ahmed (P.W.2), son of the deceased, but perusal of complaint (Ex.P.2-A) as well as F.I.R. (Ex.P.8-A) reveals that neither he is the eye-witness of the occurrence nor got first hand information about the culpability of appellant. Strangely enough, it finds mentioned that on telephonic call from Police Station, city Quetta, it revealed that Hisam-ud-Din (convict) visited police station, made admission implicating him, Kaleem Ullah as well as appellant and narrated the mode and manner of occurrence.

11. Deposition of Ali Ahmed (P.W.2) is though in line with the accusation setup in complaint (Ex.P.2-A) but his statement, even if taken as gospel truth, would not suggest even an iota of incriminating evidence against the appellant. His evidence to the extent of implication of appellant is nothing but hearsay.

12. Evidence of Musa Jan, Levies Constable (P.W.4), Maqbool Anwar, Additional Deputy Commissioner (P.W.5), Rehmat Ullah Umrani, Judicial

Magistrate-Senior Civil Judge (P.W.6) and Shaista Khan, Naib Tehsildar (P.W.7) is not required to be dealt with as they deposed against Hisam-ud-Din (convict).

13. Only evidence produced by the prosecution against appellant is the statement of Muhammad Naeem Khan, Judicial Magistrate (P.W.8), who recorded confession of appellant (Ex.P.8-C).

Confessional statement of appellant was heavily relied upon by learned law officer further submitting that it gets corroboration from the confessional statement of Hisam-ud-Din, which evidence in his opinion is sufficient to prove charge against the appellant.

14. Prior to dealing with the evidentiary value of confession, it is desirable to highlight the criteria for acceptance or rejection of judicial confession.

15. The Hon'ble Supreme Court of Pakistan dealt with the pre-requisites for acceptance of judicial confession in "HASHIM QASIM and another v. The STATE" (2017 SCMR 986) and it was held at page-994 as follow:

*"12. It is trite law that for accepting a confession, two essential requirements must be fulfilled i.e. that the confession was made voluntarily, it was based on true account of facts, leading to the crime and the same was proved at the trial. The superior courts have also given strict guidelines for the Magistrate, recording confession, to be followed without any exception which need not be repeated herein, because long line of authorities on this point is already in the field."*

There is another important factor which has to be kept in view for acceptance or rejection of confession. In the case of "MUHAMMAD PERVEZ and others v. THE STATE and others" (2007 SCMR 670), Hon'ble Shariat

Appellate Bench of Supreme Court of Pakistan, also dilated upon the factum of delay in recording judicial confession which alongwith other attending circumstances was held to be sufficient to brush aside the confession. Dealing with the moot point, it was held at page-680 as follow:

*"6. In case all the facts are put in a juxtaposition, then it is crystal clear that confessional statement was recorded after five days as the appellant Pervez was remained in the custody of the local police. It is a settled law the delay over 24 hours would normally be fatal to the acceptance of judicial confession as law laid down by this Court in Naqebullah's case PLD 1978 SC 21 coupled with the fact that prosecution had failed to explain the delay in recording the confessional statement. This fact created doubt qua the confessional piece of evidence. See Khan Muhammad's case 1981 SCMR 597. It is no doubt that mere delay of 24 hours in recording the confessional statement is not fatal but surrounding circumstances are also to be considered qua believing or not believing the confessional statement."*

In order to act upon the confession, it must be found true, convincing and made voluntarily. Reference may be made to the Rule of law enunciated in "SULEMAN v. THE STATE" (2006 SCMR 366).

Exculpatory statement by the accused would be of little help to the prosecution.

16. Keeping in view the yardstick, now we will examine the confession banked upon by the learned Trial Court to record conviction.

17. According to Abdul Karim, Naib Risaldar-Investigating Officer (P.W.9), on 15<sup>th</sup> of September, 2014, he received information from Police Station, Pishin that appellant has been arrested. He went to said police station, procured his custody and obtained his physical remand. The witness further stated that appellant made confession during investigation

and his statement under Section 161 of The Code was recorded on 17<sup>th</sup> of September, while on 19<sup>th</sup> of September, 2014, his confessional statement was recorded by Judicial Magistrate which facts was endorsed by Muhammad Naeem Khan, Judicial Magistrate (P.W.8).

18. Confession by appellant before Investigating Officer as per saying of I.O. (P.W.9), then recording his statement under Section 161 of The Code on 17<sup>th</sup> of September and then after two days his production before Judicial Magistrate (P.W.8) for recording confession is not understandable. This state of affair itself in our considered view casts doubt about the volunteer act of the appellant to get his confession recorded. No doubt, before the Judicial Magistrate, replying question, appellant denied element of torture but if he at the very outset made admission of guilt before I.O. (P.W.9), then why he was not immediately produced before the Magistrate for recording confession. After admission of guilt before Investigating Officer as stated by him (Having no evidentiary value being inadmissible piece of evidence), why the matter was delayed. Wisdom to record statement of appellant under Section 161 of The Code is also not known. When the appellant admitted his guilt during the course of investigation, there was no option with the Investigating Officer but to produce the appellant before Judicial Magistrate for recording confession without any further delay.

We are conscious that learned Judicial Magistrate (P.W.8) put him certain questions as is evident from statement (Ex.P.8-C). Question No.13 was put to the appellant whether he requires time to think over the

consequences who replied in negative. The reply appears to be un-usual which has to be kept in view. The delay in the circumstances becomes meaningful.

We as such are constrained to brush aside confession on legal premises.

19. Matter can be examined from another angle as well.

Though the appellant gave the detail of occurrence in his confessional statement but while explaining the factum of firing, he just stated that in Kali Katwan, driver of vehicle was offering prayer when Hisam-ud-Din opened fire landing on his neck. The appellant did not attribute any inculpatory act to him though Hisam-ud-Din in his confession (Ex.P.6-A) stated that when driver was offering prayer, the appellant and Kalim Ullah caught hold of him (Driver) and asked him to make fire, upon which he made fire aiming at driver who died at the spot.

The statements on this aspect cannot be reconciled.

Keeping in view the position of the deceased (offering prayer) neither there was any occasion nor justification to catch him hold as disclosed by co-convict (Hisam-ud-Din)

In the circumstances, we are doubtful about the truthfulness of the confession which even otherwise is exculpatory and as such cannot be used against the appellant.

20. We are not un-mindful of the remaining portion of statement, upon which heavy reliance was placed but that too by itself would not be





sufficient even to prove act of robbery as argued as there is no corroboration available to this extent. Even otherwise, we have concluded on legal premises that confession suffers from legal infirmities and as such cannot be acted upon.

During the course of arguments, our attention was drawn to the reply to question No.18 given by appellant in his statement recorded under Section 342 of The Code, according to which impression can be gathered that appellant made confession (Ex.P.8-C).

Question No.18 as laid and framed is a composite question suggesting production of statement under Section 164 of The Code, Envelope (Ex.P.8-A), its Murasila (Ex.P.8-B) and "your confessional statement (Ex.P.8-C)", which was answered in affirmative.

Keeping in view the form of question and reply, argument advanced is based on one possible interpretation but simultaneously, it can be argued that affirmative reply is regarding production of documents referred to including confessional statement.

Even if interpretation made on behalf of prosecution is acted upon, it would not advance plea of prosecution because, we have dealt with the evidentiary value of said confession presuming that it was made by appellant but neither it can be said to be voluntarily nor rings true.

21. Confessional statement of Hisam-ud-Din (convict) cannot be used against the appellant as both were not tried jointly, one of the condition to act upon such confession as a "circumstantial evidence".

22. There is no other incriminating evidence against the appellant.
23. Recovery of taxi from abandoned place through recovery memo (Ex.P.4-A) without pointation of appellant cannot provide corroboration to the case of prosecution though argued with vehemence.
24. Medical evidence coming from the mouth of Dr. Saleem Ullah (P.W.1) and Medical Certificate (Ex.P.1-A) cannot provide basis for conviction against appellant. Such type of evidence cannot prove the identity of culprit. Reliance is placed upon the dictum laid down in "HASHIM QASIM and another v. The STATE" (2017 SCMR 986).
25. Abscondence of the appellant was also heavily relied upon by learned law officer. The argument got no force for mani-fold reasons. First, bald statement of Abdul Karim, Naib Risaldar-I.O. (P.W.9) stating that appellant was proclaimed offender without any proof regarding issuance of non-bailable warrant of arrest and proclamation under Section 87 of The Code would not be sufficient to prove his said status. Second, nothing was put to the appellant in this regard in his statement recorded under Section 342 of The Code. Even otherwise, mere abscondence cannot provide basis for conviction though it can be used as a corroborative piece of evidence.

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Moot point was examined by Apex Court in "ROHTAS KHAN v. THE STATE" (2010 SCMR 566) and it was held at pages-571 and 572 as follow:

*"12. The learned High Court gave importance to the abscondence of the appellant. No doubt it is a relevant fact but it can be used as a corroborative piece of evidence, which cannot be read in isolation but it has to be read along with substantive piece of evidence. This Court in the case of Asadullah v. Muhammad Ali PLD 1971 SC 541 observed that both corroborative and ocular evidence are to be read together and not in isolation. As regards abscondence this Court in the case of Rasool Muhammad v. Asal Muhammad 1995 SCMR 1373 observed that abscondence is only a suspicion circumstance. In the case of Muhammad Sadiq v. Najeeb Ali 1995 SCMR 1632 this Court observed that abscondence itself has no value in the absence of any other evidence. It was also held in the case of Muhammad Khan v. State 1999 SCMR 1220 that abscondence of the accused can never remedy the defects in the prosecution case. In the case of Gul Khan v. State 1999 SCMR 204 it was observed that abscondence per se is not sufficient to prove the guilt but can be taken as a corroborative piece of evidence. In the cases of Muhammad Arshad v. Qasim Ali 1992 SCMR 814, Pir Badshah v. State 1985 SCMR 2070 and Amir Gul v. State 1981 SCMR 182 it was observed that conviction on abscondence alone cannot be sustained. In the present case, substantive piece of evidence in the shape of ocular account has been disbelieved, therefore, no conviction can be based on abscondence alone."*

When the prosecution failed to produce worthy of credit evidence to connect the appellant with the commission of crime, how mere abscondence (Even if proved) can be used to record conviction.

26. Conviction cannot be basis on high probabilities. Reference may be made to "YASIN alias GHULAM MUSTAFA v. THE STATE" (2008 SCMR 336). *S*

27. Viewed from whichever angle, the prosecution failed to produce convincing, corroborative and confidence inspiring evidence against the appellant, therefore, we are constrained to extend benefit of doubt to him. Reliance is placed upon the dictum laid down in "GHULAM QADIR and 2 others v. THE STATE" (2008 SCMR 1221), "FAHEEM AHMED FAROOQUI v. THE STATE" (2008 SCMR 1572) and "HASHIM QASIM and another v. The STATE" (2017 SCMR 986) resulting in acquittal of appellant while accepting the appeal.

  
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

  
MR. JUSTICE SHEIKH NAJAM UL HASAN  
CHIEF JUSTICE

Dated 19<sup>th</sup> of December, 2017  
at Islamabad.  
Mubashir/