

Form No: HCJD/C-121.

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Murder Reference No. 80 of 2009.

The State.

Vs

Shahid Azeem.

APPELLANT BY: Mr Jan Muhammad Khan, Advocate.
RESPONDENT BY: Mr Muhammad Ishaq Shah, Advocate.
Malik Awais Haider Awan, State Counsel.

DATE OF HEARING: **11.04.2018.**

ATHAR MINALLAH, J.- Through this judgment we shall answer Murder Reference no. 80 of 2009 and decide Criminal Appeal no. 506 of 2009 (Shahid Azeem vs. The State). Shahid Azeem son of Muhammad Shafi (hereinafter referred to as the "***Appellant***") was tried and consequently convicted and sentenced vide judgment, dated 05.12.2009, rendered by the learned Additional Sessions Judge, Islamabad in the following terms;-

"Hence, the accused Shahid Azeem son of Muhammad Shafi, is convicted under Section 302-B of PPC for committing murder of Sadia Hussain, minor 07 years old girl and is sentenced to capital punishment of death. He be hanged by neck till his death. He is also fined to tune of Rs.1,00,000/. He is further directed to pay compensation under Section 544-A of Cr.P.C., to the tune of

Rs.1,00,000/- to the legal heirs of the deceased.

The accused will undergo six months SI if he fails to pay the fine. The accused Shahid Azeem, is also convicted under Section 376 of PPC for commission of rape with the minor girl and is sentenced to capital punishment of death. He be hanged by neck till his death. He is further convicted under Section 364 of PPC and sentenced for kidnapping minor Sadia with the intention to commit rape and with the knowledge that rape may result in her death and is sentenced to 10 years RI alongwith fine of Rs.50,000/-. It is also proved from the record that the accused threw away the dead body of deceased Sadia over the Mumty in order to conceal evidence of his act and is punished under section 201 PPC to the extent of 07 years RI alongwith fine of Rs.50,000/- failing which he shall also undergo SI for 6 months."

2. The facts, in brief, are that the Appellant is a dual national. He holds nationality of the Kingdom of Norway in addition to that of the Islamic Republic of Pakistan. As an owner of House no. 1312, Street no. 12, Sector I-10/2, Islamabad, the Appellant had rented out the ground portion to Akhtar Hussain son of Nawab Khan PW.14 (hereinafter referred to as the **"Complainant"**). The latter, at the time when the occurrence had taken place, was living on the ground floor as a tenant along with his family which included his 07 year old daughter,

namely Sadia Hassan (hereinafter referred to as the "**Deceased**"). The Appellant was living in the upper portion of the same house. The Complainant informed **15** on 15.10.2007 that the Deceased had not returned home after she had gone to play in the park in the afternoon. On receiving information Shams-ul-Akbar, SI visited the house of the Complainant and communicated the information to the concerned Police Station. The Complainant filed an application at Police Station, Sabzimandi, stating therein that the Deceased was missing. The said application was filed on 29.10.2007, Ex.P.M. / P.M.1. Another application Ex.P.N. was filed by the Complainant on 04.11.2007, stating therein that he apprehended that someone had abducted/kidnapped his daughter probably for demanding ransom. Pursuant to the said written complaint Criminal Case i.e. FIR no. 249, dated 04.11.2007, was registered under section 364-A of the Pakistan Penal Code, 1860 (hereinafter referred to as the "**FIR**"). On 24.11.2007, the occupant of House no. 1313, Street no. 12, Sector I-10/2, Islamabad, namely Rafique Ahmed PW.2, noticed a body lying on the roof of the head room above the stair case well (hereinafter referred to as "Mumty") of the adjacent house i.e. House no. 1314. Rafique Ahmed PW.2, therefore, informed his neighbours including the Complainant. The Police Station, Sabzimandi was also informed and pursuant thereto Shams-ul-Akbar/SI PW.15, reached the crime scene. He prepared a memo of identification of the dead body Ex.P.P. and a rough site plan Ex.P.AA. Two bricks, local tobacco in the form of a pill of 'Naswar' and two

crushed left over cigarette butts were also taken into possession vide respective recovery memos. The dead body was sent for conducting an autopsy. Dr. Sadia Zia, PW.10 conducted the postmortem Ex.P.H/P.H-1. She entered the witness box as PW.10 and confirmed a mark having been found around the neck and also that the Deceased had been raped. She was of the opinion that death was caused due to strangulation and having been raped. Dr. Farrukh Kamal, PW.11 was also present when the autopsy was conducted and confirmed preparing the postmortem report Ex.P.H and Ex.P.H-1, pursuant to instructions given by Dr. Sadia Zia, PW.10. The last worn clothes were handed over to the Investigating Officer and the same were taken into possession vide recovery memo Ex.P.V. On 25.11.2007, Muhammad Akram prepared a scaled site plan Ex.P.K. On 26.11.2007, the Complainant recorded his supplementary statement, wherein he nominated the Appellant as the accused alleged to have committed the crime. The Appellant had proceeded for Hajj on 14.11.2007 and returned on 25.12.2007. He was put on the 'Exit Control List' pursuant to a written request made on 01.12.2007. On his arrival at Benazir Bhutto International Airport on 25.12.2007, the Appellant was arrested and his passport P.7, ticket P.8, membership card P.9 and cash amount of Rs.1600/- were taken into possession vide recovery memo Ex.P.Z. During investigations the Appellant narrated events which had led to the murder of the Deceased. The disclosures made by the Appellant led the Investigating Officer to the recovery of a 'Shawl' P.1 (a piece of fabric worn

usually by women), a piece of cloth, said to have been stained with semen P.2, Chapal P.3 (slippers) and these items were taken into possession by the Investigating Officer vide recovery memos which were duly witnessed. The place where the dead body had been kept by the Appellant was also indentified by the Appellant to Shams-ul-Akbar, SI PW.15 and, therefore, the latter prepared the memo of pointation where the dead body of the Deceased had been kept, Ex.P.D. On 27.12.2007, section 376 of the Pakistan Penal Code, 1860 (hereinafter referred to as the "**PPC**") was added and the investigations were transferred to Khalid Masood Akram, Inspector PW.16. On 02.01.2008, the Appellant was produced before the learned Judicial Magistrate who ordered sending him to the judicial lockup. After passing of the said order regarding sending the Appellant to the judicial lockup, the latter was produced before Malik Muhammad Afsar, Assistant Commissioner, PW.13, for recording his statement under section 164 of the Criminal Procedure Code, 1898 (hereinafter referred to as the "**Cr.P.C.**"). The said statement was recorded pursuant to application dated 29.12.2009 Ex.P.L. After fulfilling the legal requirements, the confessional statement of the Appellant was recorded under section 164 of the Cr.P.C. wherein he narrated the events which had led to the death of the Deceased, Ex.P.L-1 and Ex.P.L-2. It is also pertinent to mention that the counsel engaged by the Appellant had filed an application on 29.12.2007, wherein it was prayed that the Appellant be ordered to be medically examined, alleging that he had been tortured. Notice was also issued to

the State for 01.01.2008. The Appellant, vide application dated 06.08.2008 Ex.D.E., retracted his confessional statement, stating therein that it was not given by him voluntarily. On completion of the investigations, the charge was framed on 14.07.2009. The charge to the extent of the addition of section 376 of the PPC was amended vide order, dated 05.12.2009. The Appellant preferred not to be examined under oath and, therefore, he recorded his statement under section 342 of the Cr.P.C, denying having committed the offences. The learned trial Court, after recording of evidence and affording an opportunity of hearing to the parties, convicted the Appellant and sentenced him to death in the terms which have been reproduced above. Reference was made to this Court bearing no. 80 of 2009 and the Appellant has preferred Criminal Appeal no. 506 of 2009.

3. Mr Jan Muhammad Khan, ASC has contended that; the Appellant was not provided the relevant documents and that too within the prescribed period and, therefore, provisions of section 265-D of the Cr.P.C. have been violated; charges were framed on 14.07.2008 in respect of sections 364, 302 and 201 of the PPC, in addition to section 10 of Zina (Enforcement of Hudood) Ordinance, 1979; later due to the repeal of the Ordinance of 1979, the charge was reframed vide order dated 05.12.2009 by adding section 376 of the PPC and on the same date the judgment was rendered; the reframing of the charge required re-examination of the witnesses and giving an opportunity to the Appellant to cross examine them; sections

231 and 232 of the Cr.P.C. makes it mandatory that whenever a charge is altered, then an opportunity has to be given to the accused as contemplated therein; the confessional statement purportedly recorded under section 164 of the Cr.P.C. was not given voluntarily; an application was filed wherein it was alleged that the Appellant had been severely tortured; the latter was arrested on 25.12.2007 and he remained on physical remand till 02.01.2008; the application for recording of the confessional statement reflects that it was dated 29.12.2007; the delay in the recording of the confessional statement is fatal; at the relevant time Shams-ul-Akbar SI, P.W.15 was not the Investigating Officer and was, therefore, not authorized to produce the Appellant for the recording of his confessional statement; requirements were not fulfilled by the learned Magistrate; after recording of the statement under section 164 of the Cr.P.C., the Appellant remained incarcerated at the Police Station; the Appellant could not have been kept in the lockup of the Police Station after the recording of his confessional statement; the learned trial Court did not take into consideration the fact that the Appellant had retracted his confessional statement and the same was recorded in writing vide application, dated 06.08.2008, Ex.D.E; the Appellant had also stated in his statement, recorded under section 342 of Cr.P.C, that he had been tortured while he was incarcerated; the retracted confessional statement could not have been relied upon; the statement of Roshmeen Khan PW.3 was recorded by the Investigating Officer after a considerable delay; no one had

witnessed the offence; statements under section 161 of the Cr.P.C were recorded after considerable delay and the same has not been explained; the Appellant, before leaving for Hajj, had been searching for the Deceased along with the Complainant; circumstantial evidence brought on record is not sufficient to complete the chain; some other items were also recovered from the Mumty, where the dead body of the Deceased was found; the brand of cigarette recovered from the portion where the Appellant lived and recovered from the Mumty were different; the recoveries made purportedly at the instance of the Appellant are fake and planted; medical evidence does not support the prosecution case; the recovered Shawl could not have left the marks on the neck as reported in the postmortem report; the investigations were not honest and were carried out to protect others; in the facts and circumstances of the instant case a sentence of death could not have been awarded. The learned counsel has placed reliance on the cases titled "*Hakam Deen vs. The State through Advocate General and 15 others*" [PLD 2006 S.C. (AJ&K) 43], "*Muhammad Baqa alias Baqir vs. The State*" [2000 P.Cr.L.J. 465], "*Khuda Bux and another vs. The Crown*" [1969 SCMR 390], "*Muhammad Hashim Raza vs. The State*" [PLJ 1997 Cr.C. (Lahore) 237], "*Muhammad Ali vs. The State*" [2008 P.Cr.L.J. 87], "*Muhammad Pervez and others vs. The State and others*" [2007 SCMR 670], "*Manjeet Singh vs. The State*" [PLD 2006 S.C. 30], "*Aala Muhammad and another vs. The State*" [2008 SCMR 649], "*Muhammad Ismail vs. The State*" [2011 MLD 967], "*Sh. Muhammad Amjad vs. The State*"

[2004 SCJ 33], "Akbar Ali vs. The State and 03 others" [2007 MLD 1004], "Hakam Deen vs. The State through Advocate General and 15 others" [2005 YLR 2032], "Muhammad Asif vs. The State" [2017 SCMR 486], "Nisar vs. The State" [PLD 2008 S.C. 343], "Rahat Ali vs. The State" [2010 SCMR 584], "Imran alias Dully and another vs. The State and others" [2015 SCMR 155], "Mst. Askar Jan and others vs. Muhammad Daud and others" [2010 SCMR 1604], "Azeem Khan and another vs. Mujahid Khan and others" [2016 SCMR 274], "Hashim Qasim and another vs. The State" [2017 SCMR 986] and "Fayyaz Ahmad vs. The State" [2017 SCMR 2026].

4. Mr Muhammad Ishaq Shah, ASC appeared on behalf of the Complainant and argued that; all the documents were provided to the Appellant and, therefore, there was no violation of the provisions of the Cr.P.C, inter alia, section 265-C; no complaint was filed by the Appellant regarding not having been provided the relevant documents; no prejudice was caused by altering the charge; the addition of section 376 of the PPC did not require a retrial or reexamination of the witnesses; the confessional statement was recorded under section 164 of the Cr.P.C and an application was filed after a considerable delay on 06.08.2008, alleging that the same was not made voluntarily; the learned trial Court has dealt with this aspect in detail and has rightly observed that despite having several opportunities the Appellant had not complained before any judicial forum that he had been tortured; the confessional statement is duly corroborated by the recoveries, the statement of Roshmeen

Khan PW.3 and the other evidence; it is evident from the evidence that the Appellant was alone in his portion of the house on the day of occurrence since other family members had gone to visit their ancestral village in Gujrat; this part of the deposition of Shams-ul-Akbar, SI PW.15 was not challenged; the prosecution has established its case beyond a reasonable doubt; the Appellant had committed a heinous crime and no mitigating circumstances exist so as to justify awarding a lesser sentence than death. The learned counsel has placed reliance on the cases titled "*Sher Dil and others vs. The State and others*" [2003 YLR 110], "*Imran and 03 others vs. The State*" [2007 P.Cr.L.J. 721], "*Muhammad Shafi vs. The State*" [1992 P.Cr.L.J. 1385], "*Mst. Naseem Akhtar and another vs. The State*" [1999 SCMR 1744], "*Majeed vs. The State*" [2010 SCMR 55], "*Manjeet Sindh vs. The State*" [PLD 2006 S.C. 30], "*Nizam ud Din vs. Riaz and another*" [2010 SCMR 457], "*Muhammad Sharif vs. the State*" [1969 SCMR 521], "*Muhammad Gul and others vs. The State*" [1991 SCMR 942], "*Anwar Khan and another vs. The State*" [2006 SCMR 1343], "*Soobo vs. The State*" [2016 P.Cr.L.J. 290], "*Rafiq Ahmad vs. Police Constable Saeed Shah and another*" [1997 MLD 2208], "*S.A.K. Rehmani vs. The State*" [2005 SCMR 364], "*Shah Nawaz vs. The State*" [1992 SCMR 1583], "*Nazir Ahmed and others vs. The State and others*" [PLD 2005 Karachi 18], "*Mst. Rizwana Bibi and others vs. The State and others*" [2003 YLR 263], "*Muhammad Ashraf Khan Tareen vs. The State*" [1995 P.Cr.L.J. 313], "*Nabi Bakhsh and another vs. The State and another*" [1999 SCMR 1972],

"Tariq Mehmood and others vs. The State and others" [2002 SCMR 1602], "Prithi Chand vs. State of Himachal Pradesh" [1990 MLD 1389] and "Ch. Muhammad Yaqoob and others vs. The State and others" [1992 SCMR 1983].

5. The learned State Counsel has adopted the arguments advanced by the learned counsel for the Complainant.

6. The learned counsels for the parties have been heard and the record perused with their able assistance.

7. Admittedly, the Appellant holds the nationality of the Kingdom of Norway in addition to that of Pakistan. He had rented the lower portion of his house to the Complainant and the latter was residing there along with his family which included the Deceased, his seven year old child. There was no eye witness of the occurrence and the case against the Appellant is based mainly on his confessional statement recorded under section 164 of the Cr.P.C. and the evidence which corroborates the events narrated therein. The Appellant was arrested on 25.12.2007 on his return from the Kingdom of Saudi Arabia after performing Hajj. The dead body of the Deceased was accidentally found lying on the Mumty of House no. 1314, by the occupant of House no. 1313 i.e. Rafique Ahmed, PW.2 on 24.11.2007. It is not denied that the said Mumty was accessible from the portion of the house which was occupied by the Appellant. The Appellant had retracted his confessional statement by filing an application on 06.08.2008. It

is also obvious from the record that his confessional statement was recorded after almost seven days from the date of his arrest. The medical evidence confirms that the Deceased was strangled besides being raped. The Appellant had led the Investigating Officer to the recovery of the Shawl P.1 and Chapals P.3. The Chapals (slippers) were identified by the Complainant as those of his daughter i.e. the Deceased on 12.02.2007. The Appellant had also led to the recovery of a piece of cloth P.2, which according to his own confessional statement was used for the purpose of cleaning after he had committed the offence. The Appellant had also led the police to the place where he had left the dead body of the Deceased i.e. on the Mumty and the Investigating Officer had accordingly recorded a memo to this effect. Consequent to the repeal of section 10 of the Zina (Enforcement of Haddood) Ordinance, 1979, section 376 of the PPC was added. Roshmeen Khan (PW-3) had deposed that on the day when the Deceased had disappeared, the latter had bought cigarettes and had stated that it was for her "uncle". It is obvious from the evidence that the relationship of the Appellant was cordial with the Complainant. There was no reason for involving the Appellant in this case falsely. The question which is required to be answered by us is whether the confessional statement recorded under section 164 of the Cr.P.C. was given voluntarily and whether there is sufficient evidence on record to corroborate the events narrated therein. The retraction of the confessional statement

on 06.08.2008 is also of relevance. In order to answer these questions, it would be beneficial to examine the precedent law.

8. The august Supreme Court in the case titled "The State versus Minhun alias Gul Hassan" [PLD 1964 Supreme Court 813] has held as follows;-

"As for the confessions the High Court, it appears, was duly conscious of the fact that retracted confessions, whether judicial or extra-judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. It is now well settled that as against the maker himself his confession, judicial or extra-judicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement. The question, however, as to whether in the facts and circumstances of a given case the Court should act upon such a confession alone is an entirely different question, which relate to the weight and evidentiary value of the confession and not to its admissibility in law. As observed even by Munir, C.J in his commentary on the law of

Evidence at page 168 (Vol.I) "it is a settled rule of evidence that unless a retracted confession is corroborated in material particulars it is not prudent to base a conviction in a criminal case on its strength alone. It is the duty of the Court that is called upon to act upon a retracted confession to enquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true.

The proposition that a retracted extra-judicial confession cannot corroborate a retracted judicial confession cannot also be assailed where corroboration is found necessary, for, that would amount to utilizing of one piece of tainted evidence to corroborate another piece of tainted evidence".

9. In the case titled "*Ch. Muhammad Yaqoob and others versus The State and others*" [1992 SCMR 1983], the august Supreme Court, after examining the precedent law, has summarized the principles as follows;-

"From the above cited cases, inter alia, the following principles of law are deducible:

- i) That if a statement of fact made by an accused in a confession is of the nature that if it is assumed to be true, it would negate the offence alleged to be confessed, it is called an exculpatory confession.*
- ii) That a statement of an accused that contains self-exculpatory matter cannot amount to confession.*

- iii) *That a retracted confession is sufficient to sustain a conviction for a capital offence, if the Court is of the view that the same is voluntary and is true, but as a rule of prudence, it has been consistently held by the superior Courts that the same should not be acted upon unless corroborated by some other reliable evidence in material particulars.*
- iv) *That though the confession of a co-accused cannot be made foundation of conviction but it may be used in support of other evidence.*
- v) *That the confession of a co-accused is an evidence of a weak character.*
- vi) *That under Islamic Jurisprudence, in order to make a confession reliable, it should be voluntarily made and not on account of any coercion, duress or violence.*
- vii) *That any delay in recording of a confession may, or may not, be fatal as to the evidentiary value of a retracted confession as in the case of Syed Sharifuddin Pirzada vs. Sohbat Khan and 3 others (supra), this Court has held that the factum that the accused were in the police custody for 11 to 15 days, was not fatal as to the credibility of the retracted confessions for the reason that the Court was satisfied that the retracted confessions were not tutored and were, in fact, made voluntarily.*
- viii) *That any lapse on the administrative side on the part of a Magistrate recording a confession, may not be fatal as to the evidentiary value of such confession provided the Court is satisfied that the lapses on his part have not, in any way, adversely affected the voluntariness or truthfulness of the confession.*
- ix) *That if an accomplice's evidence is not corroborated in material respects, it cannot be acted upon and that the evidence of an accomplice cannot be used to corroborate evidence of another accomplice.*

The legal position, which has emerged from the above reports, seems to be that in order to judge the evidentiary value of retracted confession, the Court is to advert to the question, whether the same appears to have been made voluntarily, without any inducement, duress or coercion with

the object to state the truth. If the Court is satisfied on the above aspect, the mere fact that there were some irregularities in recording of a confession, would not warrant disregarding of the same”.

10. The august Supreme Court reiterated the law annunciated in the case titled “*Bahadur Khan versus The State*” [*PLD 1996 S.C. 336*] and has observed and held in the case titled “*Khalid Javed and another versus The State*” [*2003 SCMR 1419*] as follows;-

*“The next important test, which the Court is required to satisfy is whether the accused has got recorded a true confessional statement. In this context it is to be seen that accused has retracted his confession and alleged that under coercion same was obtained from him. Therefore, before believing the same it is imperative to examine as to whether same is corroborated by other evidence no material points as held in the case of “Bahadur Khan V. The State” [*PLD 1996 SC 336*]”.*

11. It has been held in the case “*Bahadur Khan V. The State*” [*PLD 1996 SC 336*] that a judicial confession alone can be made a basis for conviction when it is found true, convincing and made voluntarily by the accused without any duress or coercion.

12. The above annunciation of law has been reiterated by the apex Court in the case titled “*Manjeet Singh versus The*

State" [PLD 2006 Supreme Court 30] and has further observed and held as follows;-

"However, the real test is that confession must not only be voluntary but it must also be true and to ascertain its truthfulness it is necessary to examine and compare the confession with the rest of prosecution evidence to exclude any possibility or probability of any doubt qua its true character."

13. The august Supreme Court in the case titled *"Muhammad Amin versus The State" [PLD 2006 S.C. 219]* has observed and held that a confession, judicial or extra judicial, whether retracted or not retracted, can validly form the sole basis for the conviction of its maker, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture, coercion or inducement. Likewise in the case titled *"Allah Nawaz versus State" [2009 SCMR 736]*, the august Supreme Court has reaffirmed that it is settled law that a confession is to be rejected or accepted as a whole. Moreover, a mere suggestion to the Magistrate who had recorded the confessional statement that it was involuntary is not enough to throw it away.

14. The august Supreme Court has elucidated the principles regarding the effect of delay in recording of a confessional statement in the case titled *"Majeed versus The*

State" [2010 SCMR 55]. It has been held that delay in recording the confessional statement of an accused by itself is not sufficient to adversely affect its validity and no hard and fast rule can be laid down regarding the period for recording such a confessional statement during investigations. Moreover, it has been observed that any lapse on the part of the Magistrate in recording a confession cannot always be treated as fatal to the evidentiary value of the confession, if the Court is satisfied that the said lapse did not in any way adversely affect the voluntariness or truthfulness of the confession. It has been emphasized that a voluntary and truly recorded confession requires no corroboration and is sufficient for conviction, but as a rule of procedure, the Court is required to seek corroboration of the same on material particulars.

15. In the case titled "*Dadullah and another versus The State*" [2015 SCMR 856], the august Supreme Court has observed and held as follows;-

"This is settled law that conviction could not be recorded on the sole basis of confessional statement and the prosecution has to prove its case beyond any shadow of doubt. However, having gone through the evidence, we have found that the confessional statement of the accused were not the result of maltreatment and coercive measures".

16. The august Supreme Court has elaborately dealt with the law relating to the evidentiary value of a confessional statement in the case titled "*Azeem Khan and another versus Mujahid Khan and others*" [2016 SCMR 274] and the relevant portion is reproduced as follows;-

"Keeping in view the High Court Rules, laying down a binding procedure for taking required precautions and observing the requirements of the provision of section 364 read with section 164, Cr.P.C, by now it has become a trite law that before recording confession and that too in crimes entailing capital punishment, the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that, all signs of fear inculcated by the Investigating Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in

uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person is willing to confess, then all required questions formulated by the High Court Rules should be put to him and the answers given, be recorded in the words spoken by him. The statement of accused be recorded by the Magistrate with his own hand and in case there is a genuine compelling reason then, a special note is to be given that the same was dictated to a responsible official of the Court like Stenographer or Reader and oath shall also be administered to such official that he would correctly type or write the true and correct version, the accused stated and dictated by the Magistrate. In case, the accused is illiterate, the confession he makes, if recorded in another language i.e. Urdu or English then, after its completion, the same be read-over and explained to him in the language, the accused fully understand and thereafter a certificate, as required under section 364, Cr.P.C with regard to these proceedings be given by the Magistrate under his seal and signature and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to

any police official/officer whether he is Naib Court wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused”.

17. Reiterating the above principles and law the august Supreme Court in the case titled "*Hashim Qasim and another vs. The State*"[2017 SCMR 986] has observed and held that the pre-requisites for accepting a confession are twofold i.e. there are two essential requirements which must be fulfilled; first, that the confession was made voluntarily and was based on true accounts of facts leading to the crime and, second, the same was proved at the trial.

18. It is, therefore, obvious from the above precedent law that a retracted judicial confession could be legally taken into consideration if the Court is satisfied that it was true and recorded voluntarily i.e. not obtained by torture, coercion or inducement. However, though a retracted confession is sufficient to sustain even a conviction of capital punishment but the rule of prudence requires to consider the surrounding circumstances and that it should not be acted upon unless corroborated by other credible evidence in material particulars. Depending on the facts and circumstances in each case, delay in recording a confessional statement may or may not be fatal. The Recording Magistrate has essentially to observe the mandatory procedure highlighted by the august Supreme Court

in the case of Azeem Khan and another versus Mujahid Khan and others supra.

19. In the instant case, we are satisfied that the confessional statement, despite having been retracted, was true and made voluntarily. We have no doubt that it narrated actual facts as had happened on the fateful day. The Appellant, being a citizen and national of the Kingdom of Norway, had the added advantage of approaching the Diplomatic mission for counselor assistance had he been dealt with otherwise than in accordance with the law. It is evident from the record that at no stage had the Appellant made any request for allowing him to contact the Diplomatic mission of the Kingdom of Norway in Islamabad. The Appellant had appeared before the Judicial Magistrate who ordered sending him on judicial remand. Later in the day he also appeared before another learned Magistrate for recording his statement under section 164 of the Cr.P.C. From the time of his arrest till recording of his statement under section 164 of the Cr.P.C., the Appellant had numerous opportunities to bring to the notice of various judicial forums before which he was produced any illegality committed by the police officials let alone having been subjected to torture. After his confessional statement was recorded, he preferred to keep silent for more than seven months and belatedly filed an application on 06.08.2008, stating therein that he had not recorded his confessional statement voluntarily. In his statement recorded under section 342 of the Cr.P.C., he had taken a different stance of having been forced to sign some documents and

putting his thumb impressions. His confessional statement was recorded by Malik Muhammad Afsar, Assistant Commissioner / Magistrate, who had entered the witness box as PW.3. He had indeed observed all the legal procedural requirements. Despite lengthy cross examination he remained consistent and the credibility was unshaken. The recoveries were proved and corroborated the confessional statement in material particulars. The recovery of the Chapals P.3 (slippers) of the Deceased from the portion occupied by the Appellant stands established and the same were identified by the Complainant as that of his daughter. Moreover, the medical evidence establishes beyond a reasonable doubt that the confessional statement was not only voluntary but reflected the true facts which had led to the commission of the crime by the Appellant. There is no force in the argument advanced by the learned counsel for the Appellant that the recovered Shawl P.1 could not have caused the injury on the neck which was described in the postmortem report. Shawl is a piece of fabric ordinarily worn by women. It can be used for tying or binding something tightly, having the same effect as a rope. It, therefore, can be used to strangle a person, which in the instant case was a child of tender age. We are satisfied that in the facts and circumstances of the case the delay in recording the confessional statement was not fatal. The argument that after reframing of the charge a retrial had become inevitable is misplaced. No prejudice was caused to the Appellant and, therefore, a retrial would have been a futile exercise. The learned counsel for the Appellant, despite his able

assistance, was not able to show how in any manner whatsoever the reframing of the charge had prejudiced the latter. Moreover, the delay in transporting the Appellant to the prison after recording his statement was inconsequential. The reason for the delay has been explained by the prosecution. Moreover, it did not effect the recording of the confessional statement.

20. For what has been discussed above, we are satisfied that the prosecution has established its case beyond a reasonable doubt. The confessional statement recorded by the learned Assistant Commissioner / Magistrate under section 164 of the Cr.P.C. on 02.01.2008 was corroborated by evidence which was brought on record during the course of the trial. We are satisfied that the statement was made voluntarily. We do not find any reason to interfere with the conviction and sentence awarded by the learned trial Court. Consequently, we answer the Murder Reference no. 80 of 2009 in the ***affirmative*** and accordingly ***dismiss*** Criminal Appeal no. 506 of 2009, the same having been found to be without merit.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(ATHAR MINALLAH)
JUDGE

Announced in open Court on 11.07.2018.

JUDGE

JUDGE

Approved for reporting.

*Asad K/**

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