

**[Balochistan]**

**Before Muhammad Hashim Khan Kakar and Muhammad Noor Meskanzai, JJ**

**ARAB---Appellant**

**Versus**

**The STATE---Respondent**

Criminal Appeal No.357 of 2008, decided on 24th October, 2012.

**(a) Penal Code (XLV of 1860)---**

---Ss. 302(b) & 302(c)---Criminal Procedure Code (V of 1898), Ss. 164 & 364---Qanun-e-Shahadat, (10 of 1984), Art. 37---Qatl-e-amd---Appreciation of evidence---Sentence, reduction in---Confessional statement of accused recorded voluntarily and promptly---Deceased contributing to his own death---Effect---Accused, who was a juvenile, allegedly fired at the deceased---Motive for the incident was a dispute over vacation of a rented shop---Accused recorded his confessional statement before the Magistrate but subsequently retraced the same---Trial Court convicted the accused under S.302(b), P.P.C. and sentenced him to life imprisonment along with compensation of Rs.50,000 to be paid to legal heirs of deceased---Validity---Accused voluntarily surrendered before the police and handed over his crime weapon---Confessional statement of accused was recorded a day after his arrest, which eliminated the possibility of use of coercion, inducement or persuasion---Promptitude with which confessional statement of accused was recorded depicted voluntariness---Judicial Magistrate who recorded confessional statement of accused complied with all the necessary formalities enumerated in Ss.164 and 364, Cr.P.C.---Accused had brought nothing on record to show that the confession was not voluntary or the same was obtained through coercion, maltreatment or inducement---Retraction of confession by accused seemed to be palpably false and incorrect and the only conclusion that could be drawn was that confessional statement was recorded by accused voluntarily---Confessional statement of accused stood

corroborated by motive, medical evidence and recovery of crime weapon---Report of firearm expert was not produced by the prosecution since crime weapon and empties were damaged due to an explosion at the Forensic Science Laboratory---Report of firearm expert hardly made a difference in view of the confessional statement of the accused, which was adjudged to be true and voluntary---Doctor mentioned that time between death and examination of accused was 2 to 4 hours, which corresponded with the time of occurrence as mentioned in confessional statement of accused---Prior to the incident deceased entered the house of accused and misbehaved---Accused apparently committed murder of deceased to defend his family honour and it appeared that it was immoral and improper act of the deceased himself, which led or at least contributed to his ultimate murder---Conviction of accused under S.302(b), P.P.C. was converted to S.302(c), P.P.C. and his sentence of life imprisonment was altered to fourteen years imprisonment along with compensation of Rs. 50,000 to be paid to the legal heirs of deceased---Appeal was dismissed accordingly.

**(b) Criminal Procedure Code (V of 1898)---**

---S. 164---Confession, retraction of---Burden of proof---Scope---When an accused person retracted or resiled from his confession, then the onus lies on him that he did not record any confession.

**(c) Criminal Procedure Code (V of 1898)---**

---S. 164---Sole confessional statement of accused---Conviction---Scope---Conviction could be based on sole confessional statement, provided the same was voluntary and true.

State through A.-G. N.-W.F.P., Peshawar v. Waqar Ahmed 1992 SCMR 950 rel.

**(d) Criminal Procedure Code (V of 1898)---**

---S. 164---Confessional statement---Inculpatory and exculpatory part, reliance on---Scope--  
-General rule was that confessional statement of accused was to be accepted as a whole, if the conviction was based solely on his statement---Confessional statement of accused in such a case could not be relied upon in part by accepting inculpatory part and excluding exculpatory part of it---Exception to the general rule applied where conviction was not based solely on the confession, in which case confession could be accepted in part by relying upon inculpatory part and excluding the exculpatory part.

Faiz v. The State 1983 SCMR 76 rel.

**(e) Criminal Procedure Code (V of 1898)---**

---Ss. 164 & 364--- Oaths Act (X of 1873), S. 5--- Confessional statement of accused recorded on oath, reliance on---Scope---Confessional statement of accused should not be recorded on oath---Mere fact that judicial confession was recorded on oath, would not be sufficient to reject the same, as it might only be a procedural mistake in the form of an irregularity in exercise of jurisdiction, which might not affect the statement in substance--- Notwithstanding procedural defect in recording the confession, a judicial confession, if voluntary and confidence inspiring, could safely be made basis of conviction.

Nazeer alias Wazir v. The State PLD 2007 SC 202 rel.

Mujeeb Ahmed Hashmi and Kushal Khan Kasi for Appellant.

Abdul Sattar Durrani, Additional P.-G. for the State.

Usman Yousafzai and Muhammad Hassan Sherani for the Complainant.

Date of hearing: 15th October, 2012.

**JUDGMENT**

**MUHAMMAD HASHIM KHAN KAKAR, J.**---This criminal appeal is directed against the judgment dated 3rd December, 2008 (the "impugned judgment"), passed by the Sessions Judge/Juvenile Court, Loralai (the "trial Court"), whereby appellant Arab son of Muhammad Sharif was convicted under section 302(b) of the P.P.C. and sentenced to suffer life imprisonment and to pay an amount of Rs.50,000 (Rupees fifty thousand only) as compensation to the legal heirs of deceased Bashir Ahmed as provided under section 544 of

the Criminal Procedure Code 1898 (Cr.P.C.), or in default whereof to further undergo six (6) months' simple imprisonment (SI), with the benefit of section 382-B of the Cr.P.C.

2. Complainant Abdul Rasheed in his Fard-e-Bayan (Exh.P/4-B) dated 13th June, 2008 alleged that he was present in his house situated at Labour Colony, Loralai. At about 11-30 p.m., the boys informed him that his son Bashir Ahmed is lying injured near the small gate of the Masjid, at which he came out and saw his son in injured condition, who informed him that he was fired at and injured by accused Arab with a Kalashnikov. The complainant and his son Nazar Ahmed shifted the injured to civil hospital. The motive behind the occurrence was stated to be vacation of a rented shop. Consequently, a case vide Crime No.67 of 2008, under section 324 of the P.P.C. was registered against the accused at Saddar Police Station, Loralai. Subsequently, the injured, while shifting him to Quetta for further treatment, succumbed to the injuries and, accordingly, section 324 of the P.P.C. was substituted to that of section 302 of the P.P.C. in F.I.R.

3. After usual investigation, challan was prepared and the appellant was sent up to face the trial. On the State allegations, a formal charge was framed and read over to the appellant, to which he did not plead guilty and claimed trial. The prosecution, in order to prove its case, produced four witnesses, viz. Dr. Amjad Pervaiz, Senior Medico Legal Officer, DHQ Hospital, Loralai (P.W.1), Ahmed Khan, constable (P.W.2), Abdul Muqet, Judicial Magistrate, Loralai (P.W.3) and Noor Muhammad, SI/SHO, Investigating Officer (P.W.4).

4. After recording prosecution evidence, the accused/appellant was examined under section 342 of the Cr.P.C., wherein once again he denied the charge and professed his innocence, however, he did not opt to record his statement on oath under section 340(2) of the Cr.P.C., but produced Jamal Bibi (D.W.1) in his defence.

5. Upon consideration of the evidence, adduced by the prosecution, the trial Court held that the prosecution has succeeded in proving its case against the appellant/accused beyond reasonable doubt and having held so, convicted and sentenced the appellant, as noted above.

6. Mr. Mujeeb Ahmed Hashmi, learned counsel for the appellant, contended that on the basis of sole retracted confession, which, otherwise, not true and voluntary, no conviction could have been awarded in absence of any corroboratory evidence. Learned counsel further stated that the recovery of Kalashnikov as well as empties from the alleged place of occurrence is also of no avail to the prosecution and no corroboration could be sought from it qua retracted confession, as the same were not sent to Forensic Science Laboratory (FSL) for expert's opinion, as such, the conviction is not sustainable under the law.

7. Mr. Muhammad Usman Yousafzai, learned counsel for the complainant, while supporting the judgment of the trial Court, argued that the judicial confession was rightly believed by the trial Court being voluntary in nature and the appellant has given truthful account of the incident and further that conviction can be based on the sole confessional statement, provided the same bears truth and is confidence-inspiring.

8. We have given due consideration to the arguments and have gone through the evidence with the valuable assistance of both the counsel for the parties. After having gone through the entire record, we are of the view that the prosecution has established the guilt of the appellant to the hilt. The record reflects that the appellant was arrested on 13th June, 2008 and confessional statement was recorded on 14th June, 2008, which eliminates the possibility of use of coercion, inducement or persuasion. The promptitude with which the confessional statement was got recorded depicts voluntariness.

9. We have also gone through the statement of learned Judicial Magistrate, who recorded the confessional statement of the appellant, which revealed that all the necessary formalities as enumerated in section 364 of the Cr.P.C. were complied with prior to recording of statement under section 164 of the Cr.P.C. We have noticed that during cross-examination, the defence counsel had suggested to P.W.3 Abdul Muqeet, Judicial Magistrate that the confessional statement was the result of maltreatment and coercive measure, but, quite surprisingly, the appellant, by taking a somersault, has completely negated the said version while answering question No.7 in his examination got recorded under section 342 of the Cr.P.C. and stated that he was not produced before the Judicial Magistrate for the purpose. It is well-settled that when an accused person retracts or resiles from his confession, then the onus lies on him that he did not record any confession. The appellant has brought nothing on record to show that the confession was not voluntary or the same was obtained through coercion, maltreatment or inducement. Thus, in our considered view, retraction of the same seems to be palpably false and incorrect and the only irresistible conclusion would be that the confessional statement was got recorded by the appellant voluntarily and at his own.

10. Adverting to the next contention that conviction cannot be based on the sole confessional statement, it may be observed that the incident was unwitnessed; and after commission of the offence, the appellant voluntarily surrendered himself before the police authorities and besides handing over the crime weapon i.e. Kalashnikov, also got recorded his confessional statement on very next day of his arrest. It is by now well settled that conviction can be based on the sole confessional statement, provided the same is voluntary and true. By holding this view, we are fortified from a case of State through A.-G., N.-W.F.P., Peshawar v. Waqar Ahmed, 1992 SCMR 950, wherein Hon'ble Supreme Court observed as under:--

"When an accused has given an account of the incident and its truth is not doubted and such statement is proved to be correct in all its parts, such solitary piece of evidence can be used against the accused without any further corroboration. There is

no basic difference between a confession or a retracted confession, if the element of truth is not missing. It is always a question of fact which is to be adjudged by the Courts on the attending circumstances of a particular case. In this case, we have come to the irresistible conclusion that the confessional statement of the accused is true and voluntary and conviction could be recorded on such statement."

It may be noted that the confessional statement stands corroborated by motive, medical evidence and recovery of crime weapon. It is true that the report of Fire-arm Expert was not produced by the prosecution to show that the empties secured from the place of occurrence were wedded with the Kalashnikov recovered from possession of the appellant, but it is equally true that in this regard an explanation was given by the Investigating Officer, as the same were damaged due to explosion at FSL Crimes Branch, Quetta. Thus, it hardly makes any difference, as the above said fact has been admitted by the appellant himself in his confessional statement, which has been adjudged as true and voluntary.

11. Similarly, the confessional statement also finds corroboration from medical evidence, furnished by Dr. Amjad Pervaiz (P.W.1), who found the following injuries on the dead body of Bashir Ahmed:--

(1) "A small circular wound, on the right side of the lower chest (i.e., wound of entrance) 2 cm x 2 cm deep entrance, with fresh blood.

(2) Burst wound on the epigastric region tearing muscle, tissue deep with fresh blood (i.e., wound of exit)."

According to the doctor's opinion, death was caused due to circulatory collapse with excessive bleeding and the injuries were caused with firearm. The time mentioned by the doctor between death and examination was 2 - 4 hours, which also corresponds with the time of occurrence as mentioned in confessional statement (Exh.P/3-B).

12. It is also worth-mentioning that the appellant, while recording his confessional statement, has given the motive of firing at deceased Bashir Ahmed. The motive, which was only known to him as well as to the inhabitants of the house, wherein the occurrence took place, came from the mouth of the appellant and D.W.1 Mst. Jamal Bibi, who categorically stated that on the fateful night at about 11-30 p.m., Bashir Ahmed (deceased) entered in the house and misbehaved with Mst. Gul Makai.

13. The only question, which now remains to be answered, is as to whether the confessional statement of accused can be accepted in part or as a whole? The general law is that the confessional statement of the accused is to be accepted as a whole, if the conviction is based solely on his statement. In such a situation, the statement of the accused cannot be relied upon in part by accepting inculpatory part and excluding an exculpatory part of his statement. However, there is exception to the general rule, that is, if the conviction is not based solely on the confession, then law permits that the same can be accepted in part by relying upon inculpatory part and excluding the exculpatory part of his statement. This view finds support from a case *Faiz v. The State* 1983 SCMR which is as under:--

"8. The judgment of the High Court makes it abundantly clear that the ocular evidence was totally discarded and the only material utilized by the Court for determining the guilt of the appellants was the "defence version." There were no proved or established facts to test the defence version. This distinguishes the decision in *Imamudain's* case which had proved or established facts. In *Balmakund's* case a reference to Full Bench of the High Court became necessary because the Judges hearing the case found the exculpatory part of the statement of the accused to be so unworthy of belief that no Court could act upon them. The Full Bench noted that during the last one hundred years the following two rules of criminal jurisdiction have been consistently observed without any attempt to engraft as exception:--

(a) where there is other evidence a portion of the confession may, in the light of that evidence, be rejected while acting upon the remainder with the other evidence.

(b) where there is no other evidence, the Court cannot accept the inculpatory element and reject the exculpatory element as inherently incredible."

In the attending facts and circumstances, while placing implicit reliance on the above cited rulings of law as laid down by the Hon'ble Supreme Court of Pakistan in connection with to evaluate and assess the confessional statement of the accused when the conviction is based solely on his such statement, we rely upon the confessional statement as a whole. We noticed that on 12th June, 2008 at about 11-30 p.m., deceased Bashir Ahmed entered the house of the accused and started misbehaving with his cousin; viz, Gul Makai, leading to the instant unpleasant incident, which culminated in unfortunate death of deceased Bashir Ahmed. We can safely conclude that the occurrence was result of the reasons as stated by the appellant in his confessional statement in order to save his family honour and the act of the accused is to be adjudged at the touchstone of evidence available on record in accordance with the principle of administration of justice. It appears that the appellant committed the offence in an effort to defend his family honour. It, thus, appears that it was immoral or improper act of the deceased himself, which had led or had at least contributed to his ultimate murder.

14. We are in agreement with learned counsel for the appellant that the confessional statement of an accused should not be recorded on oath, but mere fact that a judicial confession was recorded on oath, would not be sufficient to reject it, as it may be only procedural mistake in the form of an irregularity in exercise of jurisdiction, which may not affect the statement in substance. It is settled proposition of law that notwithstanding procedural defect in recording the confession, a judicial confession, if it is found true, voluntary and confidence inspiring, can safely be made basis of conviction. In this regard, reference can be made to a case of Nazeer alias Wazir v. The State PLD 2007 SC 202, wherein it was held as under:--

"8. The provisions of sections 164, Cr.P.C. and 364, Cr.P.C. invariably apply to all sorts of statements and as confessional statement recorded under section 164, Cr.P.C. on oath is violative of section 5 of the Oaths Act, 1873 which prohibits the administration of oath or affirmation to an accused person, therefore, the question for consideration would be whether a confessional statement which was recorded on oath, if caused no prejudice or injustice to the accused, is admissible in evidence or not. The rule enacted in section 5 of Oaths Act, 1873, is based on the concept that law does not compel an accused to make a confession and he is under no obligation to speak the truth but if he willingly and voluntarily makes a judicial confession his statement is an evidence and thus in the light of this principle the administration of an oath or affirmation to an accused is considered not based on public policy and is an illegality in law. This rule of English Law, in principle, is not in conflict with the principles governing the criminal administration of justice in Islam except that a Muslim is not supposed to tell a lie before the Court and must speak truth."

15. In view of the above, we convert the conviction of the appellant from section 302(b) of the P.P.C. to that of section 302(c) of the P.P.C. and alter the sentence of life imprisonment to that of fourteen (14) years' rigorous imprisonment (RI). The appellant shall also pay compensation amount of Rs.50,000 to the legal heirs of the deceased, or in default whereof to further undergo SI for six (6) months. He shall also be entitled to the benefit of section 382-B of the Cr.P.C.

With the above modification in the quantum of sentence of imprisonment of the appellant, the appeal, being without any substance, is dismissed. The aforesaid modified sentences of the appellant shall order to run concurrently with the conviction and sentence awarded to him in connected Arms Case No.1 of 2008, arising out of F.I.R. No.68 of 2008, under section 13(e) of the Pakistan Arms Ordinance, 1965 registered at Saddar Police Station, Loralai, which is subject-matter of Criminal Appeal No.211 of 2009.



