

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department]

Jail Criminal Appeal No.225-P/2017
With Murder Reference No.6 of 2017

1. HukmanShah s/o Sada Gul; and
2. Azmat Ullah s/o Sher Zaman,
Both residents of Darsamand
District Hangu.

Appellant (s)

VERSUS

The State etc

Respondent (s)

For Appellant (s) :-	<u>Mr. Shabbir Hussain Gigyani,</u> <u>Advocate.</u>
For State :-	<u>Mr. Danial Khan Chamkani, AAG.</u>
For complainant :-	<u>Nemo</u>
Date of hearing:	<u>06.03.2024</u>
Date of announcement :-	<u>14-05-2024</u>

JUDGMENT

ISHTIAQ IBRAHIM, CJ.- At a trial held by learned Additional Sessions Judge-I Hangu ("**Trial Court**"), in case vide FIR No.581 dated 11.12.2013, registered under Sections 302, 392, 386, 412 & 34 Pakistan Penal Code, 1860 ("**PPC**"), at Police Station Doaba District Hangu, Hukman Shah and Azamat Ullah ("**the appellants**"), having been found guilty of committing murder of Fazal-ur-Rehman deceased, robbery, extortion and dishonestly receiving stolen property, have been convicted and sentenced vide judgment dated 31.03.2017 ("**impugned judgment**"), as under:-

Under Section 302 (b) PPC:- Each Sentenced to death as Ta'azir.

Under Section 392 PPC: To undergo rigorous imprisonment (R.I) for nine years each and to pay Rs.50,000/- each as fine and in default thereof to further undergo six months simple imprisonment (S.I) each.

Under Section 386 PPC:-To undergo nine years R.I. each and to pay Rs.40,000/- each as fine and in default thereof to further undergo six months S.I.

Under Section 412 PPC:- To undergo nine years R.I. each and to pay Rs.50,000/- each as fine and in default thereof to further undergo six months S.I. each.

Benefit of Section 382-B Cr.P.C. has been extended to the appellants, however, the substantive sentences of imprisonment shall run consecutively.

2. Feeling aggrieved, the appellants have questioned their conviction and sentences through the instant Jail Criminal Appeal, while the learned trial Court has sent **Murder Reference No.6 of 2017**, for confirmation of death sentence of the convicts.

3. As both the matters are the outcome of one and the same judgment of the learned trial Court, therefore, we propose to decide and answer the same through this single judgment.

4. The prosecution's case as per First Information report (FIR) Exh.PA is that on 09.11.2013 one Musharraf, driver of taxi motorcar bearing Registration No.RT.699-Islamabad, went missing along with his taxi and qua his missing, one Sangeen Khan, owner of the taxi made report in Police Station West Cantt, Peshawar, which was incorporated in daily diary No.18 dated

11.11.2013. Upon his report, inquiry under section 156 (3) Cr.P.C. was initiated during which Gulzar, brother of taxi driver Musharraf, recorded statement under section 161 Cr.P.C. wherein he charged unknown culprit(s) for abduction/kidnapping of Musharraf along with taxi for ransom. According to Sangeen Khan, as per mobile cell phone data his driver Mushaff was located going towards Tall City, but thereafter his cell phone was found switched off. He suspected illegal confinement of Musharraf in Tall City District Hangu. Initially, case FIR No.568 dated 05.12.2013 under section 365-A PPC was registered in Police Station West Cantt Peshawar against unknown culprit(s). During investigation, Azmat Ullah and Hukman Shah, the appellants, were arrested along with co-accused Sher Zaman and Muhammad Saeed on 07.12.2013 and 11.12.2013 by Toheed Inspector. On the pointation of appellants Azmat Ullah and Hukman Shah, decomposed dead body of abductee Musharraf was recovered from a dry well of Poultry Farm of appellant Azmat Ullah in presence of doctor and Mr. Muhammad Mushtaq Judicial Magistrate-II, Hangu.

5. At the time of recovery of dead body of Musharraf deceased, deadbody of one Fazal-ur-Rehman, deceased of the present case, was also recovered by the police on the pointation of the appellants from the same Well inside Poultry Farm of appellant Azmat Ullah. Raja

Mehmood Sultan complainant (PW.7), present at the spot reported to Said Khan DSP (PW.9) to the effect that Fazl-ur-Rehman deceased was his driver and was plying motorcar bearing registration No.LRQ.4773 as a taxi from Islamabad Airport; that on 02.11.2013 Taxi of the deceased was hired by a young man from Islamabad to Tall Hangu in his presence and when he did not return, his son Jafar reported about his missing in Police Post Islamabad Airport; that he along with relatives of the deceased was in search of Fazal-ur-Rehman for the last so many days when in the meantime that he learnt about availability of a human dead body in a Well situated in the limits of Darsamand, therefore, he along with relatives of the deceased proceeded to Darsamand where the police on the pointation of the appellants, recovered dead body of Fazl-ur-Rehman deceased which was decomposed. Similarly, the police also recovered another dead body which was identified to be that of taxi driver Musharraf. He identified appellant Hukman Shah at the spot to be the person who had hired taxi of Fazl-ur-Rehman deceased in his presence from Islamabad Airport to Tall. He charged both the appellants for commission of the offence. All the proceedings were conducted at the spot in presence of Illaqa Judicial Magistrate and Medical Officer. Report of complainant Raja Mehmood Sultan was recorded in the shape of Murasila on the basis

of which FIR No.581 dated 11.12.2013 under sections 302, 386, 392, 412 and 34 PPC was registered against the appellants at Police Station Doaba Hangu. The dead body of Musharraf deceased, was taken into possession by the police of Police Station West Cantt Peshawar in case FIR No.568 (ibid).

6. Dr. Qasim Gul (PW.5), conducted autopsy on the dead body of Fazl-ur-Rehman deceased and found the following:-

1. Entry wound on right posterior occipital region about 2x2 cm, exit wound at right eye about 3x4 cm.

Head hair absent clean shaved, mustache black in colour, shirt not present, whole body was decomposed and swollen with foul smelling. Head, trunk, abdomen were grossly swollen. Tip of nose fallen, fingers partially loss, clothes were wet over which mud was present.

Cranium and Spinal Cord: Skull perforated and bones of skull fractured.

Abdomen: Intact but all its parts were decomposed and swollen, mouth disfigured and swollen.

Opinion: As per his opinion cause of death of the deceased was cardio pulmonary arrest due to perforated injury on his skull and brain due to firearm injury.

Probable time between injury and death: 10-30 minutes approximately and between death and postmortem: 20 to 30 days approximately.

7. Investigation of the case was entrusted to Habib Ullah Inspector (PW.6), who after registration of the FIR

proceeded to the spot and prepared site plan Exh.PB on the pointation of complainant in presence of Illaqa Judicial Magistrate and Medical Officer, recorded statements of the PWs under section 161 Cr.P.C., draw pictures of the spot which are Exh.PW.6/1, placed on file postmortem report of the deceased. As the appellants were already arrested in case FIR No.568 (supra), therefore, he arrested them from Peshawar Jail in the present case vide arrest card Exh.PW.6/3 and shifted them from Peshawar to Hangu vide application Exh.PW.6/4. On 19.12.2013, he obtained physical remand of the appellant from learned Illaqa Judicial Magistrate. On 20.12.2013, he prepared sketch Exh.PW.6/6 of the place where motorcar of the deceased was sold on the pointation of the appellants which is Exh.PW.3/1. On 23.12.2013 he produced the appellants before the learned Judicial Magistrate, where they recorded their confessional statements. He also initiated proceedings under sections 204 and 87 Cr.P.C. against absconding co-accused Riaz to whom taxi motorcar of the deceased was sold, recorded statement of the Seizing Officer who recovered 30 bore pistol along with 05 live rounds of the same bore from appellant and placed on file FSL report Exh.PW.6/11. On completion of investigation he handed over case file to SHO, who submitted challan against the appellants before the learned trial Court.

8. On receipt of challan by the learned trial Court, the appellants were summoned and formally charge sheeted to which they pleaded not guilty and claimed trial. To prove its case, the prosecution examined as many as twelve witnesses. After closure of the prosecution's evidence, statements of the appellants were recorded under section 342 Cr.P.C., wherein they denied the prosecution's allegation and professed their innocence. They, however, declined to be examined on oath under section 340(2) Cr.P.C. or to produce evidence in defence. On conclusion of trial, the learned trial court, after hearing both the sides, convicted and sentenced the appellants as mentioned in the initial paragraph of the judgment, hence, this appeal and Murder Reference.

9. We have heard the exhaustive arguments of learned counsel for the parties and perused the record and evidence with their valuable assistance.

10. Admittedly, there is no ocular account in the present case and entire prosecution's case is built on the circumstantial evidence in the shape of recovery of the dead body of Fazal-ur-Rehman deceased from a Well situated in Poultry Farm of appellant Azmat Ullah on the disclosure/pointation of the appellants, confessional statements of the appellants and evidence of the last seen of the deceased in the company of appellant Hukman

Shah, furnished by complainant Raja Muhammad Sultan (PW.12), owner of taxi motorcar bearing Registration No.4773-Lahore. It may be noted that all judicial evidence is either direct or circumstantial. By direct evidence is meant when the principal fact is attested directly by witnesses, things or documents. To all other forms, the term circumstantial evidence is applied. It is well settled principle of law that conviction can be recorded even in case carrying death sentence on the basis of circumstantial evidence if it excludes all hypothesis of innocence of accused. The prosecution is duty bound to prove every circumstance independently as is so connected with other circumstances which constitutes an unbroken chain that leads to no other inference but to the guilt of accused. Reliance can be placed on the case of *Mohammad Basharat v. Saqib Shah* (2013 P.Cr.L.J 619), wherein it was held as under:-

“The superior Courts while appreciating the circumstantial evidence which is always considered to be a weak type of evidence, have held that there is no rule of law or practice to prevent a Court from sentencing an accused person to death merely on the circumstantial evidence provided that in a case resting on a circumstantial evidence, no link in the chain should be missing and all the circumstances must lead to the guilt of the accused. The circumstantial evidence can only form basis for

conviction when it is incompatible with the innocence of accused or the guilt of any other person and in no manner be incapable of explaining upon any reasonable hypotheses except that of the guilt of accused. Every link in circumstantial evidence should be proved by cogent evidence and if not then no conviction could be maintained or awarded to an accused."

The Supreme Court of Pakistan in case titled, *Munawar Hussain v. Imran Waseem* (2013 SCMR 374), has observed as under:-

"Even, death penalty can also be awarded on circumstantial evidence but it should be beyond any shadow of doubt. The chain of facts be such that reasonable inference can be drawn that accused has committed the offence. All the facts established should be consistent only with the hypotheses of guilt of the accused. If any link is missing that will destroy the whole links of such evidence and all the links of the circumstances must lead to the guilt of the accused. It is not a such type of evidence, but it is sufficiency and quality which matters. The circumstantial evidence should be so interconnected that it forms such a continuous chain that its one end touches the dead body and the other the neck of accused thereby excluding all hypothesis of his innocence."

11. Taking the case in hand at the touch stones of the principles enumerated in the judgments (supra), first we are taking for discussion confessional statements of the appellants so as to determine whether these are voluntary and free from coercion, torture and inducement and to

what extent these finds corroboration from other independent circumstances. For the sake of convenience and ready reference, we deem it appropriate to reproduce confessional statements of appellants below:-

Hukman Shah

“Stated that, during those days I was residing in Islamabad. On telephone information of Azmat Ullah (co-appellant), I booked a taxi motorcar on special trip from Islamabad to Doaba Hangu and when we reached Doaba, I contacted Azmat Ullah, who came out from his house. We took the taxi driver along with taxi to Poultry Farm situated in front of the house of Azmat ullah and then its driver inside the Poultry Farm, where we tried to tie him so as to snatch key of the taxi from him, but he being a healthy man was resisting, therefore, Azmat Ullah fired at him two shots, as a result, he got hit and died on the spot. We then threw his dead body in a Well inside the Poultry Farm and put stones and mud over in the Well. We sold the taxi motorcar to one Riaz of Darsamand in lieu of sale consideration of Rs.1,90,000/-, out of which he paid us Rs.90,000/- in cash while the remaining sale consideration was agreed to be paid by him within two week; after 9/10 days of the aforesaid incident, I went to Peshawar Airport wherefrom a booked another taxi motorcar to Darsamand Doaba. On our arrival to Doaba, I contacted Azmatullah who was already present in his Poultry Farm. We

parked the taxi motorcar in front of the Poultry Farm and took the driver inside the Farm where Azmat Ullah committed his murder with pistol and thereafter we threw his dead body inside the Well of Poultry Farm. From the pocket of the deceased we recovered Rs.18000/- in cash, one mobile cell phone, CNIC and driving license. The CNIC and driving license were burnt by Azmat Ullah while cash amount was divided by us whereas the mobile cell phone of the deceased was kept by me. We also sold taxi motorcar of the second deceased to said Riaz in lieu of sale consideration of Rs.3,70,000/- which amount was also divided by us. I then proceeded to Islamabad. ”

Azmat Ullah


“Stated that Hukman Shah was residing in Islamabad. I contacted and told him to book a taxi motorcar from Islamabad Airport so as to commit murder of the taxi driver and sell his motorcar. Hukman Shah brought a taxi motorcar to Doaba and contacted me. We took the taxi in front of Poultry Farm and took its driver inside the Poultry Farm. We tried to snatch key from the driver but he was not willing, therefore, I opened fire at him, as a result, he got hit and died on the spot. We threw his dead body in a Well inside the poultry Farm and sold his motorcar to one Riaz in lieu of sale consideration of Rs.1,90,000/-, out of which he paid Rs.90,000/- in cash at the spot while the remaining sale consideration was agreed to be paid

by him after 10/11 days; that from pocket of the deceased we recovered rupees one thousand in cash and mobile cell phone. I kept the mobile with myself while handed over rupees one thousand to Hukman Shah. Thereafter I sent Hukman Shah to Peshawar Airport where he hired another taxi motorcar and brought to Doaba. We also took the said taxi motorcar along with its driver to Poultry Farm where I committed murder of the driver and threw his dead body in the same Well. We sold his taxi motorcar to said Riaz in lieu of sale consideration of Rs.3,70,000/- which amount was paid by him and divided by us. Thereafter Hukman Shah went to Islamabad. I confess my guilt of committing murder of two taxi drivers."

12. Perusal of confessional statements of the appellants would reveal that both are in line with each other on the points as to how car of driver Fazl-ur-Rehman deceased was booked by Hukman Shah appellant on the direction of appellant Azmat Ullah from Islamabad Airport and taken to Doaba Hangu where he was done to death inside Poultry Farm of appellant Azmat Ullah and his dead body was thrown by both the appellants in a dry Well and his taxi motorcar was sold to absconding co-accused Riaz. From confessional statements of the appellants it is also manifest that appellant Hukman Shah has played the role of taking the deceased from Islamabad Airport on special trip to Doaba so as to

snatch motorcar from him and on resistance of the deceased, his murder was committed by appellant Azmat Ullah. No doubt, appellant Hukman Shah has not made any firing at the deceased, however, in throwing dead body of the deceased in a Well and selling his taxi motorcar followed by distribution of the sale consideration, both the appellants have played equal role.

13. The confessional statements of the appellants is corroborated by the testimony of Said Khan DSP (PW.9), who deposed that he along with other police officials, Illaqa Judicial Magistrate, doctor and inhabitants of the locality went to the place known as Zer Khawari Darsamand and on the disclosure/pointation of the appellants recovered two human dead bodies from a well located inside Poultry Farm owned by appellant Azmat ullah; that out of the two deceased, one was identified to be that of Musharraf deceased of case FIR No.568 of 2013 Police Station Gharbi Peshawar, while another was identified by complainant and relatives to be that of Fazal-ur-Rehman deceased of the present case. Complainant present at the spot identified appellant Hukman Shah to be the person who had hired taxi motorcar of the deceased from Islamabad to Thall. On the report of complainant Mursila Exh.,PW.9/1 was drafted on the basis of which FIR Exh.PA was registered against the appellants. He prepared pointation memo



Exh.PW.2/1, which was duly certified by the Judicial Magistrate on the spot. The testimony of Muhammad Mushtaq Khan Judicial Magistrate (PW.11) is consistent with testimony of Said Khan DSP (PW.9) with regard to recovery of dead body of the deceased from a dry Well inside Poultry Farm of Azmat Ullah appellant, on the pointation of the appellants. He deposed that on the written request of local police, he was directed by the learned Sessions Judge Hangu to accompany the police for discovery of body of the deceased; that he along with local police, appellants, doctor and his staff proceeded to the spot situated in village Darsamand; that as per instructions of the appellants they reached the spot i.e. Poultry Farm where on their pointation two dead bodies were recovered from a dry Well; that in this regard SHO Police Station Doaba prepared pointation/discovery memo which is Exh.PW.2/1 and the same was certified by him.

14. The testimony of Raja Mohammad Sultan complainant (PW.12), also corroborates statements of the above named two PWs. He deposed that during those days he was running the business of Rent A-Car in Islamabad; that on 02.11.2013 at about 09.00 AM one of the accused (at this stage he pointed towards Hukman Shah appellant present in the trial court), came to him and asked for a taxi car on a pretext that he has been

arrived from Dubai and due to demise of his father he has to rush to Darsamand Hangu; that he settled rent of the taxi car as Rs.8000/- and directed his driver Fazal-ur-Rehman deceased to accompany appellant Hukman Shah to Doaba in a motorcar bearing registration No.4773 Lahore; that despite lapse of about 1 or 2 months, his driver did not return; that they were searching for him, during which course from mobile phone data of Fazl-ur-Rehman deceased his last location was traced in Darsamand Hangu; that on 11.12.2013, the local police of Police Station Doaba informed him to visit Darsamand Hangu, upon which he along with his son Raja Nadeem as well as relatives of the deceased came to Darsamand; that on the pointation of the appellants dead bodies of two persons were recovered from a dry Well situated in Poultry Farm of appellant Azmat Ullah; that out of the two deceased, one was identified by him and relatives of the deceased to be that of driver Fazal-ur-Rehman deceased; that in respect of recovery of the dead body of the deceased his statement was recorded; that he also signed pointation memo Exh.PW.9/1 in presence of the doctor, the local police and the Judicial Magistrate; that after completion of the proceedings on the spot, we took the dead body of the deceased Fazl-ur-Rehma deceased to village. He charged both the appellants for murder of the deceased.

15. The above named material witnesses of the recovery of the dead body of the deceased on the discovery of the appellants have been cross-examined at length by the defence but nothing of the sort that the police was already in the knowledge of the place of the recovery of the dead body could be extracted from them.

16. Another circumstantial piece of evidence is the confessional statements of the appellants against each other. Under Article 43 QSO consideration of proved confession affecting person making it and others jointly under trial for the same offence, such confession can be used against the accused making it and against co-accused as circumstantial evidence. At this juncture Article 43 of the Qanun-e-Shahadat Order 1984 is reproduced below:-

“43. Consideration of proved confession affecting person making it and others jointly under trial for same offence:- When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons is proved.

- (a) Such confessional shall be proof against the person; making it; and
- (b) The court may take into consideration such confession as circumstantial evidence against such other person.

Illustrations:

- (a) A and B are jointly tried for the murder of C. It is proved that A said, “B and I murdered C”. The court may consider the effect of this confession against B.

- (b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said "A and I murdered C". This statement may not be taken into consideration by the Court against A as B is not being jointly tried.

Perusal of Article 43 of the Order (ibid), reveals that confession of an accused can be used against him as well as against co-accused being jointly tried for the same offence. In the instant case, both the appellants have been tried jointly and they have made confession which has been proved by the prosecution through confidence inspiring evidence corroborated by other reliable and cogent evidence. Thus we are firm in our view that confessional statements of the appellants can be used against each one of them as a circumstantial piece of evidence.

17. Another piece of circumstantial piece of evidence is the testimony of Raja Mehmood Sultan complainant (PW.12), who has furnished evidence of last seen of the deceased in company of appellant Hukman Shah. He while appearing before the learned trial court in the witness box has deposed that during those days he was running a business of Rent A-Car business and Fazl-ur-Rehman deceased was his driver; that on 02.11.2013 at about 09.00 AM one of the accused, this time (he pointed towards appellant Hukman Shah present in the trial court) came and hired his taxi motorcar against rent of Rs.8000/- from Islamabad to Doaba on a pretext that he

has arrived from Dubai and due to demise of his father he has to rush to Doaba Hangu; that he directed his driver Fazl-ur-Rehman deceased to take him in a Taxi motorcar bearing Registration No.4773, whereafter his driver along with taxi disappeared. Argument of learned counsel for the appellants that no identification parade of the appellants has been conducted is unpersuasive because at the time of recovery of the dead body of the deceased on the pointation of the appellants, the complainant identified appellant Hukman Shah at the spot by stating that he was the person who hired taxi motorcar of the deceased from Islamabad Airport to Doaba and he has duly mentioned this fact in the FIR. By considering the above fact we are of the view that holding of identification parade was not the legal requirement in the circumstances of the case. Record shows that the deceased went missing on 02.11.2013 while his dead body was recovered on 11.12.2013 i.e. after one month and nine days. The Testimony of Dr. Qasim Gul (PW.5), who has conducted autopsy on the dead body of the deceased supports the testimony of complainant and confessional statements of the appellants as on examination he found the dead body of the deceased decomposed and one entry wound on his right posterior occipital region about 2x2 cm having corresponding exit about 3x4 cm. According to statement

of the Medical Officer, whole body of the deceased was decomposed and swollen with foul smelling. Tip of his nose was fallen and his fingers were partially damaged. He has opined probable time between death and postmortem as 20 to 30 days approximately which support the testimony of complainant keeping in view the date of missing of the deceased. Undoubtedly, "last seen evidence" is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The "last seen evidence theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. It is well settled that it is not prudent to base conviction of an accused solely on "last seen evidence". "Last seen evidence" should be applied taking into consideration case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen. If a person is last seen with the accused, the accused must offer an explanation as to how and when he parted company with the deceased. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden but if he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon

him. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. It may not be out of context to mention here that the "Last seen theory" does not entirely shift the burden of proof in a criminal trial upon the accused, which is always upon the prosecution, however, it lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. In this regard Article 122 of the Qanun-e-Shahadat Order, 1984 ("Order 1984"), is of worth perusal, according to which when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. For the sake of convenience Article 122 of the Order, 1984 is reproduced below:-

"122. Burden of proving fact especially

within knowledge:- When any fact is especially within the knowledge of any person the burden of proving that fact is upon him."

Article 122 is an exception to Article 117 Illustration (a) which lays down the general rule that in a criminal case

the burden of proof is on the prosecution. Article 122 is certainly not intended to relieve the prosecution from its duty, however, it is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stress that it means facts that are pre-eminently or exceptionally within the knowledge of the accused. In the instant case, the deceased was last seen in the company of appellant Hukman Shah, who has not furnished any explanation so as to point towards his innocence, rather the explanation furnished by him in his confessional statement the deceased was taken to Poultry Farm of Azmat Ullah appellant where he was done to death and his taxi motorcar was snatched.

18. The above discussed circumstantial pieces of evidence make an unbroken chain that its one end touches the dead body of the deceased and another neck of the appellants. No doubt, the appellants have retracted from their confessional statements but it is settled law that conviction can be recorded on the basis of retracted judicial confession, if the same is proved voluntary, true and corroborated by other strong circumstances of the case. Mere denial of accused from confessional

statement, in statement under section 342 Cr.P.C. that the same was involuntary or that he has not made any such statement would not make his confessional statement inadmissible. In case titled, "Manjeet Singh vs the State" (PLD 2006 Supreme Court 30), it has been held by the Hon'ble Supreme Court that retracted confession either judicial or extra judicial, if found truthful and confidence inspiring as well as qualified the test of voluntariness can be used for conviction without looking for any other sort of corroboration. The Hon'ble Apex court in the judgment (supra) has further observed that no rule of criminal administration of justice existed to the effect that the court having found the retracted confession voluntary and true must look for the corroboration and that in absence of corroborative evidence, conviction cannot be maintained. Retraction of a judicial or extra judicial confession itself is not an infirmity to be considered sufficient to withhold the conviction because evidentiary value of a confession is not to be diminished by the mere fact that it was retracted by the maker at the trial. Even an independent corroboration thereof from other sources direct or circumstantial, cannot be insisted in every case as a mandatory rule, rather the rule of corroboration is applied by way of abundant caution and is a case depending entirely on the confessional statement

of a person or only on the circumstantial evidence, and this rule is applied more cautiously.

19. Muhammad Mushtaq Khan, learned Judicial Magistrate (PW.11), who has recorded confessional statements of the appellants has deposed that on 23.12.2013, the appellants were produced before him for recording their confessional statements; that he after observing all legal and code of formalities and putting all relevant and necessary questions to the appellants, one by one, recorded their confessional statements under his own hand writing. He exhibited confessional statements of the appellants as Exh.PW.11/5 and Exh.PW.11/6. The learned Judicial Magistrate has been subjected to lengthy cross-examination by the defence but nothing of the sort that the confessional statements of the appellants were involuntary and result of torture, coercion or inducement could be extracted from him.

20. In view of what has been discussed above, we are firm in our view to hold that confessional statements of the appellants are voluntary and true as well as free from any force and inducement and are corroborated by circumstantial and medical evidence discussed above.

21. Yet there is another important aspect which further strengthens the prosecution's case. For murder of the second deceased, namely, Musharraf, was taken from Peshawar Airport by appellant Hukman Shah and was

done to death in the way as the deceased of the present case was done to death, separate case vide FIR No.568 dated 05.12.2013, under section 365-A, 302, 382 PPC and 7 ATA 1997 was registered against the appellants in Police Station West Cantt (Gharbi) Peshawar. The appellants after facing regular trial, were convicted and sentenced vide judgment dated 21.03.2015, against which the appellants preferred Cr.A. No.204-P of 2015, before this court but the same was dismissed vide judgment dated 08.11.2017. From the facts and circumstances of both the cases it is proved that appellants are habitual of abducting/kidnapping taxi drivers from different Airports, thereafter committing their murder and selling their taxi motorcars.

22. On reappraisal of the prosecution's evidence, we have reached to an irresistible conclusion that the prosecution has proved the guilt of appellants under section 302(b), 386, 392 PPC. So far as conviction of the appellants under section 412 is concerned, it pertains to dishonestly receiving property stolen in the commission of a dacoity, therefore, this section as per available evidence has relevancy with the role of absconding co-accused Riaz, to whom the taxi of the deceased was allegedly sold by the appellant. The learned trial court has rightly held appellants guilty of offences under section 302, 386 and 392 PPC, however, has erred in law

which recording their conviction and sentence under section 412 PPC. Besides, sentence of death awarded by the learned trial court to appellant Hukman Shah also requires serious consideration. From the entire prosecution's evidence as well as confessional statements of the appellants it is proved that it was appellant Azmat Ullah who fired at the deceased, as a result, he got hit and died on the spot. No doubt, appellant Hukman Shah has not fired at the deceased; however, the prosecution has proved his role of abetment in the commission of offence as he was the person who brought the deceased from Islamabad Airport to Doaba Darsamand Hangu on a pretext, where he was done to death by Azmat Ullah appellant, however, his dead body and taxi motorcar were disposed of by both the appellants. In this view of the matter, death sentence of appellant Hukman Shah under section 302(b) PPC is altered to of rigorous imprisonment for life would meet the ends of justice.

23. For what has been discussed above, this appeal is disposed of in the terms that conviction and sentences of appellant Azmat Ullah under section 302(b), 386 and 392 PPC are maintained. Conviction and sentences of appellant Hukman Shah under section 302(b), 386 and 392 PPC are also maintained, however, his sentence of death under section 302(b) PPC is altered from death to

rigorous imprisonment for life. Both the appellants are acquitted under section 412 PPC.

24. Another legal point is that the learned trial court while recording conviction and sentence of the appellants has not adhere to the mandatory provisions of section 544-A Cr.P.C. as no compensation has been ordered by it to be paid by the appellants to legal heirs of the deceased, which was the mandatory requirement of section 544-A Cr.P.C., which for the sake of convenience and ready reference is reproduced below:-

“S.544-A Cr.P.C. Compensation to the heirs of

the person killed, etc: (1) Whenever a person is convicted of an offence in the commission whereof the death of or hurt, injury or mental anguish or psychological damage to any person is caused or damage to or loss or destruction of any property is caused, **the Court shall when convicting such person,** unless for reasons to be recorded in writing it otherwise directs, order the person convicted to pay to the heirs of the person whose death has been caused, or to person hurt or injured, or to the person to whom mental anguish or psychological damage has been caused, or to the owner of the property damaged, lost or destroyed, as the case may be, such compensation as the court may determine having regard to the circumstances of the case; and

(2) The compensation payable under sub-section (1) shall be recoverable as an arrear of land revenue and the court may further order that, in default of payment or of recovery as aforesaid the person ordered to pay such compensation shall suffer imprisonment for a period not exceeding six months, or if it be a court of the Magistrate of

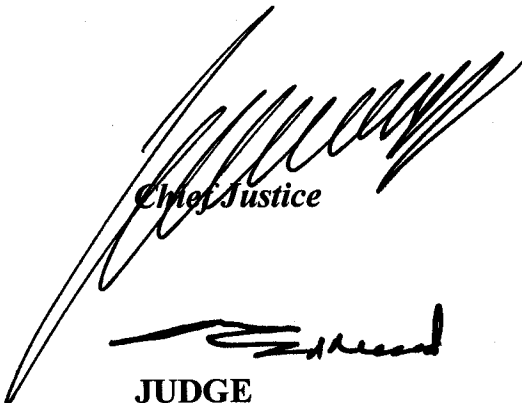
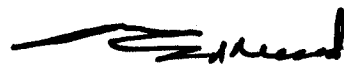
the third class, for a period not exceeding thirty days.

(3) The compensation payable under sub-section (1) shall be in addition to any sentence which the court may impose for the offence of which the person directed to pay compensation has been convicted.

The learned trial court has not recorded any reason for not awarding compensation under section 544-A Cr.P.C. In this view of the matter, in addition of sentence under section 302(b) PPC, each of the appellant shall pay rupees ten lac to legal heirs of the deceased as compensation in terms of section 544-A Cr.P.C. and in default thereof shall further undergo six months simple imprisonment each. The substantive sentences of imprisonment shall run concurrently with each other.

25. In view of the above, **Murder Reference No.6 of 2017** to the extent of sentence of the appellant Azmat Ullah is answered in the **Affirmative** while to the extent of appellant Hukman Shah the same is answered in the **Negative**.

Announced:
14-05-2024
M.Siraj Afridi CS


Chief Justice

JUDGE

DB of Hon'ble Mr. Justice Ishtiaq Ibrahim Chief Justice,
And Mr. Justice Shakeel Ahmad