IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE MANZOOR AHMAD MALIK
MR. JUSTICE SYED MANSOOR ALI SHAH
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CRL.PETITION NO.1124-L OF 2015 AND 1120-L OF 2015
(Against the judgment of the Lahore High Court, Lahore dated 14.09.2015 passed in Murder Reference No.276/2011 and Criminal Appeal No.996/2011)

Raza	:	*(In Crl.P.No.1124-L of 2015)*
Allah Ditta	:	*(In Crl.P.1120-L/2015)*
	...	***Petitioners***

Versus

The State	:	*(In Crl.P.No.1124-L of 2015)*
The State and two others	:	*In Crl.P.1120-L/2015)*
	...	***Respondents***

For the Petitioner	:	*Ch. Walayat Ali, ASC* *(In Cr.P.No.1124-L/2015)* *Nemo* *(In Crl.P.1120-L of 2015)*
For the (State)	:	*Mr. Jaffar, Additional Prosecutor General*
Date of Hearing	:	*25.06.2020*

ORDER

SAYYED MAZAHAR ALI AKBAR NAQVI, J:- *Criminal petition for leave to appeal under section 185(3) of the Constitution of Islamic Republic of Pakistan, 1973 has been assailed by the petitioner calling in question impugned judgment dated 14.09.2015 passed by Lahore High Court, Lahore in Murder Reference No.276/2011 and Crl. Appeal No.996/2011.*

2. *As per prosecution story portrayed in the FIR No.203/2009 dated 04.06.2009, offence under section 302 PPC registered with police station Saddar Farooqabad Sheikhupura (Exh.PD) lodged at the instance of one Allah Ditta son of Lal Din, (PW-3) is that he is resident of Herchand and they are three brothers and he is eldest. The complainant and his younger brother Qurban*

reside with their parents at Herchand whereas brother Ramzan live separately. On 03.05.2009 at evening, the complainant alongwith his father came to the house of brother Muhammad Ramzan because his daughter was sick. They were talking to each other when at about 7:00 p.m. Raza son of Niaz i.e. a neighbor of Ramzan called him outside. The complainant with father also came out of the house alongwith Ramzan. Ayisha Bibi wife of Ramzan followed and came out of the house. Raza was armed with Carbine, he raised lalkara to Muhammad Ramzan that he had entered into an altercation with his mother, therefore, he will taught a lesson and thereafter accused made a fire shot with his Carbine 12 bore which hit Muhammad Ramzan on his abdomen, below the chest. Muhammad Ramzan fell down being injured whereas accused fled away from there. The occurrence was witnessed by the complainant, his father and Bhabi Ayisha. The injured was taken to Sheikhupura Hospital but he was referred to Mayo Hospital, Lahore. Initially the FIR was registered under Section 324 PPC but when the injured died on 08.05.2009, offence under Section 302 PPC was added.

3. After registration of the aforesaid case, investigation was carried out and petitioner was challaned while placing his name in column No.3 of the report under Section 173 Cr.P.C.

On receipt of challan, the learned Trial Court formally charge sheeted the petitioner vide order dated 12.08.2010 to which he pleaded not guilty and claimed trial. Prosecution in order to substantiate its case produced as many as 13 witnesses. The petitioner was examined under Section 342, Cr.P.C, however, he opted not to appear in his defence as his own witness in terms of

Section 340(2), Cr.P.C. to disproof the allegations levelled against him.

4. The learned trial court after conclusion of trial found that the prosecution succeeded to prove allegations against the petitioner, hence convicted him under section 302(b) PPC and sentenced him to death. The petitioner was further burdened to pay compensation of Rs.1,00,000/- to be paid to the legal heirs of the deceased in terms of Section 544-A Cr.P.C. In default thereof, he was further ordered to undergo simple imprisonment for six months.

5. The petitioner being aggrieved by the judgment of the learned trial court dated 07.06.2011 filed criminal appeal No.996 of 2011 before the Lahore High Court, Lahore whereas the learned trial court forwarded Murder Reference No.276 of 2011 for confirmation of the sentence of death inflicted upon the petitioner in terms of Section 374, Cr.P.C. The learned Division Bench of High Court vide judgment dated 14.09.2015 converted death sentence of the petitioner into imprisonment for life whereas amount of compensation and imprisonment in its default prescribed by the learned Trial Court was ordered to be maintained. Benefit of Section 382-B Cr.P.C was also given to him. Hence, instant petition.

6. At the very outset, learned counsel for the petitioner argued that in fact both the courts below have not attended the circumstances of the case in its true perspective and convicted the petitioner under Section 302(b) PPC, which is not substantiated from the record. Contends that as far as occurrence is concerned, the same has been admitted by the petitioner while making his statement under Section 342 Cr.P.C. Adds that a specific plea was

taken by the petitioner before the Investigation Officer that the deceased made an attempt to commit rape with sister of the petitioner namely Saima Bibi. Contends that plea of the petitioner was found correct during the course of investigation as such the conviction and sentence recorded by learned Courts below is not sustainable in the eye of law. Contends that when it is established from the record that petitioner has committed the occurrence on the question of 'ghairat', therefore, the petitioner is entitled for the benefit of the same and as such the appropriate sentence could be under Section 302(c) PPC.

7. On the other hand, learned Law Officer has not seriously controverted the contentions raised by learned counsel for the petitioner as the same is spelled out from the record.

8. We have heard the learned counsel for the parties and gone through the record.

9. Admittedly, the occurrence had taken place within the local limits of Police Station Saddar Farooqabad, District Sheikhupura. There is no denial to this fact that the allegation against the petitioner is that he caused fire-arm injury with Carbine, which landed on the abdomen near the chest of the deceased Muhammad Ramzan. The injured was taken to District Headquarter Hospital, Sheikhupura from where he was referred to Mayo Hospital, Lahore however, he succumbed to the injuries on 08.05.2009 and as such the provision of Section 302 PPC was added in the crime report. The petitioner since his arrest and commencement of investigation has raised first plea wherein it has been mentioned that deceased had made an attempt to commit rape with his sister. The mother of

*petitioner Maqsoodan Bibi had gone to reprimand Muhammad Ramzan deceased upon which he started abusing mother of the petitioner and also grappled with her. The petitioner approached there he could not afford the conduct of the deceased and as such he flared up and under the heat of passion could not resist and as such made a single fire shot. The stance taken by the petitioner remained consistent throughout during the course of investigation as well as the trial. During investigation, the first plea raised by the petitioner was found correct by the Investigating Officer. It is an admitted fact that first plea of the accused is admissible in evidence under Article 27 of the Qanun-e-Shahadat Order, 1984 ("**Order of 1984**"). Article 27 of Order 1984 is general principle enabling the Investigating Officer to record the same whereas Article 28 is mere an exception. As a general rule evidence not forming part of the transaction is not admissible whereas Articles 27/28 are an exceptions to the said general principle by laying down a rule that admissibility of those fact which might not be tendered in evidence to prove it but these are relevant to prove the status/mind the person committing it. For example the guilt, intent, knowledge, negligence, malice etc., and in all the intentions qua these conditions would be admissible as it is provided under **Article 27 of the Order of 1984**. Article 27 of the Order of 1984 has extended the scope to meet the question qua the existence of person state of mind or bodily feeling and all these facts and their existence in the state of affair has turned relevant.*

During the course of proceedings before the learned Trial Court, the suggestion qua the state of mind referred above was also put to the prosecution witnesses of ocular account PW-3 and PW-4, respectively. Now the question, which requires determination, only

relates to the quantum of sentence in the given facts and circumstances narrated above.

10. As observed earlier, that the occurrence had taken place due to the act of the deceased, which enraged the mental faculty of the petitioner and under the impulses of the same the instant occurrence had taken place, the same is spelled out from the record and as such the benefit of the same is available for which so many circumstances are not required rather the glimpse of the same is always deemed sufficient, which has been established by the Superior Court from time to time.

11. For what has been discussed above, we are of the considered view that sentence inflicted upon the petitioner by learned Courts below under Section 302(b) PPC is not made out, therefore, keeping in view the facts narrated above, instant petition is converted into appeal and same is partially allowed and we convert the sentence from imprisonment for life under Section 302(b) PPC to imprisonment for 10 years under Section 302(c) PPC whereas amount of compensation and imprisonment in its default prescribed by the learned Trial Court is ordered to be maintained. Benefit of Section 382-B Cr.P.C is also extended. The **Crl. Petition No.1120 (L)/2015** filed by the complainant for enhancement of sentence, having no substance, is **dismissed**.

See para-43.

Judge

I disagree with the reasoning & my learned brother and therefore have appended my own judgement.

Judge

Judge

Ishfaq

JUDGEMENT

Syed Mansoor Ali Shah, J.-

12. I have had the opportunity of going through the order of my learned brother Sayyad Mazahar Ali Akbar Naqvi J. While I agree with the conclusion regarding the conviction and quantum of sentence awarded to the petitioner under section 302 (c) instead of section 302 (b) of the Pakistan Penal Code, 1860 ("**PPC**"), however, with respect, I find myself unable to agree with the reasoning in paragraphs 9 and 10 of the Order of my learned brother.

13. In the instant case, the First Information Report[1] by the complainant Allah Ditta (PW-3), records that on 03.05.2009 around 7pm, Raza ("petitioner") called his neighbour, Ramzan ("deceased"), to come out of his house. As soon as Ramzan came out in the street outside his house, the petitioner shot him with his 12 bore carbine in the belly. Ramzan suffered several injuries all over the abdomen and the chest. He was rushed to the local hospital in Sheikhupura and then to hospital in Lahore but unfortunately he succumbed to his injuries on 08.05.2009. Motive behind this gory incident, as reported, was the quarrel between the mother of the petitioner and the deceased. In this background the petitioner was sent up for trial. He was convicted for murder under section 302(b) PPC and sentenced to death[2] by the trial court and upon appeal to the High Court his conviction was maintained but his sentence was reduced to imprisonment for life, while the remaining sentence awarded by the trial court was kept intact vide impugned judgment dated 14.09.2015.

14. Main reliance of the prosecution evidence is on the ocular account of PW-3 and PW-4; the brother and wife of the deceased who witnessed the crime; and the medical evidence which supports the ocular account. On the other hand, the defence plea of the petitioner (accused) in the statement under section 342 of the Criminal Procedure Code,1898 ("**CrPC**") is that he acted under grave and sudden provocation as the deceased attempted to rape his sister and then abused and grappled with his mother. This was

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[1] FIR No. 203 dated 04.05.2009

[2] The petitioner was also ordered to pay an amount of Rs 100,000/- as compensation under section 544 Cr.P.C to the legal heirs of the deceased. In case of non-payment the petitioner was to further undergo imprisonment for six months.

also the first version taken by the petitioner (accused) before the investigating Police Officer after his arrest.

15. In a criminal trial, it is now jurisprudentially settled that the proper course for the court is to first discuss and assess the prosecution evidence in order to arrive at the conclusion as to whether or not the prosecution has succeeded in proving the charge against the accused on the basis of the evidence. In case where the accused has taken a specific plea the court is to appreciate the prosecution evidence and the defence version in *juxtaposition* in order to arrive at a just conclusion.[3]

16. In the present case, the statement of the petitioner under section 342 CrPC refers to the statement (first version) of the petitioner made before the Police Officer after his arrest. Therefore, before appraising the prosecution evidence and the defence version, it is imperative to answer the following important legal questions that have arisen in this case:

> *(i) What is the provision of law under which the statement of an accused is recorded by the Police Officer during the investigation?*
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> *(ii) Whether the statement of the accused recorded by the Police Officer during investigation is relevant and admissible, particularly in view of the bar contained in Article 38 of the Qanun-e-Shahdat Order, 1984 ("**QSO**") and Section 162 of the CrPC?*
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> *(iii) What is the meaning and scope of Article 27 of the QSO and its applicability to the present case?*
>
> *(iv) Whether reasonable possibility of the defence plea of being true can benefit the accused?*

17. I endeavour to answer the above questions as under:-

> ***(i) What is the provision of law under which the statement of an accused is recorded by the investigating Police Officer during investigation?***

There is no specific provision under Cr.P.C that deals with the recording of the statement of the accused during police investigation. High Courts in British India had divergent opinions on the applicability of Sections 161 and 162, Cr.P.C to the statements of accused persons recorded by investigating officers in the course of investigation. This conflict of opinion was resolved by

[3] See Ali Ahmad v. State (PLD 2020 SC 201).

the decision of the Privy Council in *Pakala Narayana Swamy*.[4] While discussing the phrase "any person" under section 162 Cr.P.C Lord Atkin, observed: "That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom may be suspected at the time…but eventually accused." A full bench of the Allahabad High Court observed in *Upadhyaya*[5]: "After the decision of the Privy Council … it is no longer possible to accept the argument that sections 161 and 162 Criminal Procedure Code do not cover statements made by accused persons and that under those sections an investigating officer is not authorised to record the statements of such persons. Nor is there anything in the section to show that only non-confessional or non-incriminatory statements of such accused persons can be recorded. The words used are wide enough to include all kinds of statements, provided of course, they throw some light on the offences under investigation." Likewise, Dorab Patel, J., in *Ghulam Hussain*,[6] observed: "After the Judicial Committee's observations in *Naryana Swami's* case it cannot even be argued that statements by the accused do not fall within the ambit of section 162 of the Code."

18. The relevant extracts of Section 161 and 162 are reproduced hereunder:-

> "**161. Examination of witnesses by police.--**(1) Any Police-officer making an investigation under this Chapter or any police-officer not below such rank as the Provincial Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
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> **162. Statements to police not to be signed: Use of such statements in evidence.** (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof, whether In a police-diary or otherwise or any part of such statement or record, be used for any purpose (save as hereinafter

[4] Pakala Narayana Swami v. Emperor (AIR 1939 PC 47) and Nandini Satpathy v. P.L. Dani (AIR 1972 SC 1025). Also see *Ratanlal and Dhirajlal*. Code of Criminal Procedure, p. 612. 20th edition. Lexis Nexis.
[5] Deoman Upadhyaya v. State (AIR 1960 All 1)
[6] Ghulam Hussain v. State (PLD 1974 Karachi 91)

> provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made.
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This expression "any person" has to be understood in the context of section 161 Cr.P.C. It requires a police officer making an investigation to examine "any person" supposed to be acquainted with the facts and circumstances of the case. This expression is extensive and, in its plain and ordinary meaning, includes all persons who are supposed to be acquainted with the facts and circumstances of the case, and not only the witnesses but also those who are alleged to have committed the offence under investigation in a case. A person who is alleged to have committed the offence, is as much supposed to be acquainted with the facts and circumstances of the case as an alleged eye-witness is. There is no reason to modify or restrict that plain and ordinary meaning of the expression "any person" by interpretation, especially when it does not present any absurdity or inconsistency. "If the words of the statue are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do in such case best declare the intention of the law-giver."[7] Besides "when the meaning of the words is plain it is not the duty of the courts to busy themselves with the supposed intentions".[8] I see no reason to restrict the simple meaning of the phrase "any person" and exclude the "accused" from its ambit.

19. In a recent decision of this Court in *Sughran Bibi*,[9] a seven-member bench of this Court in to which one of us (Malik, J.) was a member, supports this interpretation. Khosa, ACJ., speaking for the bench therein declared that: "During the investigation conducted after registration of an FIR the investigating officer may record any number of versions of the same incident brought to his notice by different persons which versions are to be recorded by him under section 161, CrPC. in the same case. No separate FIR is to be recorded for any new version of the same incident brought to the notice of the investigating officer during the investigation of the

[7] Sussex Peerage Case, (1844) 11 CL&F 85, per Tindal, C.J.
[8] Pakala Narayana Swami v. Emperor (AIR 1939 PC 47)
[9] Sughran Bibi v. State (PLD 2018 SC 595).

case." It is common that in most cases a version of the same occurrence different from the one recorded in FIR is given by the accused, as it happened in the present case. And in view of the law declared in *Sughran Bibi*, it can be said with certainty that such version of an accused is to be, and is, recorded under section 161, CrPC.

20. The answer to the above question is that the statement of the accused after his arrest or during investigation is covered by section 161 CrPC.

(ii) Whether the statement of the accused recorded by the investigating Police Officer during investigation is relevant and admissible, particularly in view of the bar contained in Article 38 of the QSO and Section 162 of the Cr.P.C?

21. The term "relevant" means what is logically probative and "admissible" means that which is legally receivable. The legal admissibility of facts is for the most part determined by their logical relevancy to the issue.[10] Admissibility is determined according to the rule of evidence, while the relevancy of a fact is determined by the issue in a case.[11] The scheme of the QSO is to make all relevant facts admissible, as said by Lord Hobhouse,[12] that "relevant in this Act[13] means admissible".

22. Statement made by the accused, after his arrest, before the Police Officer may include a statement (i) where he admits the commission of the crime and therefore amounts to a confession; or (ii) where the accused denies the commission of the crime; or (iii) the accused admits the commission of the crime but gives his own version of it. Out of the above three, we specially examine the last category of statement (version), as the same is relevant in this case.

23. "Confession" has been defined as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.[14] The Privy Council in *Pakala Narayana Swami*[15] defined confession as a statement made

[10] *Woodroffe & Amir Ali* , Law of Evidence, p.215, vol-1, 20th edition.
[11] Canadian Criminal Evidence.
[12] *Woodroffe & Amir Ali* , Law of Evidence, p.216, vol-1, 20th edition
[13] Evidence Act, 1872
[14] Sir J F Stephen, Digest of Evidence , vol I (3rd edition).
[15] Pakala Narayana Swami v. Emperor (AIR 1939 PC 47).

by an accused which "either admit in terms the offence, or at any rate substantially all the facts which constitute the offence." A confession is thus a species of admission, and can briefly be stated to be an admission of the guilt by the accused.[16] The expression "confession" has been used in Articles 37 to 43, QSO, but it is not defined therein. There is a distinction between admissions and confessions. It would appear that confessions are a species of which admission is the genus. All admissions are not confessions, but all confessions are admissions. If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If, on the other hand, the statement falls short of it, it amounts to an admission.[17] No statement, which contains self-exculpatory matter, can amount to a confession, if the exculpatory statement is of some fact which, if true, would negate the guilt.[18]A confession is thus an admission by an accused in a criminal case and if he does not incriminate himself, the statement cannot be said to be a confession.[19]

24. Article 37 of QSO provides that a confession is irrelevant if caused by inducement, etc. and Article 41 provides that if the inducement, etc. mentioned in Article 37 is removed, confession becomes relevant. Joint reading of Articles 37 and 41 leads to an unambiguous corollary that a voluntary confession of the accused is a relevant fact under QSO.

25. Article 38, QSO states that no confession made to a police officer shall be proved as against a person accused of any offence. Section 162, Cr.P.C declares that no statement made by any person to a police-officer in the course of an investigation shall be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made, except the statement of a prosecution witness to contradict him in cross-examination, or to explain any matter referred to in cross-examination of that witness in re-examination. The question which has remained under judicial debate since 1872 is whether Article 38, QSO and Section 162, CrPC bar the admissibility of a

[16] See Laiq Shah v. State, (1990 MLD 581); Sahoo v. Uttar Pradesh (AIR 1966 SC 40).
[17] *Woodroffe & Amir Ali* , Law of Evidence, p.1179, vol-1, 20th edition.
[18] Ram Singh v. State (AIR 1959 All 518).
[19] Sobar Singh v. Stat (AIR 1966 Patna 488)

confessional statement of an accused, which is used by the accused in his favour.

Bar of Article 38, QSO

26. Article 38 states that no confession made to a police officer shall be proved as against a person accused of any offence. What if the confession is to be used by the accused in his favour? Is such a confession admissible? Can the converse be a logical corollary of Article 38? The very first case that can be referred to in this regard, is *Pitamber*[20] where a full bench of the Bombay High Court held that "there is not anything ... in the Indian Evidence Act ... that would justify us in excluding such evidence when sought to be given *on behalf* of the co-accused, provided it be relevant." *Hasil*[21] is the most important case on the question as it was frequently referred to and consistently followed in later cases by courts not only in Pakistan, but in India also. In *Hasil*, A division bench of the Lahore High Court held: "The prohibition contained in section 25 [of the Evidence Act, 1872] can be treated as applying only to confessions which are to be proved as against the accused, that is, in support of the prosecution case, and cannot apply to statements on which the accused himself wishes to rely in connection either with his conviction or his sentence." Similar views were expressed in *Lal Khan,*[22] *Ghulam Abbas*[23] and *Muhammad Yaqub.*[24]

27. The legal position as to the scope and purpose of Article 38, QSO is thus well settled now. This Article prohibits the admissibility of a confession made to a police officer if proved against the accused but does not bar the use of it by the accused in his own favour. The Legislature cannot be attributed by implication the intent to deprive an accused from his right to make use of any of his statements, if they are relevant and admissible under any provision of the QSO. Article 38 has been enacted for the benefit of the accused, to eradicate the apprehension that Police may misuse their extensive powers if confessions made to them are made admissible in evidence, against the accused. A

[20] Imperatix v. Pitamber, (1877) 2 Bom. 61. Also see: Karan Singh v. Emperor (AIR 1928 All 25)
[21] Hasil v. Emperor (AIR (29) 1942 Lahore 37).
[22] Lal Khan v. Emperor (AIR 1948 Lah. 43)
[23] Ghulam Abbas v. State (PLD 1968 Lahore 101)
[24] Muhammad Yaqub v. State (PLD 1969 Lahore 548)

provision enacted for the benefit of the accused cannot be construed to his detriment.

Bar of Section 162, CrPC

28. Having come to the conclusion that the statement made by the petitioner to the investigating officer as his first version of the alleged occurrence is recorded under section 161 CrPC, the question that arises for determination is how can it be used in favour of the accused in view of the restriction prescribed by Section 162, CrPC? Section 162 states as under:

> **S.162 Statement to police not to be signed: use of such statements in evidence:- (**1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof whether in a police-diary or otherwise or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
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> Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Evidence Act, 1872 (I of 1872) When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:
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> Provided further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefore) and shall exclude such part from the copy of the statement furnished to the accused.
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> (2) Nothing in this section shall be deemed to apply to any statement falling within the provision of section 32, clause (1), of the Evidence Act, 1872 (or to affect the provisions of Section 27 of that Act.

Although there was a divergence of opinion in the High Courts of British India on this question, but most of the High Courts found the provisions of the Evidence Act (now QSO) on the subject of confession to be a special law and declared that the provisions of the Evidence Act on the subject of confession are not affected by section 162, CrPC. The observations of Beaumont, C.J. made in *Biram Sardar*,[25] are notable:-

> "Most, if not all, of the learned Judges agree that section 27, Evidence Act, is a special law in force at the date of the passing of the amended section 162, and that point seems to me beyond question. It is a law applicable to a particular subject within section 41, I.P.C. . . . Section 1 (2) enacts a

[25] Biram Sardar v. Emperor (AIR 1941 Bom. 146).

> rule of construction to be applied in the interpretation of the Code. That rule is that where there is a conflict between the Code and a special law, the special law is to prevail in the absence of a specific provision to the contrary. . .I am myself inclined to think that "specific provision" is a stronger expression than "express provision" and means a provision clearly expressed. I do not see how a provision arising by implication only can be said to be specific. But if this is going too far, I am clearly of opinion that the language of the Code giving rise to the implication must at any rate be so directly contradictory to the special law that it can be affirmed with certainty that the Legislature intended to override the special law. There is, however, nothing in the language of section 162 which suggests that the Legislature had in mind section 27, Evidence Act. The language of the two sections is quite distinct and to a large extent the respective subject-matters are not identical. Section 162 deals with all statements made to a police officer in the course of an investigation; section 27, Evidence Act, merely deals with information received from a person accused of an offence in the custody of a police officer which leads to a discovery. The two sections only overlap in respect of statements made to a police officer in course of an inquiry which lead to a discovery. It seems to me impossible to hold that section 162 contains a specific provision that section 27, Evidence Act, is not to prevail over it."

29. Similar question arose in *Ghulam Hussain*[26] as to whether the admissibility of a statement falling under section 25 of the Evidence Act, 1872 (Article 30 of QSO) is affected by the provisions of Section 162, CrPC? Dorab Patel J. writing for the High Court in *Ghulam Hussain* observed that "section 162 of the Code does not draw any distinction between statements by the accused on which the prosecution wished to rely and statement on which accused himself wished to rely....the Courts have evolved a rule.. that a provision intended to protect the accused is not used against him[27]. In cases of this kind, when two versions of the same incident are being put forward, it is often of the greatest importance for an accused to be able to show that his own explanation was put forward at the earliest possible opportunity, and we do not think that it can ever have been the intention of the Legislature that an accused person should be deprived of the right to make use of such a statement, merely because to a certain extent it goes against him[28]. After an exhaustive survey of almost all the previous decisions the court in *Ghulam Hussain* concluded that the confessional statement recorded of the accused in the

[26] Ghulam Hussain v. State (PLD 1974 Karachi 91).
[27] Ibid. para 20 at page 107.
[28] Hasil v. Emperor (AIR (29) 1942 Lahore 37).

police diary was not hit by Section 162 of the CrPC if used by the accused in his favour.

30. It is observed that Section 1(2) CrPC states that the Criminal Procedure Code, 1898 extends to the whole of Pakistan but, in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force. Section 41 of PPC defines "special law" to be a law applicable to a particular subject and section 4(2) of CrPC provides that all words and expressions used in the CrPC but not defined therein shall have the same meanings as in PPC. Like Article 38 of the QSO, Section 162 CrPC is also for the protection of the accused and benefits the accused (see provisos to section 162), I, therefore, agree with the view taken in the cases discussed above, that a confessional statement of the accused before a police officer, setting out his first version and used by the accused in his own favour are not barred by the provision of Section 162 CrPC.

31. The answer to the above question is that a statement (first version), as discussed above, made by an accused before a Police Officer is relevant and admissible and not barred under Article 38 of the QSO or section 162 of the Cr.P.C, if used by the accused in his own favour.

(iii) What is the meaning and scope of Article 27 of the QSO and its applicability to the present case?

32. Article 27 falls under Chapter III of the QSO which deals with Relevancy of Facts. The Article states:

> **27. Facts showing existence of state of mind, or of body, or bodily feeling.** Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or goodwill towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.
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> **Explanation 1.** A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.
>
> **Explanation 2.** But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this Article, the previous conviction of such person shall also be a relevant fact.

Article 27 deals with such external or collateral facts which show the existence of any state of mind.[29] Evidence of such external or collateral facts is admitted to prove a person's state of mind, and not to prove the occurrence itself. Thus, the scope of this Article is that there must be a cluster of facts outside and around the fact in issue or the occurrence from which inference can be drawn to show and support the state of mind in question; such surrounding facts become relevant under Article 27. This construction is supported by Explanation 1 to the Article, which provides that relevant facts must show that the state of mind exists not generally but in reference to the particular matter in question. Both previous and subsequent events may be relevant under this Article as showing the state of mind.[30] Illustration (e) refers to "previous publication" and illustration (j) refer to threatening letters "previously sent," but in illustration (m) the test is merely proximity of time, not priority. Similarly illustrations (i), (k), (l) and (o) to Article 27 are self-explanatory and support the above view.

33. The above view is supported by *R v. Armstrong*[31] where the accused was charged with the murder of his wife by administering arsenic, evidence that the accused had attempted to poison another person with arsenic on a subsequent occasion, was held to have been rightly admitted to rebut the defence that the wife had committed suicide and that the arsenic was kept by the accused for an innocent purpose, namely, for killing weeds. So also in *R v. Mortimer,*[32] where the charge was one of murder by deliberately running down a woman bicyclist with a motorcar, evidence was admitted of similar attacks on other women, immediately before or after the offence charged.

34. Previous decisions on the subject of relevancy and admissibility of such first version of accused persons in their favour have not referred to Article 27 while dealing with the question. There is no case law that relies upon Article 27 for this purpose except *Liaqat Ali,*[33] and the judgments[34] that relied upon *Liaqat Ali.*

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[29] See Hussain v. Mansoor Ali (PLD 1977 Kar 320) per Zafar Hussain Mirza, J.
[30] AIR 1947 PC 135
[31] [1922] 2 KB 555
[32] (1936) 25 Cr App R 150
[33] Liaqat Ali v. State (1998 P Cr LJ 216)

35. In *Liaqat Ali*, Dr. Khalid Ranjha, J. mainly relied upon the afore-referred cases of *Hasil, Muhammad Yaqoob* and *Ghulam Hussain*, for decision of the question involved in the case; he referred to Article 27 as an additional ground only. His words are quoted for ready reference:

> "It may also be added that the statement of an accused person immediately after the occurrence is in a way relevant fact within the meaning of Article 27 of Qanun-e-Shahadat and as such there can be no legal bar in bringing it on record as an admissible fact."[35]
>
> *(Emphasis supplied)*

There is no discussion on how the said Article is applicable for determining relevancy of the statement of the accused made to the investigating officer in the course of investigation. An important aspect that escaped the notice of the learned Judge is that the accused in that case, had taken a plea of self-defence in his statement made to the investigating officer. That statement was therefore not inculpatory. It was thus not a confessional statement, as discussed above. The plea of self-defence, if true, definitely negatives the offence alleged. But it is not so in a case of plea of grave and sudden provocation which simply diminishes the criminal liability and consequentially entails lesser punishment only, and does not negative the offence altogether. The statement of the accused in that case was a self-serving statement equal to the statement denying, and not admitting, the guilt by the accused. The statement having been made by the accused to the investigation officer in the course of investigation, and not falling within the scope of the special law of confession in the QSO, was clearly hit by the bar of Section 162, Cr.P.C. The reliance by the learned Judge on *Hasil, Muhammad Yaqoob* and *Ghulam Hussain* was, submitted with respect, is grossly misplaced.

36. Article 27 of the QSO provides that if a state of mind is a fact in issue or a relevant fact then facts that establish the state of mind are also relevant. These surrounding facts are obviously other than the facts in issue. Therefore, Article 27 has little relevance to the instant case.

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[34] see Bashir Ahmed v. Ghulam Muhammed (2019 P Cr LJ 1312), Shahzeb v. State (2018 P Cr L J 287). These judgments rely on Liaqat Ali case.

[35] Emphasis supplied.

First version of the accused – no special evidentiary value

37. The confessional statement of the accused before a police officer at the time of his arrest shows his own version put forward at the earliest possible opportunity and has over the years come to be referred to as the "first version" or interchangeably used as the "first plea." First version is a statement made before a police officer which is not otherwise admissible under section 162 CrPC, except in the case of a confessional statement to be used by the accused in his favour, as discussed above. It is, however, underlined that the first version of the accused by itself has no special evidentiary value or weight. Once it is relevant and admissible (as discussed above), it is to be examined in the light of the overall evidence of the case i.e., the statement of the accused recorded under section 342 CrPC, his statement, if any, under section 340(2) of the Cr.P.C alongwith the defence evidence, if any, and the overall evidence of the prosecution. The attribution of high probative value to the first version of the accused, in some cases, pretending it as a principle of law has no basis in criminal jurisprudence. The probative value of such version of the accused, if found relevant and admissible under the law, is to be determined like any other piece of evidence in the peculiar facts and circumstances of each case as it does not stand on any special footing.

(iv) Whether reasonable possibility of the defence plea of being true can benefit the accused?

38. In *Woolmington*,[36] a famous English case, Viscount Sankey, Lord Chancellor, in his "Golden thread" speech laid down: "While the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence. ... Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt … If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case

[36] L R 1935 A C . 462.

and the prisoner is entitled to an acquittal." The application of the *Woolmington principle* in Pakistan was considered by the Federal Court[37] of Pakistan in *Safdar Ali*.[38] Abdul Rashid, CJ., in that case, held:

> "**If, after an examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true, it is clear that such a view reacts on the whole prosecution case. In these circumstances, the accused is entitled to the benefit of doubt, not as a matter of grace, but as of right, because the prosecution has not proved its case beyond reasonable doubt.** ... The principles laid down in Woolmington's case are applicable with full force in Pakistan." *(emphasis supplied)*

Thus if after examination of the whole evidence, the Court is of the opinion that there is reasonable possibility that the defence put forward by the accused might be true, then the whole of the prosecution case is viewed in context of this reasonable possibility, entitling the accused to the benefit of the doubt. This principle has since then been consistently followed and applied by this Court,[39] and has received endorsement of larger benches of this Court in the cases of *Ashiq Hussain*[40] and *Abdul Haque*.[41] This Court, in *Ashiq Hussain*, said that it would be enough for the accused if, in the final analysis, the defence plea is substantiated to the extent of creating reasonable doubt in the credibility of the prosecution case, and in *Abdul Haque* held that: "In criminal jurisprudence general principle is that prosecution prove the case against the accused beyond doubt and this burden does not shift from prosecution even if accused takes up any particular plea and fails in it. If there is any room for benefit of doubt in the case of prosecution, the same will go to accused and not to prosecution." Thus, reasonable possibility of the defence plea of being true can benefit the accused.

Statement of the accused under section 342 Cr.P.C

39. It is important to underline that the statement of the accused under section 342 CrPC is not evidence, it is only the

[37] Predecessor of this Court.
[38] Safdar Ali v. Crown (PLD 1953 FC 93).
[39] See Shamir v. State, (PLD 1958 SC 242); Mir Ahmed v. State (PLD 1962 SC 489); Rahmat v. State (1969 PCRLJ 1067); Waris v. State, (PLD 1981 SC 127); Nadeem v. State, 1985 SCMR 510; Saifullah v. State (1994 SCMR 1462); State v. Misbahuddin (2003 SCMR 150); Waqar Nazir v. State (2007 SCMR 661); Inayat Ali v. Shahzada (2008 SCMR 1565); Sabir Ali v. State (2011 SCMR 629).
[40] Ashiq Hussain v. State (1993 SCMR 417), 5-Member Bench.
[41] Abdul Haque v. State (PLD 1996 SC 1), 5-Member Bench.

stand or version of the accused by way of an explanation when incriminating material against him is brought to his notice.[42] The statement is not made on oath, and cannot be tested by cross-examination, and is made under the protection of immunity of the maker of the statement from punishment for making false statement.[43] Such statement cannot be placed on the same footing as statements made by witness in court on oath, which are tested by cross-examination. Such statement thus does not strictly constitute evidence, but in view of the presumption of innocence in favour of the accused, the statement may provide valuable material to the courts for appraising the prosecution evidence in arriving at its findings. The version given in such statement if found by the court to be reasonable and in accord with the probabilities of the established facts and circumstances, the same maybe accepted by the court even without requiring defence evidence, unless the version is falsified by the prosecution evidence.[44]

40. Coming to the present case, it is observed that the two eye-witnesses i.e., the complainant (PW-3) and Ayesha Bibi (PW-4), are the brother and wife of the deceased, respectively. PW-4 lives in a village nearby and was visiting the deceased to inquire about his indisposed daughter. Both of the eye-witnesses even though close relatives of the deceased, harbour no prior enmity to falsely implicate the petitioner, hence their testimony cannot be discarded merely because of their relationship with the deceased, especially when their presence at the scene of the crime is not unnatural or unusual. The ocular account is fully supported by medical evidence, which confirm the firearm injuries on the body of the deceased. However, it has been observed by us that recovery of the carbine is ineffective due to the inconclusive FSL Report and, therefore, does not support the case of the prosecution. Regarding motive the crime report states that the incident happened as a result of the quarrel between the deceased and the mother of the petitioner; while PW-3 and PW-4 give two different accounts. PW-3 deposed that a quarrel had taken place between his mother and the petitioner. PW-4, the widow of the deceased, stated that the quarrel took place between her and the mother of the petitioner on

[42] Devandar Kumar Singla v. Baldev Krishan Singla (AIR 2004 SC 3084)
[43] See Section 342(2) Cr.P.C
[44] Hate Singh Bhagat Singh v. Madhya Bharat (AIR 1953 SC 468). Also see *K K Dutta,* Treatise on Criminal Law. Pp. 380-389. Eastern Book Company.

lighting fire to the garbage/trash. Both the eye-witnesses have given an inconsistent and contradictory account of the motive behind the incident.

41. We now examine the statement of the accused under section 342 CrPC which states as under:

> Q.5. Why this case against you and why the P.Ws. deposed against you?
>
> A. Complainant got registered the instant case after twisting the true facts of the case. As a matter of fact on 03.05.2009, Ramzan deceased made attempt to commit rape with my sister, namely Saima Bibi. My mother, namely, Maqsoodan Bibi came there and interrupted and reprimanded to Ramzan deceased. Upon which he started abusing her and grappled with her. Meanwhile, I came there after listening the reason of quarrel and abuses of Ramzan deceased. I flared up and under grave and sudden provocation, I made a single shot. I have no intention to kill Ramzan deceased, so I did not repeat the fire. During investigation, I took the same stance which was found correct. P.W.10/Investigating Officer, had admitted this fact during cross-examination.

The defence version as to the circumstances that led to the occurrence is that the deceased attempted to outrage the modesty of accused's sister, Saima Bibi. The mother of the accused reprimanded the deceased, whereupon the deceased started abusing and grappling with her. Meanwhile, the petitioner (accused) reached there and made a fire shot to the deceased, acting under grave and sudden provocation. This defence version finds support from the statement of PW-10 (investigating Police Officer) made in his cross-examination which is relevant and admissible as discussed above. Reading the prosecution evidence in juxtaposition with the defence version, we see that while the prosecution has been successful in establishing and proving that it was the petitioner who fired at the deceased whereby his death occurred. However, it has been noticed that the High Court for valid reasons has observed that "during the trial the motive alleged in the complaint and the FIR was not substantiated and as such remained shrouded in mystery" and concluded that "the occurrence was without premeditation and pre-planning." The finding of the High Court that the occurrence was without premeditation and pre-planning is in line with the first version of the petitioner. The confessional statement of the petitioner made to the investigating officer has been held relevant and admissible to be used in his favour; the statement is not inherently improbable or unbelievable, nor is it inconsistent with the overall facts and circumstances of the case; the first version of the petitioner does

not appear to be a concocted one or an afterthought, as it has been his consistent stance since his arrest in the case till recording of his statement under section 342, CrPC.[45] It is underlined that generally absence of motive is a mitigating factor that has a bearing on the quantum of punishment. Absence of motive, therefore, becomes relevant if there is possibility of further reduction in the quantum of punishment. In a case like this, where the petitioner in his first version has raised a plea of grave and sudden provocation, motive assumes crucial importance. It is not only explanatory of the conduct of persons concerned in the incident in the given situation, but also helps in the proper appreciation of evidence in the case, in the light of motivation of their conduct. In the attending circumstances of the present case, a reasonable possibility has arisen that the act of the petitioner may have been induced by grave and sudden provocation to the petitioner. The benefit of the possibility of the existence of another version emerging out of the statement of the petitioner under section 342 CrPC and the first version of the accused before the Police Officer, if extended to the petitioner, brings his case under Section 302(c) instead of Section 302(b) PPC and in the circumstances of the case the petitioner is entitled to this benefit.

42. For the foregoing reasons and in the circumstances of the case, the instant criminal petition is converted into an appeal and is partly allowed. The conviction and sentence of the petitioner-appellant recorded by the trial court and maintained/modified by the High Court under Section 302(b) P.P.C are set aside. Instead the petitioner-appellant is convicted under Section 302(c) PPC and sentenced to rigorous imprisonment for 10 years. He shall also pay compensation of Rs.100,000/- (one hundred thousand) to the legal heirs of the deceased, in terms of Section 544-A, Cr.P.C, and in default of its payment he shall undergo simple imprisonment for a period of six months. Benefit of Section 382-B, CrPC is extended to him. The criminal petition filed by the complainant for enhancement of the sentence of the petitioner-appellant being devoid of merits is dismissed and leave to appeal is refused.

Judge

[45] See: Mehrban v. Javaid (2001 SCMR 195).

Manzoor Ahmad Malik, J.-

43. I have read the order passed by my learned brother Sayyed Mazahar Ali Akbar Naqvi, J. and the judgment authored by my learned brother Syed Mansoor Ali Shah, J. While agreeing with the conclusion drawn by my learned brothers, I fully agree with the reasoning given by my learned brother Syed Mansoor Ali Shah, J.

Judge

Lahore,
25th June, 2020
APPROVED FOR REPORTING
Iqbal