IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Sardar Tariq Masood
Mr. Justice Syed Mansoor Ali Shah

Criminal Appeal No.154-L of 2013, and
Criminal Petition No.366-L of 2013.
(on appeal from the judgment of Lahore High Court, Lahore dated 26.02.2013, passed in Crl.A No.1053/2007)

Ali Ahmad (in Crl.A-154-L/13) ...*Appellant*
Imtiaz Ahmad (in Crl.P-366-L/13) ...*Petitioner*

Versus

The State & another (in Crl.A-154-L/13)
Ali Ahmad, etc (in Crl.P-366-L/13)
...*Respondents*

For the appellant: Mr. Muhammad Akram Qureshi, ASC.

For the petitioner: Ch. Tahir Nasrullah, ASC.
& for respondent No.2
(in Crl.A-154-L/13)

For the State: Mr. Mazhar Sher Awan, Addl.P.G.

Research Assistance: Supreme Court Research Centre.

Date of hearing: 14.03.2019

JUDGMENT

Syed Mansoor Ali Shah, J.- Ali Ahmad (the appellant), murdered his sister, Rabia Khalil and her paramour, Raheel Arif, in his own house, in the wee hours of the night (3:00 am) on 23.04.2006. He was thereafter booked in FIR No.155 of the same date registered at Police Station, City Gojra, District Toba Tek Singh for offences punishable under section 302 P.P.C. After regular trial, he was convicted under section 302(c) PPC and sentenced to rigorous imprisonment for 10 years by the Trial Court. Upon appeal by the complainant the High Court through impugned judgment dated 26.02.2013 set-aside the judgment of the trial court and convicted the appellant under section 302(b), PPC and sentenced him to imprisonment for life, thereby the

criminal appeal of the complainant was allowed, whereas the criminal appeal filed by the appellant seeking acquittal was dismissed.

2. When this appeal came up for hearing before this Court on 27.3.2014, it was pointed out that the heirs of the deceased Rabia Khalil had entered into compromise with the appellant. Criminal Misc. Application No.512-L/2013 was placed on the record in this regard, which was allowed and the appeal of the appellant was partly accepted to the extent of Rabia Khalil and conviction of the appellant qua her murder was set aside, while the appeal to the extent of conviction qua the murder of Raheel Arif was kept pending, which has come up for hearing before us today.

3. Story of the prosecution is that the brother of the complainant, Muhammad Nawaz, was hospitalized due to a heart condition at Bashir Clinic, Gojra Road, Gojra on 21.04.2006. The appellant, having close terms with Muhammad Nawaz and his family, regularly visited him at the clinic. At the end of one of his visits to the clinic on 23.04.2006, the appellant, around 2:15 am, requested Raheel Arif, nephew of the complainant, to walk him home from the clinic. Around 3:00 am, the same night, the complainant, who was also at the clinic, went out to drop Hassan Iftikhar (PW-12) and Adeel Arif (brother of Raheel Arif) home on his motorbike. The complainant party on their way home and while passing by *Mehdi Mohalah*, heard a fire shot in a street and on hearing the same, turned and drove into that street and saw the appellant firing at Raheel Arif, who succumbed to his injuries and died in the street. The crime report continues to state that thereafter the appellant went into the house and locked the door and more fire shots were heard from inside the house. According to prosecution the motive behind the murder was that the appellant suspected that Raheel Arif had illicit relations with his sister Rabia Khalil.

4. The defence version, as per statement of the appellant recorded under section 342 Cr.P.C, is that he murdered the deceased and his sister due to grave and sudden provocation when he saw his sister in a compromising position with the deceased, as he returned home from medical clinic in the wee hours of the night on 23.4.2006.

5. We have heard the learned counsel for the parties and have examined the record and the judgments of the courts below. The trial court disbelieved the presence of the eye-witnesses, the complainant, Ali Ahmad (PW-11) and Hassan Iftikhar (PW-12) at the site of the occurrence after a careful appraisal of their testimony, supported by cogent reasons. The High Court has not upset the said findings in the impugned judgment. Additionally, we find that according to the prosecution the complainant (PW-11) set out on his motorbike to drop Hassan Iftikhar (PW-12) and Adeel Arif (brother of the deceased Raheel Arif) at their respective homes. In the cross-examination the eye-witnesses (PW-11 and PW-12) and Syed Kazim Hussin (PW-1), the draftsman who prepared the site plan (Ex-PA), stated that the place of occurrence does not fall on the way to their homes. The site plan (Ex-PA) does not even show that the road to Samundari Road, Gulshan Colony or Abdullahpur (areas where residences of PW-12, Adeel Arif and PW-11 are situate) passes through the place of occurrence. According to the site plan the complainant party saw the occurrence from a distance of 297 feet, in the dead of the night. There is a contradiction between the statements of the two eye-witnesses (PW-11 & PW-12) regarding their distance from the site of occurrence, PW-12 categorically stated in his cross-examination that he was present during the occurrence at a distance of 14/15 feet from the place of occurrence, while PW-11 supports the site plan which describes the distance to be 297 feet. This inconsistency between the statement of the two eye-witnesses casts doubt on the case of the prosecution. The light of the motorcycle and a private bulb installed in the doorway of the house

of the appellant is also suspect as neither the said bulb nor the motorcycle was recovered. Adeel Arif, one of the three eye-witnesses, being the real brother of the deceased and as a consequence being the most aggrieved amongst them, was given up by the prosecution as being "unnecessary," giving rise to an adverse inference regarding his presence at the scene of the crime. The above analysis makes the presence of the eye-witnesses at the crime scene doubtful, as concluded by the trial court.

6. With the presence of the eye-witnesses doubtful at the scene of the crime, it is not safe to place reliance on the ocular account. As a consequence, the medical evidence or the recovery of the firearm from the appellant lends little support or corroboration, to the case of the prosecution. For the above reasons we are of the view that the prosecution failed to establish the culpability of the appellant, on the basis of its evidence.

7. The High Court did not examine the case of the prosecution and appraise its evidence to find out whether the prosecution had succeeded to prove the charge against the accused but instead, examined only the defence plea by placing reliance on Article 121 of the Qanun-e-Shahdat Order, 1984 **("QSO")** and held that the appellant had failed to prove his plea of grave and sudden provocation as taken in his statement under section 342 Cr.P.C and proceeded to convict him under section 302(b) PPC for the offence of "honour killing", as alleged by the prosecution.

Process of appraising evidence and scope of Article 121 of QSO

8. In a criminal trial, it is now jurisprudentially well-entrenched, the proper course for the court is to first discuss and assess the prosecution evidence, particularly the reliability of the eye-witnesses, 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 its evidence.[1] Burden is always on the

[1] See Ashiq Hussain v. State, PLD 1994 SC 879.

prosecution to prove its case and it is only when a prima facie case is made out against the accused sufficient to justify his conviction, does the burden shift upon the accused under Article 121 of the QSO, if he relies on any of the General Exceptions in the P.P.C or within any special exception or proviso contained in any other part of the PPC or in any law defining the offence charged.[2] If the prosecution fails to prove its case against the accused, the question of shifting of burden upon the accused does not arise as it becomes immaterial. Where the accused has taken a defence plea (like, self defence, provocation, accident, etc.) which relates to an essential ingredient of the offence charged, the court is to appraise the prosecution case and the defense version in juxtaposition to adjudicate the matter.[3]

9. The approach adopted by the High Court, in the instant case, in examining the defence plea of grave and sudden provocation in isolation from the prosecution evidence was incorrect. The High Court did not appraise the prosecution evidence at all and convicted the appellant, under section 302(b) PPC, on the basis of its finding that he had failed to establish his defence plea of grave and sudden provocation. This approach of the High Court in coming to the conclusion of the culpability of the appellant was contrary to the law declared by the two larger benches of this Court in the cases of *Wali Muhammad*[4] and *Ashiq Hussain.*[5] In the cited cases this Court authoritatively declared that the accused cannot be convicted on the ground that his defense plea appears unconvincing. The prosecution is duty bound to prove its case against the accused beyond reasonable doubt on the basis of its own evidence and is not absolved of this duty even if the accused has taken a defence plea.

---

[2] See Shamoon v. State, 1995 SCMR 1377; Mushtaq Hussain v. State, 2011 SCMR 45, per Rahmat Hussain Jafferi, J.

[3] See Safdar Ali v. Crown, PLD 1953 FC 93; Abdul Haque v. Sate, PLD 1996 SC 1; Mst. Mumtaz Begum v. Ghulam Farid, 2003 SCMR 647; Lal Khan v. Crown, PLD 1952 Lah 502; Ghulam Yousaf v. Crown, PLD 1953 Lah 213; State v. Balahari, PLD 1962 Dacca 467

[4] Wali Muhammad v. State, 1969 SCMR 612, (five member Bench).

[5] Ashiq Hussain v. State, 1993 SCMR 417, (five member Bench).

10. Reliance by the High Court on *Feroze*[6] is misplaced; because in *Feroze* the learned trial court convicted the accused, and the High Court affirmed it, on the basis of the evidence of the prosecution and not on failure of the accused to prove its defence plea and this Court maintained the decisions of the courts below by refusing leave to appeal. However, if *Feroze* creates an impression that the prosecution evidence needs not to be appraised/examined in a case where the accused has taken a defence plea, we strongly dispel the same and reinforce the aforesaid view of the larger benches of this Court expressed in *Wali Muhammad* and *Ashiq Hussain.*

11. Consistent jurisprudence has evolved over the years by several judgments of this Court, wherein the accused persons were acquitted by accepting their plea taken in statement under section 342 Cr.P.C., of having acted in furtherance of self-defence, when the prosecution had failed to prove its case against them. The cases of *Mehrban,*[7] *Najib Raza,*[8] *Waris Khan,*[9] *Muhammad Aksar,*[10] *Faiz*[11] and *Sultan*[12] may be referred in this regard. These cases do not discuss Article 121, QSO[13] as the accused is not required to prove his plea of self-defense, on failure of the prosecution to prove its case.

Honour killing vis-a-vis grave & sudden provocation

12. The High Court has also relied on *Ameer*[14], for holding that the case is one of honour killing and not of grave and sudden provocation, without fully appreciating the difference between the two. In case of honour killing the act of murder is well thought out, calculated and pre-mediated, while in case of grave and sudden provocation the act is committed on the spur of the moment

---

[6] Feroze v. State, 2008 SCMR 696.
[7] Mehrban Shah v. State, 1969 SCMR 839.
[8] Najib Raza Rehmani v. State, PLD 1978 SC 200.
[9] Waris Khan v. Ishtiaq, PLD 1986 SC 335.
[10] Muhammad Aksar v. State, 1990 SCMR 1053.
[11] Faiz v. State, 1983 SCMR 76.
[12] Sultan Khan v. Sher Khan, PLD 1991 SC 520.
[13] previously section 105 of the Evidence Act, 1872
[14] Muhammad Ameer v. State, PLD 2006 SC 283.

without any pre-planning or deliberation[15]. Family honour may be at the root of both the acts, still there is a difference between the two; in case of honour killing the act is pre-meditated and a planned one, while in case of grave and sudden provocation the act is so sudden that it entails no prior deliberation or planning. Reliance by the High Court on *Ameer* is misplaced as the murder in that case was a pre-meditated one. This glaring distinguishing fact has not been appreciated by the High Court. It is also important to shed some light on the meaning and scope of the expression, "grave and sudden provocation."

Meaning and scope of grave and sudden provocation

13. The expression "grave and sudden provocation" was used by the Legislature in Exception-1 to the erstwhile section 300 of PPC as: "Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation." It is clearly spelt out from the said provisions that the provocation offered by the act of the victim must be so grave and sudden that it would deprive the offender of the power of self-control. Provocation in law thus consists mainly of three elements: (1) the act of provocation, (2) the loss of self-control, and (3) the retaliation/reaction proportionate to the provocation. The relationship of these elements to each other, particularly in point of time, is of the foremost importance to determine whether there was time for passion to cool and reason to resume.[16] The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control, whereby malice which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived.[17] The proportionality of the reaction to the provocation is tested on the touchstone of the reaction expected from a reasonable person. What a reasonable

---

[15] see Muhammad Qasim v. State, PLD 2018 SC 840; Muhammad Ameer v. State, PLD 2006 SC 283; Ali Muhammad v. Ali Ali Muhammad, PLD 1996 SC 274; Naseer Hussain v. Nawaz, 1994 SCMR 1504.
[16] See Ali Muhammad v. Ali Ali Muhammad, PLD 1996 SC 274.
[17] Holmes v. Director of Public Prosecutions, (1946) A.C. 588.

man will do in certain circumstances depends upon various factors including the customs, traditions, social and cultural values, and way of life of the society to which he belongs.[18] No abstract standard of reasonableness can be laid down, in this regard.

14. In his statement under section 342, Cr.P.C, the appellant stated that he murdered the deceased and his sister due to grave and sudden provocation when he saw Raheel Arif committing *zina* with his sister, as he returned home from the medical clinic in the wee hours of the night on 23.4.2006. His statement made under section 342 Cr.P.C is reproduced below, for ready reference:

> **"Statement of accused Ali Ahmed s/o Khalil Ahmed caste Butt aged 30 years businessman r/o Mehdi Mohallah, Gojra u/s 342 Cr.P.C without oath.**
> " .....
>
> Q.14 Have you any thing else to say?
>
> Ans. I am innocent. The real facts of the present case are that I had a family terms and good relations with Muhammad Nawaz Gill and also friendly terms with Raheel Gill. Muhammad Nawaz Gill suffered heart attack on 21.4.2006. He was admitted in Bashir Clinic Quaid-i-Azam Road, Gojra. His wife and daughter remained present with him round the clock and I used to visit him during night regularly and during day hours occasionally. On the night between 22/23.4.2006 I was present with Muhammad Nawaz in Bashir Clinic. At mid night he felt a severe pain in hgis left arm. I had informed the dispenser about the precarious condition of Muhammad Nawaz Gill and on his information doctor had attended the patient. At that time through telephonic message I had informed Ijaz Gill Nazim U.C., the real brother of Nawaz Gill and Raheel Gill, real Bhanja of Nawaz Gill about the serious condition of Muhammad Nawaz. They both had come to the clinic after some time, the condition of Muhammad Nawaz Gill became O.K. Then Raheel Arif had gone on the pretext that his mother is alone at home. **At about 3 p.m. when Muhammad Nawaz's condition was satisfactory, I left the clinic for my home. When I reached my house towards St.No.4, gate was lying open. Thereafter, I went incise my office and found my sister Rabia Khalil and Raheel Arif both committing zina with each other. I was holding my licensed pistol, I lost senses and self control and in the above said circumstances under grave and sudden provocation I made fire with my**

[18] See K. M. Nanavati vs State Of Maharashtra, AIR 1962 SC 605

> **pistol on Raheel Arif when he was trying to flee away from the spot and he sustained injury on his shin in the deohri and he fell down outside the house in street. Then I made successive fires with pistol which landed on different parts of his body and in the same mental condition I went inside the house and made fire with repeater gun on my sister Rabia Khalil and she also fell down. Thereafter, I acame back in the street and I made further firing on Raheel Arif with repeater gun 12 bore.** The occurrence was not witnessed by the PWs. After the occurrence I had informed the police at PS through telephone and informed them about the present occurrence. On the arrival of the I.O., I had informed Ijaz Gill Nazim U.C through telephonic message, thereafter the complainant had come to the place of occurrence with Mehtab Ahmed Cheema and concocted this false story and involved me in this false case. I was in police custody since 23.4.2006. On the asking of I.O. on 24.4.2006, I had written my statement and produced the same before him which is now on judicial record as Ex.DG. The underwear of Rabia Khalil was found to be stained with semen....."
>
> *(emphasis supplied)*

Scope and purpose of section 342 Cr.P.C

15. Before examining the effect of statement of the appellant made under section 342 Cr.P.C, it is necessary to explore the scope and evidentiary value of a statement made under Section 342 of the Cr.P.C, which is reproduced below:-

> **342. Power to examine the accused**. (1) For the purpose of enabling the accused **to explain any circumstances appearing in the evidence against him,** the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.
>
> (2) The accused shall not render himself liable to punishment by refusing to answer such questions or by giving false answers to them; but the Court may draw such inference from such refusal or answer as it thinks just.
>
> (3) The answers given by the accused may be **taken into consideration** in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

> (4) Except as provided by subsection (2) of S. 340 no oath shall be administered to the accused.
>
> *(emphasis supplied)*

16. Bare reading of section 342 Cr.P.C shows that its primary purpose is to enable the accused to know and to explain and respond to the evidence brought against him by the prosecution. It is essential that attention of the accused must be brought to all the vital parts of the evidence brought against him by the prosecution, especially if he is an ignorant person who cannot be expected to know or understand what particular parts of the evidence are or are likely to be considered by the Court to be against him. The purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain.[19] Muhammed Sharif, J. in *Abdul Wahab*[20] eloquently explained the object of section 342 Cr.P.C in the following words: "It should not … be overlooked that the real object of section 342 is not to subject the accused to a detailed cross-examination. It is, as a matter of fact, inviting his attention to the point or points in the evidence which are likely to influence the mind of the judge in arriving at conclusions adverse to the accused, and before such an adverse inference can be drawn, the accused should be afforded an opportunity to offer an explanation, if he has any."

Status of a statement under section 342 Cr.P.C

17. The words "taken into consideration" appearing in section 342(3), Cr.P.C are very wide. The statement of an accused recorded under section 342, Cr.P.C, has no less probative value than any other "matter" which may be taken into consideration against him within the contemplation of the definition of "proved" given in Article 2(4) of the QSO[21] (previously section 3 of the Evidence Act, 1872), which states that a fact is said to be proved

---

[19] see Tani v. Emperor, 20 Cr.L.J 12 (Nag); Md. Illias Mistri v. The King, (1949) ILR 1 Cal 43; Abdul Wahab v. Crown, PLD 1955 FC 88, at p. 90; Santan Naskar v. State of West Bengal, AIR 2010 SC 3570.

[20] Abdul Wahab's case ibid.

[21] Varand Fazal, ILR (1944) Kar 114, per O'Sullivan J.

when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. Muhammad Munir, J., in *Rahim Bakhsh*[22], regarding statement under section 342 Cr.P.C. wrote: "I know of no law which says that an admission made by an accused person in or out of court unless it is vitiated by any such circumstances as are mentioned in the Indian Evidence Act, cannot be considered to be a matter which the court may take into consideration in coming to its conclusion." The circumstances which can vitiate an admission or confession, referred to by the learned Judge, may be of inducement, threat or promise under which a particular statement is made. A statement under section 342, Cr.P.C. having been made by an accused before court in presence of his counsel has little chance of suffering from such circumstances.[23] However, an admission or confession which is improbable or unbelievable, or is not consistent with the overall facts and circumstances of a case may not have any probative value and thus cannot be relied upon by the court for reaching to a conclusion.[24]

Conviction on the basis of the statement of the accused under section 342 Cr.P.C.

18. In *Abdur Rehman,*[25] *Amin,*[26] *Mehrban,*[27] *Maqsood,*[28] and *Sattar,*[29] the High Court disbelieved the prosecution evidence but convicted the accused persons for the offence punishable under section 302(c) PPC or the erstwhile section 304-I PPC on the basis of the statements under section 342 Cr.P.C., of having committed the offences on account of grave and sudden provocation, without requiring them to prove their statements. This

---

[22] Rahim Bakhsh v. Crown, PLD 1952 FC 1.
[23] See Nasir Mehmood v. State, 2015 SCMR, per Ijaz Ahmad Chaudhry, J.
[24] See Manjeet Singh v. State, PLD 2006 SC 30; Ghulam Abuzar v. State, 1991 PCrLJ 697; Nisar Ahmad v. State, 1989 PCrLJ 1445
[25] Abdur Rehman v. State, 2011 SCMR 34.
[26] Muhammad Amin v. Muhammad Khan, 2002 SCMR 1473.
[27] Mehrban Khan v. Javaid Khan, 2001 SCMR 195.
[28] Maqsood Ahmad v. State, 1995 SCMR 359.
[29] Sattar Khan v. Rashid Khan, 1984 SCMR 678.

Court maintained the conviction recorded by the High Court, in those cases.

19. *Hanif*[30] and *Ali Muhammad*[31] may also be referred in this regard. In *Hanif*, this Court maintained the judgment of the trial court whereby the accused had been convicted for offence under section 302(c) PPC, after rejection of the prosecution evidence, on the basis of his plea of having committed the murder under the circumstances of grave and sudden provocation. In *Ali Muhammad*, this Court reversed the acquittal judgment of the High Court and convicted the accused under section 302(c) PPC, despite rejection of the prosecution evidence, on the basis of version of the accused taken in statement under section 342 Cr.P.C. The version of the accused, in that case, was that he saw the deceased and his wife lying on the same bed in an objectionable position, and acted under sting of grave and sudden provocation. In *Shamoon,*[32] this Court while relying upon the plea of the accused narrated in statement under section 342 Cr.P.C, of having acted under grave and sudden provocation converted his sentence from section 302 PPC to 304-II PPC, as both the Courts below had disbelieved the ocular testimony of the prosecution witnesses. This Court, in *Gul Nissa,*[33] made an explicit and unequivocal statement of law that "accused can be convicted on his own statement even if the prosecution evidence is rejected".

Principles governing section 342 Cr.P.C

20. The principles surrounding section 342 Cr.P.C have evolved for over a period of the last about two hundred years beginning with the case of *Sarah Jones*[34] (decided in 1827) and taking shape in *Balmakund*[35] as follows:

> "…where there is no other evidence to show affirmatively that any portion of the exculpatory

[30] State v. Muhammad Hanif, 1992 SCMR 2047, per Shafi-ur-Rahman J.
[31] Ali Muhammad v. Ali Muhammad, PLD 1996 SC 274, per Fazal Karim J.
[32] Shamoon v. State, 1995 SCMR 1377.
[33] Gul Nissa v. Muhammad Yousuf, PLD 2006 SC 556.
[34] Rex v. Sarah Jones, [1827] 2 Carrington and Pyne 629
[35] Balmakund v. Emperor, AIR 1931 All 1.

> element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible."

These principles have been refined and rearticulated by our own courts.

A. When prosecution fails to prove its case - the statement of the accused, under section 342 Cr.P.C. is to be considered in its entirety and accepted as a fact.

Sir Abdul Rashid J., the then Chief Justice of Federal Court of Pakistan observed in *Rahim Bakhsh*[36] that if the conviction of an accused is to be based solely on his statement in Court then that statement should be taken into consideration in its entirety. In *Mehrban*[37] S.A. Rahman J. speaking for a five member bench of this Court held that "[i]t was not open to the learned Judges, after having rejected the prosecution evidence as unreliable, to dissect the accused's statement and accept it in part and reject the rest of it." In *Najib Raza*[38] this Court agreed with Mahajan J. who observed that "it is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him.[39]" In *Faiz,*[40] another five member Bench of this Court held that where the conviction is based entirely on the statement of the accused then the statement should be taken into consideration in its entirety as the reply or the narration of the accused "is not tested or completed either by cross-examining him or by putting him further questions. The state of his [accused's] mind is not prodded. His bare statement about it exists on record, for whatever its worth. In the absence of any other evidence, it has to be accepted as a fact"[41], and cannot be rejected by adopting a process of appraisement and analysis.[42] In *Sultan,*[43] Abdul Qadeer Chaudhry, J. spoke for the Court to hold

---

[36] Rahim Bakhsh v. Crown, PLD 1952 FC 1.
[37] Mehrban Shah v. State, 1969 SCMR 839.
[38] Najib Raza Rehmani v. State, PLD 1978 SC 200.
[39] Hanumani Govind Nargundi v. State of Madhya Pardesh, AIR 1952 SC 343
[40] Faiz v. State, 1983 SCMR 76.
[41] Id. para 9, emphasis supplied
[42] Waris Khan v. Ishtiaq, PLD 1986 SC 335.
[43] Sultan Khan v. Sher Khan, PLD 1991 SC 520.

that when the prosecution fails to setup a case against the accused and the entire evidence of the prosecution has been discarded and disbelieved the statement of the accused under section 342 Cr.P.C has to be taken into consideration in toto (in its entirety) and the Court cannot select a portion out of the statement that goes against the accused.

B. The inculpatory part of the statement of the accused cannot be used or construed to fill up gaps in the case of the prosecution as the prosecution has to prove the case on its own evidence.

21. *Sultan*[44] went ahead to add that if there is prosecution evidence which disproves the exculpatory part of the statement of the accused under section 342 Cr.P.C, then reliance can be placed on the inculpatory part of the statement by excluding the exculpatory part, but not otherwise. In other words, if the prosecution has proved a case against the accused beyond reasonable doubt, the court may, if it deems expedient to get further support, take into consideration also the inculpatory part of the statement of the accused under section 342 Cr.P.C., only if the prosecution evidence negatives the exculpatory part of the statement and it can be safely severed from the inculpatory part but not otherwise. It is underlined that even if this exercise is not undertaken the conviction of the accused stands as the prosecution has already proved its case against the accused beyond reasonable doubt, on the basis of its evidence. The inculpatory part of the statement is not being considered to fill up gaps in the case of the prosecution but simply to draw support in a case already established by the prosecution and no more.

C. Where prosecution has failed and the statement of the accused under section 342 Cr.P.C. is accepted in entirety, the court is then to give due effect to the statement of the accused, under the law, whether in favour of or against the accused.

22. Next comes the question, how such a statement of the accused when "accepted as a fact[45]" and taken in its entirety is to be given effect and acted upon, once the prosecution has failed to

---

[44] Id.
[45] Faiz v. State, 1983 SCMR 76, para 9.

make out a case? Once the prosecution evidence is disbelieved, rejected or excluded from consideration, and the facts explained by the accused in his statement under section 342 Cr.P.C. are accepted entirely, the court is then to examine the said facts to give due effect to the statement of the accused, under the law, whether in favour of or against the accused.[46] The object of such examination is to determine whether or not the facts narrated by the accused constitute an offence under the law or fit into any exception of the offence provided under the law. In this respect, the observation of Sir Mukerji J., made in the case of *Bhola Nath* [47] is quoted to explain the purpose of this examination of the statement of the accused. The learned Judge observed, at page 5:

> "If on the whole of the statement of the accused, taken together, his guilt is established, and his plea, say, of acting in self-defence or of the case falling within any of the general or special exceptions (*sic)* is not made out on the facts admitted, there cannot be any bar to a conviction, simply because the prosecution evidence, by itself, would not have secured a conviction……"
>
> *(emphasis supplied)*

This legal examination was also aptly explained and applied by Lobo C.J. in *Gul Mahomed* [48]. The learned Judge found that accepting the statement of the appellant as true, the act of the appellant in killing his wife and another was under grave provocation but it was not under sudden provocation. The facts narrated by the appellant though were accepted but those were found not to fit in the legal parameters of Exception-I to section 300 PPC for making the case of the appellant as one of grave and sudden provocation. Likewise, this Court, in *Muhammad Azam* [49], though admitted the statement under section 342 Cr.P.C. as a whole, but found, even in those admitted facts, the accused to have exceeded in his right of self-defence and convicted him accordingly. In *Sattar* referred above the accused while explaining the circumstances in which he inflicted injuries to him, claimed to have acted in the exercise of right of self-defence. But the High

---

[46] see Jagdeo v. Emperor, 38 IC 740.
[47] Bhola Nath v. Emperor, AIR 1929 Allahabad 1.
[48] Gul Mahomed v. Emperor, AIR 1945 Sindh 42.
[49] Muhammad Azam v. State, PLJ 2009 SC 1120.

Court though accepted his statement of facts in its entirety, but convicted him under section 304-I PPC by treating his version not to fit in the legal requirement of the valid exercise of right of self-defence as the accused as per his own version of facts had chased the deceased in street who was attempting to escape from the place of occurrence.

Summary of principles of law regarding article 121, QSO and section 342 Cr.P.C.

23. We consider it appropriate to recapitulate and summarise key principles of law discussed in this judgment, regarding article 121, QSO and section 342, Cr.P.C., for convenience, which are stated as under:

i. The burden, in a criminal case, to prove the guilt of the accused is always on the prosecution. Therefore, the court, in the first instance, is to 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 its evidence.

ii. In a case where the accused has not taken any specific plea (e.g. self defence, grave and sudden provocation etc.) or has not produced any evidence in his defence, the court should decide the question of success or failure of the prosecution in proving the charge against the accused on the basis of the prosecution evidence alone.

iii. In a case where the accused has taken a specific plea or has produced evidence in his defence, the court should appraise the prosecution case and the defense version in juxtaposition, in order to arrive at a just conclusion. Even in such situation the burden remains on the prosecution to prove the necessary ingredients of the offence charged against the accused, and it does not shift upon the accused merely by taking a defence plea or producing evidence in his defence.

iv. The burden shifts upon the accused under Article 121 of the QSO to prove his defense plea, only when a *prima facie* case is made out against him by the prosecution on the basis of its evidence. If the prosecution fails to prove its case against the accused, the question of shifting of burden on the accused does not arise.

v. The primary purpose of section 342 Cr.P.C. is to enable the accused to know and to explain and respond to the evidence brought against him by the prosecution. A direct dialogue is established between the Court and the accused by putting every important incriminating piece of evidence to the accused and granting him an opportunity to answer and explain.

vi. If the prosecution fails to prove its case against the accused, the court can take into consideration the statement of the accused under section 342 Cr.P.C. whether in favour of or against the accused; but it must take into consideration that statement in its entirety and cannot select and place reliance on the inculpatory part of the statement only.

vii. In the last mentioned circumstance, the facts narrated by the accused in his statement under section 342 Cr.P.C. are to be accepted without requiring their proof. The court, however, should examine the said facts in order to give due effect to them under the law. The object of such examination is to determine whether or not the facts narrated by the accused constitute an offence under the law or fit into any exception of the offence provided under the law.

viii. An admission or confession made in statement under section 342 Cr.P.C., which is improbable or unbelievable, or is not consistent with the overall facts and circumstances of a case do not have any probative value and thus it cannot be relied upon by the court for reaching a conclusion.

24. The above settled principles of law when applied to the present case, we find that the prosecution has failed to prove the

case against the appellant beyond reasonable doubt, on the basis of its evidence. We, therefore, revert to the defense plea and the statement of the appellant made under section 342 Cr.P.C., which is to be accepted in its entirety without requiring the proof under Article 121, QSO. The appellant, in his statement under section 342 Cr.P.C., has explained that he killed his sister and her paramour on grave and sudden provocation as he saw them committing *zina* when entered in his house at 03:00 am in the night, on his return from the hospital. His statement is not improbable or unbelievable, nor is it inconsistent with the overall facts and circumstances of the case; therefore, it can safely be relied and acted upon. Our culture and social values reflected in the jurisprudence[50] developed so far is that an act of illicit sex with a female family member of the offender is considered sufficient to cause provocation so grave and sudden that it would deprive the offender of the power of self-control. The arguments on behalf of the complainant have been made only to convince this Court to believe the prosecution story, though they could not succeed; and it has not even been argued that the facts and circumstances narrated by the appellant under which he committed the murder of Raheel Arif, if admitted to be correct, do not constitute grave and sudden provocation. In the light of the scope and meaning of grave and sudden provocation discussed in para 13 above, the statement of the appellant when taken as a whole, establishes grave and sudden provocation. The case of the appellant to the extent of murder of Raheel Arif, therefore, falls within the scope of section 302(c) P.P.C; hence, his appeal is partly allowed to the extent of the impugned judgment of the High Court. The judgment of the High Court whereby the appellant was convicted under section 302(b) PPC for the murder of Raheel Arif is set aside, while that of the Trial Court convicting the appellant under section 302(c) PPC is

---

[50] See Muhammad Qasim v. State, PLD 2018 SC 840; Gul Nissa v. Muhammad Yousuf, PLD 2006 SC 556; Naseer Hussain v. Nawaz, 1994 SCMR 1504; Noor Muhammad v. State, 1993 SCMR 208; and cases referred to in paras 18 and 19 of this judgment.

restored. However, the sentence of the appellant is modified. The appellant is sentenced to rigorous imprisonment for a period of 15 years, in the peculiar circumstances of the case. He is also directed to pay compensation of Rs.100,000/- (one hundred thousand) to the legal heirs of the deceased, in terms of section 544-A, Code of Criminal Procedure, and in default whereof to undergo simple imprisonment for six months. Benefit of Section 382-B, Code of Criminal Procedure is extended to the appellant. Consequently, criminal petition for leave to appeal filed by the complainant for enhancement of the sentence of the appellant from life imprisonment to death is dismissed for being without merit and leave to appeal is refused.

25. Foregoing are the reasons for our short order of even date.

Judge

Judge

Judge

Lahore,
14th March, 2019.
Approved for reporting.
صداقت