IN THE FEDERAL SHARIAT COURT

(APPELLATE/REVISIONAL JURISDICTION)

PRESENT

MR. JUSTICE DR. FIDA MUHAMMAD KHAN
MR. JUSTICE MEHMOOD MAQBOOL BAJWA

CRIMINAL APPEAL NO.1-Q OF 2015

ABDUL SAMAD S/O MASTER ALLAH DINNA,
BANDICHA BY CASTE, R/O UTHAL CITY
PRESENTLY CONFINED IN CENTRAL JAIL,
GADDANI. . . . . APPELLANT

VERSUS

THE STATE. . . . . RESPONDENT

JAIL CRIMINAL APPEAL NO.4-Q OF 2015

ABDUL SAMAD SON OF ABDUL JALIL,
RONJHA BY CASTE, R/O GOTH HAJI SALEH
CHIB BELA, PRESENTLY CONFINED IN
CENTRAL JAIL, GADDANI. . . . . APPELLANT

VERSUS

THE STATE. . . . . RESPONDENT

CRIMINAL REVISION NO.1-Q OF 2015

IMAM BAKHSH S/O MUHAMMAD AYOUB,
RONJHA BY CASTE, R/O GULANI GOTH,
BALLA. . . . . .PETITIONER

VERSUS

1. ABDUL SAMAD S/O ABDUL JALIL,
   RONJHA BY CASTE, R/O GOTH SALEH CHIB BELA.
2. ABDUL SAMAD S/O MASTER ALLAH DINNA,
   BANDICHA BY CASTE, R/O UTHAL CITY,
   PRESENTLY CONFINED IN CENTRAL JAIL,
   GADDANI.
3. THE STATE. . . . . RESPONDENTS

COUNSEL FOR THE APPELLANT IN CR. A. NO. 1-Q OF 2015		MR. SHAH MUHAMMAD JATOI, ADVOCATE.
COUNSEL FOR THE APPELLANT IN J. CR. A. NO. 4-Q OF 2015		MR. MUHAMMAD NAJAM-UD-DIN MENGAL, ADVOCATE.
COUNSEL FOR THE PETITIONER (COMPLAINANT) IN CR. REV.NO.1-Q OF 2015.		MR. TAHIR HUSSAIN KHAN, ADVOCATE.
COUNSEL FOR THE STATE	…	SYED ABDUL BAQIR SHAH, ADDL. P.G. BALUCHISTAN.
FIR AND POLICE STATION	…	22 OF 2011 UTHAL, DISTRICT LASBELLA.
DATE OF JUDGMENT OF TRIAL COURT	…	18.02.2015
DATES OF PREFERENCE AND FILING	…	19.03.2015 AND 23.04.2015, RESPECTIVELY.
DATE OF HEARING	…	11.01.2018
DATE OF DECISION	…	16.01.2018

JUDGMENT:

Mehmood Maqbool Bajwa, J: Through this judgment, we intend to dispose of Criminal Appeal No.1-Q of 2015 "ABDUL SAMAD vs. THE STATE", Jail Criminal Appeal No.4-Q of 2015 "ABDUL SAMAD v. THE STATE" and Criminal Revision No.1-Q of 2015 titled "IMAM BAKHSH vs. ABDUL SAMAD, ETC" arising out of one and the same judgment of conviction dated 18th of February, 2015, handed down by learned Sessions Judge, Lasbela at Hub in Crime-Report bearing No.22 of 2011 registered under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called The Ordinance VI of 1979) at Police Station Uthal. However, charge was framed under Section 17(4) of The Ordinance VI of 1979 read with Sections 302 and 34 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter shall be referred as The Code).

2. F.I.R. was lodged on the complaint (Ex.P.1-A) of Imam Bakhsh (P.W.1), brother of Naseer Ahmed, Head Constable (deceased) against un-known accused with the accusation that on 22nd of April, 2011, his deceased brother visited office of District Police Officer to collect amount of compensation awarded to his brother, Naseeb Ullah Police Constable, who sustained injuries in a police encounter in the area of Police Station Sakran, who did not turn up and on the following day, he made contact with his relatives, Habib Ullah Sub-Inspector and Nasir Ahmed, Assistant Sub-Inspector and came to Police Station Uthal in order to know the whereabouts of his (deceased) brother when on an inquiry, it revealed that deceased received amount of compensation to the tune of Rs.3 lac and went to Uthal Bus Stop to go to Hub.

On 24th of April, 2011 (Date of registration of F.I.R), the complainant as per stance alongwith Nasar Ullah, S.I (P.W.5) was present at police station when after receipt of information, he alongwith Ghous Bakhsh, Inspector (P.W.22), Nasar Ullah, S.I (P.W.5) and other police officials went to the backside of office of District Police Officer and found bag in the garden of banana containing dead body of his brother.

3. The appellants are namesake (Abdul Samad), having different parentage and caste. Abdul Samad (appellant in Crl. Appeal No.1-Q of 2015) is son of Master Allah Dina, Bandicha by caste (Hereinafter referred to as appellant No.1). Parentage of other Abdul Samad (appellant in Jail Criminal Appeal No.4-Q of 2015) is Abdul Jalil, caste Roonjha (who shall be called as appellant No.2 during discussion). Both were implicated later on and after trial, conviction was recorded against them under Section 302(b) of The Code, awarding them sentence of life imprisonment, requiring each appellant to pay compensation to the legal heirs of the deceased to the tune of Two Hundred Fifty Thousand Rupees (Rs.2,50,000) and in default of payment to suffer one year simple imprisonment with benefit of Section 382-B of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called The Act).

4. The appellants No.1 and 2 by preferring appeals No.1 and 4-Q of 2015, respectively call in question legality and validity of judgment recording conviction and awarding sentence, seeking acquittal

Imam Bakhsh (complainant) through Revision Petition No.1-Q of 2015 being dissatisfied with the quantum of punishment (life imprisonment) prays for conversion of same into capital sentence grousing absence of mitigating circumstances.

5. Both the appeals as well as revision petition was filed before the Honourable Baluchistan High Court at Quetta but due to want of jurisdiction same were transmitted to this Court later on.

6. On 11th of January, 2018, after hearing arguments, through short order, appeals were accepted resulting in acquittal of appellants and dismissal of revision petition by us. Hereinafter are the reasons of our said conclusion.

7. Lengthy arguments were advanced by the adversaries which are not going to be incorporated but will be reflected in discussion.

8. The prosecution in order to prove its case from different angles produced 23 witnesses besides production of documents.

The appellants denied incriminating evidence adduced by prosecution not only in their respective statements recorded under Sections 342 and 340 (2) of The Act but the appellant No.1 also produced Zahid Hussain (D.W.1) in support of his plea of "alibi".

9. Admittedly case was registered against unknown assailants. It is unseen and un-witnessed occurrence. Case of the prosecution rests upon "circumstantial evidence".

10. Following points are required to be kept in view while appreciating circumstantial evidence:

(i) Facts so established must be consistent with the guilt of the accused.

(ii) Circumstances from which the conclusion of guilt is to be drawn must or should be established and not may be established.

(iii) Circumstances must be of conclusive nature.

(iv) Chain of evidence must be complete, not leaning any reasonable ground about the innocence of the accused and must show in all human probability that act must have been done by the accused.

(v) Chain must be connected and different pieces of circumstantial evidence must have made one un-broken chain. One end must touch the crime and other neck of the accused.

See: "IMRAN alias DULLY and another vs. The STATE and others" (2015 SCMR 155), "AZEEM KHAN and another vs. MUJAHID KHAN and others" (2016 SCMR 274) and "Sharad Birdhichand Sarda vs. State of Maharashtra" (AIR 1984 SC 1622).

In "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986), while dealing with the yardstick to act upon circumstantial evidence, it was held at page-994 as follow:

> 9. "In cases of circumstantial evidence, there are chances of procuring and fabricating evidence, therefore, Courts are required to take extra care and caution to narrowly examine such evidence with pure judicial approach to satisfy itself, about its intrinsic worth and reliability, also ensuring that no dishonesty was committed during the course of collecting such evidence by the Investigators. If there are apparent indications of designs on part of the investigating agency in the preparation of a case resting on circumstantial evidence, the court must be on its guard against the trap of being deliberately misled into a false inference. If the court fails to observe such care and caution and hastily relies on such evidence, there would be a failure of justice. Reference may be made to the case of *Fazal Elahi v. Crown (PLD 1953 FC 214) and of Lejzor v. The Queen (PLD 1952 PC 109)*, it was held therein with considerable emphasis that circumstantial evidence may sometimes appears to be conclusive but must always be narrowly examined, if only because this count of evidence may be fabricated in order to cast suspicion on another, therefore, it is all the more necessary before drawing inference, if the accused's guilt from circumstantial evidence to be sure and that there are no other co-existing circumstances, which weaken or destroy the inference then, in that case alone it may be relied upon otherwise, not at all."

11. Evidence adduced by prosecution shall be discussed under different heads as argued by learned counsel for the appellants, complainant and learned law officer.

12. Motive suggested for the commission of occurrence is to rob the amount of compensation to the tune of Rs.3 lac and Rs.10,000/- (given

from Police Welfare Fund) collected by the deceased at the instance of his brother, Naseeb Ullah, Head Constable who sustained injuries in a police encounter and Inspector-General of Police, Baluchistan announced compensation.

13. At the very outset, it is desirable to add here that Naseeb Ullah (Injured) the beneficiary was not produced by the prosecution to prove that he authorized his deceased brother also serving in Police Department to receive and collect amount on his behalf. Reasons for non-production are not known, putting a dent in the case of prosecution on this aspect. The prosecution also failed to produce any authority letter in favour of deceased executed by Naseeb Ullah, injured.

Haq Nawaz, Cashier serving in the office of D.P.O. Uthal (P.W.2) who statedly reimbursed amount to the deceased admitted in cross-examination that the person entitled to receive amount is required to issue authority letter in favour of a person if he wants to collect amount through some other person. It is to be noted that according to this witness, he gave Rs.2½ lac to the deceased on the personal guarantee of Fazal Mohammad, Senior Clerk, Sadar Office, Uthal (P.W.3) and Azeem Ullah, Head Constable, (not produced). Though, Fazal Muhammad (P.W.3) supported the stance of Haq Nawaz, but it appears to be very unusual. Huge amount was handed over to deceased on the personal surety of officials though serving in same department and relatives of deceased and his injured brother though it could not have been done. Haq Nawaz (P.W.2) also admitted in cross-examination that he has not produced any guarantee in writing from the persons named above who stood surety. Though he stated in cross-examination that deceased signed "Acquaintance Roll" but he also frankly admitted non-production of said document. Mohammad

Sharif Khoso, Retired Inspector-I.O. (P.W.23) admitted in cross-examination that official amount cannot be handed over to any one without authority letter. Replying another question, the witness admitted that such type of amount can only be given through "crossed-cheque".

According to Haq Nawaz (P.W.2), he took deceased to P.S. Uthal, where he handed over him Rs.2½ lac but there is nothing on record to substantiate it in view of his frank admission that he did not get the same fact entered in the Roznamcha of Police Station. Though, he stated that key of safe was with him but if he was handing over huge amount to anyone, (may be brother of the nominee) having no authority in writing, why said transaction was not incorporated in Roznamcha. Delivery of amount in cash as stated is against the rules as admitted by I.O. (P.W.23).

14. Reliance of prosecution upon the evidence of Nasar Ullah, S.I. (P.W.5) as argued with vehemence to prove payment of compensation to deceased is mis-conceived and ill-founded.

The witness in his statement while disclosing the detail of articles-documents collected from the search of dead body maintained that "*Qabaz-ul-Wasool*" was also found which alongwith other articles was taken into custody vide memo (Ex.P.5-A), which part of deposition, if taken as gospel truth, shatters the case of prosecution, suggesting that the said document was issued in the month of March, 2011 and that too from Quetta. It is to be noted that according to Haq Nawaz (P.W.2) amount was given on 14th of April, 2011. It is also worth mentioning that though memo was produced in evidence but the document banked upon was not produced which even otherwise cannot support the plea taken keeping in view its date of issuance. Evidence adduced also failed to prove knowledge of

appellant No.2 that deceased had huge amount prompting him to associate appellant No.1 for committing occurrence.

15. Viewed from whichever angle, what to speak of proof of payment of compensation to deceased, evidence led even cannot suggest its payment. Adverse presumption in view of discussion has also to be drawn against the prosecution under Article 129 (g) of The Qanun-e-Shahadat Order, 1984 (President Order No.10 of 1984).

16. Disclosure of both the appellants during the course of investigation was also relied upon on behalf of prosecution to which un-due importance and sanctity was given by learned Trial Court as well.

17. Making reference to the evidence of Nasrullah, Sub-Inspector (P.W.5), Khair Muhammad, S.I. (P.W.6), Ghulam Rasool, ASI (P.W.7), Nasrullah, S.I. (P.W.8), Abdul Wahid, S.I. (P.W.15) and Muhammad Sharif Khosa, Inspector (Retd.)/I.O., it was contended that both the appellants made disclosure admitting their guilt repeatedly, sufficient to prove the case of prosecution.

Adversary not only questioned the evidentiary value adding that stated disclosures before police are inadmissible but also maintained that no disclosure was ever made by appellants.

Nasrullah, S.I. (P.W.5) in his statement deposed that on 9th of May, 2011, during the course of investigation, appellant No.1 disclosed the mode and manner of occurrence in detail, suggesting involvement of appellant No.2, also admitting his guilt. In cross-examination, he stated that disclosure was made in the investigation room.

Khair Muhammad, S.I. (P.W.6) made reference to the disclosure made by both the appellants on 8th of May, 2011. He also gave the detail of

stated disclosure. In cross-examination, he deposed that disclosure was made during the course of investigation in investigation room where both appellants were present. However, according to him, appellants were called turn by turn.

Ghulam Rasool, A.S.I. (P.W.7) made reference to the admission of guilt by the appellants on 7th of May, 2011 at about 4:00 a.m. (night) in main Bazar Uthal, where they were brought by I.O. Mohammad Sharif Khoso (P.W.23). The witness gave the detail of so-called disclosure.

He further made reference to the disclosure made by appellant No.1 on 8th of May, 2011.

In cross-examination, he stated that Dr. Abdul Hakim, Incharge Edhi Centre was also present at the time of disclosure made in Uthal Bazar who was called. He further deposed that at the time of making disclosure, he alone was present and rest of the police officials left the place.

Nasrullah, S.I. (P.W.8) in his statement made reference to the disclosure made by both the appellants on 7th of May, 2011, which according to him was made in the investigation room in the presence of police officers including D.S.P. Uthal (Gul Hassan), Mohammad Siddique, Inspector and others.

Abdul Wahid, S.I. (P.W.15) is another police officer before whom, both the appellants admitted their guilt during the course of investigation on 7th of May, 2011. He in cross-examination maintained that both the appellants were brought in investigation room simultaneously.

Mohammad Sharif Khoso, Inspector (Retd.) I.O.(P.W.23) made reference to the disclosure made by appellant No.2. He narrated the detail of disclosure as stated by said appellant.

18. In order to determine the question of admissibility and evidentiary value of the disclosures referred to, first question for consideration is whether the disclosures made by appellants are "admission" or "confession". Line of distinction and demarcation has to be made between two expressions. Every admission is not a confession. In order to determine the status, statement in its totality has to be examined in order to know whether same amounts to an admission of guilt or of substantially all the facts which constitutes the offence. If it does, it is a confession. An acknowledgment of ancillary facts not involving guilt is not a confession.

19. Keeping in view the above-yardstick, evidence of witnesses (P.W.5,6,7,8,15 and 23) referred to in brief has to be examined.

Evidence led refers to disclosure made by appellants on 7th, 8th and 9th of May, 2011. Perusal of the statements of the witnesses clearly suggests that both the appellants in clear terms gave the detail of whole occurrence commencing from the meeting of appellant No.2 with deceased, taking him to quarter for rest, having conscious knowledge of huge amount in the possession of deceased, association of appellant No.1 on the call of appellant No.2, mixing intoxicating material (ativon tablets) in tea, administering the same to the deceased, mode and manner of killing the deceased by both, disposal of dead body and distribution of amount in the possession of deceased.

All the facts clearly reveal that it is not admission of facts not essential to the crime-charge. The mode and manner of acknowledgment by the appellants as disclosed by the witnesses gives an irresistible conclusion that disclosures, if at all made, are confession for all intents and purposes.

20. Since the stated disclosures made by the appellants as deposed by the witnesses are "confession", therefore, their evidentiary value does not remain moot point keeping in view the status of place and persons before whom such confessions were made.

All the witnesses with one voice maintained that disclosures were made during the course of investigation in the investigation room, in Uthal Bazar and that too in their presence.

Since confessions were made by the appellants while in police custody and that too before the police officers, therefore, such statements cannot be proved against appellants being inadmissible as ordained by Articles 38 and 39 of The Qanun-e-Shahadat Order, 1984 (President Order No.10 of 1984).

Prosecution by producing the said witnesses on this aspect just burdened the record.

21. It is also not understandable, why the appellants made repeated confessions during the course of investigation. On each and every date, confessions are made before different police officers.

We are of the considered view that the I.O. (P.W.23) instead of focusing his intention to un-earth the truth and collect incriminating evidence dilated upon fabrication of evidence giving no benefit to the prosecution and legal heirs of the deceased. In fact by creating such type of evidence, he himself laid the foundation of acquittal of the appellants.

22. Another piece of evidence banked upon by the prosecution is judicial confession (Ex.P.93) made by appellant No.1 recorded by Dost Muhammad Mandokhel, learned Judicial Magistrate (P.W.21) with conscious attempt to persuade us to act upon it.

Perusal of the evidence of learned Judicial Magistrate (P.W.21) reveals that the said appellant was produced before him on 11th of May, 2011, who recorded his statement giving the details of pre and post occurrence facts, admitting his guilt, also highlighting the active participation of appellant No.2 who as per evidence appears to be mastermind to commit occurrence.

23. Binding force of judicial confession depends upon its voluntariness and truthfulness.

Proposition was examined by the Honourable Supreme Court in "SULEMAN vs. THE STATE" (2006 SCMR 366) and it was held at page-369 as under:

> "*It is well-settled principle of law that the judicial confession alone if it is found true, convincing and made voluntarily without any duress or coercion, the same can be basis for conviction……….*"

In the case of "MUHAMMAD PERVEZ and others vs. THE STATE" (2007 SCMR 670), the Apex Court (Honourable Shariat Appellate Bench) ruled out judicial confession from consideration due to five day's delay in its recording referring the settled proposition of law enunciated in the cases of "NAQEEB ULLAH" (PLD 1978 SC 21) and "KHAN MUHAMMAD" (1981 SCMR 597). It was also noted that prosecution failed to explain the reasons for delay.

We are not un-mindful that in the Report under reference "MUHAMMAD PERVEZ", other attending circumstances were also noted to brush aside the confessional statement.

We are also not un-mindful of proposition of law expounded in "GHULAM QADIR and others v. THE STATE" (2007 SCMR 782) in which

mere delay in recording confession was ruled out as the evidence led proved that confession was voluntarily.

We may also advantageously make reference to the dictum laid down in "HASHIM QASIM and another v. THE STATE" (2017 SCMR 986) in which while explaining the pre-requisite for acceptance of confession, it was concluded that confession must be voluntarily, based on true account of facts leading to the crime and then its proof during the course of trial. Precautionary measures which the Recording Magistrate have to be observed were also narrated.

24. Keeping in view the yardstick, evidence of learned Judicial Magistrate (P.W.21) and confessional statement (Ex.P.93) of appellant No.1 has to be scanned.

Maker of confession was arrested on 6th of May, 2011, while confession was recorded on 11th of May, 2011. There is a delay of five days in recording the confessional statement, effect of which has to be determined keeping in view the facts and circumstances of the case.

Evidence of Muhammad Sharif Khoso, Inspector-I.O. (P.W.23) clearly suggests the dates of disclosures and detail made by maker of confession before police. Evidence of Nasarullah, S.I. (P.W.5), Khair Muhammad, S.I. (P.W.6), Ghulam Rasool, A.S.I. (P.W.7), Nasarullah, S.I. (P.W.8) and Abdul Wahid, S.I. (P.W.15) highlights the detail of disclosures made on 7th, 8th and 9th of May, 2011 by both the appellants.

If the appellant named above was repeatedly confessing his guilt, why he was not produced before the learned Judicial Magistrate for recording judicial confession? When the appellant admitted his guilt by making disclosure during the course of investigation for the first time, the Investigating Officer was duty bound to arrange his appearance before the

competent authority for recording confession. Omission is fatal particularly when no attempt was made to justify the delay.

25. However, we are not brushing aside the confession on this score alone. There are other important attending circumstances which cannot be ignored. Perusal of the confessional statement (Ex.P.93) reveals that its maker while replying question No.6 stated that on the first day after his arrest, he was given beating and was subject to torture. However, in the next breath, he admitted that thereafter no such attempt was made.

Torture by the police even on the first day casts serious doubt about the voluntariness of the confession. We are conscious of the reply given by said appellant to question No.7 denying any compulsion or inducement on the part of police to make confession and reply put by appellant No.2 in cross-examination in this regard but said replies by itself are not sufficient to persuade us to treat the confession voluntarily in the absence of any evidence to refute the allegation of torture.

The argument that appellant as per his own saying was not subject to torture except first day and as such confession was without duress has least impressed us. Re-action of all persons in such eventualities will not be same all the times. Some persons having strong nerves can re-act by not submitting to the will of dominating authority if later on there is no ill-treatment. However, others having in mind the oppressive treatment may be for one day submit to the desire and dictate of person in authority.

Perusal of the statement (Ex.P.93), questions put to the maker and certificate (Ex.P.94) is no whether suggestive that handcuffs of the confessor were removed prior to making confession. The Judicial Magistrate (P.W.21) admitted in cross-examination that he did not mention factum of removal of handcuffs in his statement. Though, he in the next

breath, voluntarily maintained that he recorded statement according to the rules but this volunteer portion by itself is not sufficient to fill in the gap which appears to be conscious attempt to rectify the omission amounting to illegality as it will be presumed that handcuffs were not removed.

Replying another question, the learned Judicial Magistrate (P.W.21) admitted that he did not make reference in his report regarding the provision of time granted to the appellant No.1 to ponder though it was legal compulsion for the learned Magistrate to provide time to think over the consequences and said fact should have been incorporated in the Report.

It is also worth-mentioning that as per note given by the witness (P.W.21), the appellant was produced by Muhammad Sharif Khoso, Retired Inspector-I.O. (P.W.23) at 12:30 p.m. and his statement was recorded there and then which clearly demonstrates non-provision of time to the appellant to re-compose.

Un-explained delay in recording confession, torture upon the maker during the course of investigation (even on the first day as stated by appellant and not disputed), omission to mention factum of removal of handcuffs, failure of the learned Judicial Magistrate to mention grant of time prior to making confessional statement, note recorded by learned Judicial Magistrate regarding production of appellant at a particular time and recording statement at the same time cast serious doubt about the voluntariness of confession.

26. Pursuant to above, we are constrained to hold that confession which even otherwise was re-tracted by disputing its genuineness made by appellant No.1 got no voluntarily character and as such cannot be

believed, relied and acted upon not only against its maker but also cannot be used as "circumstantial evidence" against appellant No.2.

27. Pointation of places of murder and throwing dead body is another piece of evidence led by prosecution to prove the culpability of both the appellants. Pointation memo is Ex.P.11-C. To prove this fact, reference was made to the evidence of Abdul Wahid, Sub-Inspector (P.W.15) and Muhammad Sharif Khoso, Inspector-I.O. (P.W.23).

Pointation of both places referred to without any recovery is of little help to the prosecution to prove guilt of the appellants being inadmissible evidence. Reliance is placed upon the dictum laid down in "MUHAMMAD RAMZAN vs. THE STATE" (PLD 1957 (W.P.) Lahore 956), "NAEEM AKHTAR & others vs. THE STATE" (1993 Pakistan Supreme Court Cases (Crl.) 845) and "ZIAUL REHMAN vs. THE STATE" (2000 SCMR 528).

28. Factum of recovery of different articles including cash was also heavily relied upon by prosecution to prove the charge.

29. Recovery of plastic paper, pieces of rope and electric wire taken into custody through memo (Ex.P.5-B) from the place of dead body as deposed by Nasarullah, S.I. (P.W.5) cannot connect both the appellants in the commission of crime as nothing was secured on the pointation of any of the appellant.

Production of Rs.83,000/- by both the appellants on their pointation through recovery memo (Ex.P.6-A) as deposed by Ghulam Rasool, A.S.I. (P.W.7) deposing that said amount is part of the looted cash cannot advance plea of prosecution even as a corroborative evidence for mani-fold reasons. It is a joint recovery, effected from a stationary shop opened

by one Muhammad Hussain having the keys of said shop. It is further to be noted that nothing is available on record even to suggest that amount recovered is part of cash which was in the custody of deceased.

Recovery of different keys including those of motorcycle owned by deceased taken into custody through memo (Ex.P.6-C) witnessed by Ghulam Rasool, A.S.I. (P.W.7) on the pointation of appellant No.1 from gutter searched by Chaman Dass (P.W.16), disclosure by same appellant ultimately resulting in recovery of Nokia Cell, wrist watch from gutter statedly owned by deceased through memo (Ex.P.8-A) and recovery of SIM of mobile telephone of deceased taken into custody vide memo (Ex.P.9-A) though on the pointation of same appellant would not prove the case of prosecution in the absence of any other convincing evidence, particularly, when there is nothing on record even to suggest any attempt to get the same identified being property of the deceased.

Similarly, reliance upon the evidence of Iqbal Ahmed Siddiqui (P.W.11), Javed Iqbal (P.W.13), Naeem Qadir (P.W.14) and Abdul Majeed Jamoot (P.W.17) disclosing payment to them by appellant No.1 and production of said amount to I.O. (P.W.23) by the said persons through memo (Ex.P.6-B) with the stance of police that the said appellant liquidated his liabilities from the looted amount cannot substantiate the case of prosecution in view of replies given in cross-examination by the said witnesses stating that amount produced before police is not the same which was given to them by the said appellant. It is further to be noted that Javed Iqbal (P.W.13) admitted that amount was paid by said appellant to his son who was not produced. There is nothing on record to suggest that amount given to said witnesses was part of the amount statedly looted.

Similarly, recovery of purchase of different stationary items from the looted amount as per prosecution version recovered through recovery memo (Ex.P.5-E) on the pointation of appellant No.1 is an exercise in futility to substantiate the accusation.

30. Reliance upon medical evidence by learned law officer as well as learned counsel for the complainant is of little help to the prosecution keeping in view the facts and circumstances of the case.

It is the case of prosecution that the appellants administered the deceased with tea mixing ativon tablets and then committed his murder by strangulation using rope and electric wire.

Dr. Azim Nawaz (P.W.10) was produced to prove this aspect. It is an admitted fact that postmortem was not conducted. The reason advanced was lack of facility. The witness just produced the death certificate (Ex.P.10-A). Probable cause of death as suggested is "hanging (strangulation)". The witness admitted that dead body was de-composed. He also admitted the difference between "hanging" and "strangulation". It was also not disputed that he did not take the contents of stomach for examination. However, he noted rope scars on neck.

Probable cause of death in the circumstances cannot be identified with certainty.

31. According to the evidence led by prosecution regarding disclosure before police and judicial confession, it appears to be a case of "strangulation".

In the circumstances, no implicit reliance can be placed upon this type of evidence.

Even otherwise, medical evidence which is a corroborative piece of evidence cannot disclose and prove the identity of culprits. See: "HASHIM QASIM and another vs. The STATE" (2017 SCMR 986).

32. Viewed from whichever angle, we are of the considered view that evidence led by prosecution and scanned indicates conscious attempt on the part of I.O. (P.W.23) to manufacture and fabricate evidence which does not fulfill the settled yardstick to act upon circumstantial evidence. Attempt made by police though appears to be conscious but un-successful to make a single and un-broken chain, failing to establish one end of same going to the dead body connecting the other end to the neck of the appellants.

Pursuant to above, we feel no hesitation to conclude that prosecution failed to prove its case against the appellants beyond shadow of doubt.

Both the appellants in their respective statements recorded under Sections 342 and 340 (2) of The Act controverted the evidence produced. Appellant No.1 also produced Zahid Hussain (D.W.1) in defence.

33. We are not un-mindful of the arguments advanced on behalf of complainant that appellant No.1 has taken plea of "alibi" which is not only afterthought as nothing was suggested to the prosecution witnesses in this regard in cross-examination but also could not be established.

There is no need to deal with the argument in depth while examining statements and evidence for the simple reason that failure of the appellant to prove any plea in defence, if taken, by itself would not be sufficient to prove the case of prosecution as the prosecution was under compulsion to prove its case against the appellants beyond shadow of

doubt. We are fortified in our view by law laid down in "WAJAHAT AHMED and other v. THE STATE and others" (2016 SCMR 2073) and "MUKHTAR AHMED v. THE STATE" (PLD 2002 SC 792).

34. Epitome of above discussion is that benefit of doubt has to be extended in favour of appellants as a matter of right which is accordingly extended resulting in acceptance of both the appeals, setting aside the judgment of conviction and awarding sentences.

35. Consequent upon acceptance of both the appeals (Appeal No.1-Q of 2015 and Jail Criminal Appeal No.4-Q of 2015), Criminal Revision filed by complainant titled "IMAM BAKHSH VS. ABDUL SAMAD, ETC." (No.1-Q of 2015) seeking enhancement of sentence awarded to the appellants is hereby dismissed being infructuous.

36. Before parting with the judgment, we may observe that learned Trial Court in default of payment of compensation under Section 544-A of The Act awarded sentence of one year S.I., though under the provision of law, sentence in default of payment of compensation shall not exceed six months. Let the copy of judgment be sent to the learned Trial Court for information and future guidance.

MR. JUSTICE MEHMOOD MAQBOOL BAJWA

MR. JUSTICE DR. FIDA MUHAMMAD KHAN

Dated, Islamabad the
16th January, 2018
*Mubashir/**

Approved for Reporting

JUDGE