

IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO. 08-I OF 2018

1. Tariq Hussain son of Jalil ur Rahman,
Resident of Shahzadi Payeen Balambat.
2. Shakir son of Muhammad Shafiq, resident of Hawa Derai
Timergara, District Dir Lower.

.....
Appellants

Versus

1. The State.
2. Roshan Zada SHO PS Timergara, District Dir Lower.
3. Rahim Gul father of deceased.
4. Khurshid Jehan mother of deceased.
5. Mst.Afsana Bibi widow of deceased Rahmani Gul,
All resident of Opal, Tehsil Alpuri, District Shangla.

...
Respondents

For the appellants

...
Syed Abdul Haq,
Advocate.

For the respondent No.1

...
Mr.Wilayat Khan, Assistant
Advocate General KPK

For the respondent No.3

...
In person

No.& date of FIR & PS

...
No.154/2016,
dt. 01.03.2016, Police
Station Timergara,
District Dir Lower.

Date of order
of trial court

...
23.02.2018

Date of Institution
in this Court

...
22.03.2018

Date of hearing

...
30.5.2018

Date of decision

...
30.5.2018

JUDGMENT:

SHAUKAT ALI RAKHSHANI, J:- The appellants Tariq Hussain and Shakir seeks annulment of the judgment dated 23.2.2018 rendered by learned Additional Sessions Judge/IZQ, Dir Lower Timergara, (hereinafter referred as "Trial Court"), whereby, the appellants were held guilty of the charge, in case FIR No.154/2016, (Ex.PW.7/1) registered with Police Station Timergara, District Dir Lower under sections 17(4) of the Offences Against Property(Enforcement of Hudood) Ordinance, 1979 and 302 of the Pakistan Penal Code, and consequent thereupon, convicted and sentenced the appellants in the following terms:

- i) Under section 302 (C) of the PPC, to suffer fourteen years simple imprisonment with a fine of Rs.200,000/- and in default thereof to further undergo S.I for six months. It was also ordered that the amount of fine, if realized, shall be paid to the legal heirs of deceased as provided under section 544-A of the Cr.P.C, and
- ii) Under section 392 of the PPC, to suffer simple imprisonment for four years.

The benefit of section 382-B of the Cr.P.C was extended and the sentences of imprisonment were ordered to run concurrently.

2. The resume of the facts are that on 01.03.2016 at about 12.40 p.m, P.W.1 complainant Inspector Roshan Zada, S.H.O of Police Station Timergara lodged an FIR bearing crime No.154/2016(Ex.P.W.7/1) on the basis of *murasila* (Ex.PA/1) with the averments that he received information about an unknown dead body lying in Shawara Derai,

Mian Banda opposite to Refugee Camp No.1 Timergara, reached the crime scene and found a dead body of a young man being murdered with strangulation with the help of a white cloth, tied around the neck and on personal search of the dead body a CNIC No.15503-8921036-1 (Ex.P-1) and one LTV driving license (Ex.P.2) were found, which were taken into possession vide recovery memo (Ex.P.W.1/1).

He prepared Inquest Report (Ex.PW.1/2), memo of injury (Ex.PW.1/3) and sent the dead body to the DHQ Hospital Timergara for postmortem. P.W.10 Dr.Inam Ullah conducted the postmortem of the dead body and issued medical certificate (Ex.PW.10/2) and injury sheet (Ex.PW.10/3) respectively and observed the following injuries:-

"Received dead body of Rahman Gul son of Raheem R/O Upal Shangla, Male 24/25 years has colth wrapped over his neck (Throat) Strangulated. Cloth opened and handed over to police. Time since Death: upto 14 hours (dead body has putrefaction) Cause of Death: Suffocation, strangulation. Tongue Protruded out, (cyanosis) tight closth against neck. No. BP, No Pulse."

P.W.8 Fazal Ghafoor, S.I was entrusted with the investigation of the case, who rushed to the hospital, secured white cloth (chadar) through recovery memo (Ex.P.W.8/1), duly handed over by P.W.10 Dr.Inam Ullah, whereafter he went to the crime scene and prepared site plan(Ex.P.W.8/2). On 1.3.2016, he issued a letter with regard to issuance of CDR of mobile of deceased Rehmani Gul. On 16.3.2016 the owner of the vehicle Naveed Ahmad (P.W.3) produced the documents of the Suzuki Model 1990 (NCP) Non Customs duty Paid, which was

taken into possession through recovery memo (Ex.P.W.8/8). According to P.W.8 S.I Fazal Ghafoor, he got recorded statement of the owner of the vehicle P.W.3, Naveed Ahmad and Rahim Gul (P.W.2) under section 164 Cr.P.C and on the strength of their statements; section 17(4) of the Harrahah was added. The said I.O stated that because of the connections transpired from the Call Data Record(hereinafter referred to CDR) of IMEI, of appellant Tariq Hussain and deceased, appellant Tariq Hussain was nominated through memo (Ex.PW.8/13) and CDR was taken into possession through recovery memo (Ex.PW.4/2) in the presence of constable P.W.4 constable Asif Khan.

Moving ahead with the investigation, P.W.9 Saeed ur Rehman, S.I got the investigation of the case on 16.3.2016 and on the same day appellant Tariq Hussain was arrested at 4.40 p.m at Khod and got recovered the stolen mobile phone (Samsung white colour), from his personal search, who involved the co-appellant Shakir with him as culprit, as such consequent thereupon, appellant Shakir was arrested on the same day, on whose personal search a mobile phone Nokia colour black/red, Model 110(P-1) containing SIM Nos.0347-1958804 and 0348-5434412, was recovered which was taken into possession through recovery memo (Ex.P.W.9/2).

Both the appellants jointly allegedly led the police Contingent and statedly got recovered initially from the engine-room near the

battery, key of the alleged Suzuki vehicle through recovery memo (Ex.P.W.9/5), prepared site plan (Ex.PW.9/6), made pointation of the place of occurrence, whereof by making amended in the site plan (Ex.PW.8/2), and produced the amended site plan as (Ex.P.W.9/8). Further on 17.3.2016, the identification of the Suzuki vehicle was carried out whereof memo (Ex.PW.9/9) was prepared.

P.W.9 further stated that appellants were produced before the Judicial Magistrate, through application (Ex.PW.9/12) requesting therein for recording judicial confession of the appellants but they subsequently resiled to confess. The I.O produced the CDR containing three pages through memo (Ex.PW.9/13) as well as containing two pages(Ex.P.W.9/15) of CDR of Cell number of the deceased and appellant Tariq Hussain, secured through memo (Ex.PW.9/17).

3. On finalization of the investigation, the appellants were challaned and sent to face trial of their deeds of culpability before the trial court.

4. Commencing with the trial, the learned trial court after observing codal formalities as provided under section 265-C of the Cr.P.C, framed the charge under sections 302 of the PPC and 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, which was denied by both of the appellants and claimed innocence.

5. In order to establish the accusation, the prosecution produced as many as 12 witnesses. At the end of the prosecution evidence, the

appellants were examined under section 342 Cr.P.C, who categorically denied the allegations put- forth against them and professed their false involvement in the crime, however, none of the appellants opted to record their statement on oath and also did not desire to produce any defence evidence.

6. While wrapping up the case, on 23.2.2018, the appellants were found guilty of the charges, thus were convicted and sentenced for the terms mentioned in the para (1), which judgment has been assailed through the instant appeal before this Court with the prayer, seeking acquittal.

7. We have thoroughly heard Syed Abdul Haq, Advocate, learned counsel for the appellants and Mr.Wilayat Khan, Assistant Advocate General KPK for the State in the presence of the complainant and have perused the entire record wall to wall.

8. Learned counsel for the appellant Syed Abdul Haq, inter alia contended that there is no eye witness of the occurrence and the entire case is based merely upon the recovery of alleged stolen mobile, CDR and recovery of stolen Suzuki vehicle, which in no way is worthy of credence to connect the appellants with the commission of the crime, particularly, when the admissibility of such pieces of evidence are questionable; having no sanctity in the eyes of law. He pleaded the innocence of the appellants and urged that they have falsely been

implicated in the instant case on ulterior motive, who have nothing to do with the alleged crime. To support his arguments he has referred the judgments reported as (i) 2008 SCMR 1064, (ii) 2011 SCMR 1142, (iii) 2012 YLR 2026, (iv) 2016 MLD 1363, (v) 2016 P.Cr.L.J 250, (vi) 2015 P.Cr.L.J 1171, (vii) 2016 P.Cr.L.J 380, (viii) 2002 SCMR 1885, (ix) 2009 YLR 1526, (x) PLD 2016 Peshawar 26, (xi) 2016 P.Cr.L.J 257, (xii) 2016 MLD1, and (xiii) 2008 SCMR 1221.

On the contrary Mr. Wilayat Khan, Assistant Advocate General, KPK, learned State counsel vigorously and strenuously refuted the arguments advanced by the learned counsel for the appellants and with vehemence argued that although there is no eye witness of the occurrence but the circumstantial evidence in the form of CDR, recovery of stolen mobile and vehicle by all means connect the appellants with the commission of the crime. He added that prosecution has successfully proved the guilt of the appellants henceforth, requested for dismissal of the appeal.

It is suffice to add here that during the trial, complainant P.W.2 (Rahim Gul) father of the deceased during cross-examination, deposed that he has locally inquired and is now fully satisfied that the appellants are innocent.

9. After turning page to page and examining the entire record, undeniably there is no ocular evidence and the case, mainly rests upon

the circumstantial evidence, which includes CDR, whereby the appellants were stated to have been traced, leading the I.O to the arrest of the appellants and recovery of the alleged stolen mobile set of the deceased from appellant Tariq Hussain and then were jointly led by them to the recovery of alleged snatched Suzuki vehicle, driven by the deceased Rehmani Gul as taxi as well as medical evidence and pointation of place of occurrence by the appellants.

10. We are conscious of the legal proposition that the chain of the circumstantial evidence must be complete in all terms, leaving no reasonable ground to conclude innocence of an accused. It must be natural, conclusive and consistent not only in respect of the hypothesis of the guilt of the accused but the cumulative effect of such circumstantial evidence must lead to a conclusion that the accused is definitely the perpetrator and murderer of the deceased. The chain of the circumstances must not be short of any fault, which can lead to believe that the link between the deceased and murderer is missing in any manner. In a case based upon circumstantial evidence, if a link is missing, connecting the occurrence of murder with the accused, then entire paramid of such evidence shall fall on ground, which entitles the suspect of the acquittal. In this regard, we are guided with the dictum expounded in case of **Hashim Qasim and another Vs. The State (2017 SCMR 986)**, **Kabir Shah Vs. The State through Advocate**

General, Khyber Pakhtunkhwa and another (2016 YLR 1291) and Imran alias Dully and another Vs The State and others (2015 SCMR 155).

11. Undoubtfully, the occurrence has not been witnessed by any one, either committing murder of the deceased or lastly seen the deceased going with either of the appellants. The appellants came on surface initially, when allegedly through CDR of the mobile SIM Nos: 03428097698 and 03479463860 used in the alleged stolen mobile (Samsung) having IMEI Nos.35432607925791 and 35432707925791 were obtained.

The police was also confused as to whether a mobile set can have two IMEI numbers. The answer is in affirmative as dual mobile set can have two IMEI numbers, as it has two slots and each slot can have different numbers.

Adverting to the admissibility and veracity of the documents of C.D.Rs (Ex.P.W.9/13, Ex.P.W.9/15, Ex.P.W.9/17), we have examined the pros and cons of such piece of evidence relied upon by the prosecution with due care and caution and found the same to be inadmissible and unworthy of credence on various counts.

Admittedly, the C.D.Rs (Ex.P.W.9/13, Ex.P.W.9/15, Ex.P.W.9/17) are computer generated documents, which has neither been endorsed nor issued by mobile(cellular) Company, wherefrom such document has been procured by P.W.8 S.I Fazal Ghafoor, (I.O) in the presence of marginal

the presence of marginal witnesses. It does not contain the signature or even the stamp or seal of the mobile (cellular) Company, whereby it can be believed with certainty that such documents have been issued by the said Company. Moreover, there was another option for the prosecution to prove such documents in a way that they could examine the official or any representative of the said mobile (cellular) Company, but unfortunately they have even not done so. It is also surprising to observe that the C.D.Rs (Ex.P.W.9/13, Ex.P.W.9/15, Ex.PW.9/17), even did not disclose that as to which Company has issued such record.

12. Above all, the prosecution has also failed to place any evidence on record, demonstrating the conversion taken place in between either of the appellants and the deceased as such in absence of any transcript of the conversion, such piece of evidence would be nothing but a futile exercise. We have also given due consideration and examined the C.D.R from various angles to find any relevance but we did not find any evidence, which can persuade us to believe any connection of the appellants with the crime. If the criteria is, that appellant Tariq Hussain have been in contact with the deceased as per C.D.R(Ex.PW.8/13), then there are so many other persons like Abid, Falak Naz, Naveed, Ikhtiar Alim, Asad Iqbal, Zeeshan and Sohrab, who had been in one way or the other in contact with the deceased through mobile (cellular) found, who were interrogated too during the course of investigation. The

prosecution has also failed to bring on record the documentary evidence of ownership of the SIMs in the name of deceased as well as appellants which also cannot be ignored.

In this regard, we are clear in mind that the such CDR cannot be considered either substantive or corroborative pieces of evidence, connecting the appellants with the crime. Here, we are fortified with the principle enunciated in the case of **Azeem Khan and another Vs. Mujahid Khan and others (2016 SCMR 274)** and **The State Vs. Behram Khan (2016 MLD-63)**.

13. The paramount reliance of the prosecution case is upon the recovery of allegedly stolen mobile set (Samsung) recovered from the possession of appellant Tariq Husain at the time of his arrest as well upon the recovery of stolen Suzuki vehicle at the joint pointation of both the appellants.

Recovery of Samsung mobile can be taken into account as a relevant incriminating piece of evidence on two counts; firstly, when the make, model and other details of the mobile set are furnished earlier to the recovery of such stolen articles, subject to identification of articles, proceedings, where the same is mixed amongst similar mobile sets and the persons concerned, identifies it as the plundered property.

In this case, neither the mobile number, type and any other mark of identification were furnished, either by the father or by the other

prosecution witnesses before the recovery of the property, as such it would be hard and unsafe to believe that the recovered article is the same, which was stolen from the deceased. The next way to make the recovery of mobile relevant can be that if the IMEI No is earlier given by the victim of the theft and subject to standard of proof as provided under the provision of Qanun-e-Shahadat Order, 1984, for proving a document of C.D.R. The prosecution has collected the C.D.R, but as discussed has no evidentiary value and significance, as discussed earlier.

The recovery of mobile phone becomes highly doubtful, when the testimony of P.W.2 Rahim Gul, (father of the deceased) is examined, who stated in his cross-examination that the mobile set of his deceased son was black in colour. This statement makes the entire story of recovery of mobile set and C.D.R (Ex.PW.9/17) false and unworthy of credence because the recovered mobile set (P-3) is white in colour, secured through recovery memo (Ex.PW.1/4).

As discussed herein before, the details of the alleged stolen mobile was not furnished earlier, therefore, the recovery of mobile, itself would not be considered an incriminating piece of evidence sufficient for holding the accused guilty of the charge.

14. Next, coming to the recovery of alleged stolen Suzuki vehicle on the pointatin of the appellants jointly made from an abundant place

called as Daga near the house of appellant Shakir, it would be considerable to see as to whether joint recovery is legally approved and permissible under the law or otherwise. In this regard we are persuaded with the dictum laid down in the case of **Shabbir Ahmed Vs. The State (2011 SCMR 1142)**, **Ghulam Akbar and another Vs. The State (2008 SCMR 1064)** and **Tanveer alias Rabail and another Vs. The State (2012 YLR 2026)** wherein the joint recoveries have not been approved and it has been held that joint pointation of two accused would have no evidentiary value for the same being inadmissible.

Apart from that, the prosecution has failed to prove the ownership or possession and control of the appellants in respect of the abandoned place, where from the recovery of vehicle has been effected, as it was in an open place and accessible to several persons as admitted by the prosecution witnesses. Admittedly, the Suzuki vehicle was a Non Custom Paid (NCP) vehicle having no registration documents. The engine or chasis number were not furnished, soon after the occurrence to the Investigating Officer, which has further made the recovery highly doubtful and of no significance at all.

15. As far as the medical evidence is concerned, the postmortem report(Ex.PW.10/2) only furnishes opinion with regard to the death of the deceased caused by strangulation and suffocation but it does not identify the culprits in any manner. The postmortem report

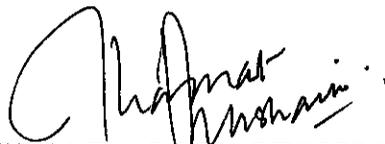
(Ex.PW.10/2) is inconclusive as the autopsy of the dead body has not been conducted, which was necessary in such like blind murder cases. Thus, we feel that by not doing so, the medical evidence has added nothing in the prosecution version rather has diminished the prospect of collecting evidence in line to dig out the real culprits of the occurrence, as there could be another aspect of the crime as well. It would not be irrelevant to add here that though FSL report regarding blood stained clothes(chadar) was sought but has not been obtained and placed on record which is another infirmity on the part of the prosecution. Pointation of place of occurrence being presented by the prosecution an important piece of evidence has been looked into but the same too has no evidentiary value as it has added nothing of the prosecution version the place of occurrence was visited and the site plan was already prepared by the prosecution witness P.W.9, thus, subsequently making pointation of place of occurrence allegedly by the appellants is hit under Article 40 of the Qanun-e-Shahdat Order, 1984 as by no means, it was within the ambit of discovery of facts, therefore, no reliance can be placed against the sufficient evidence.

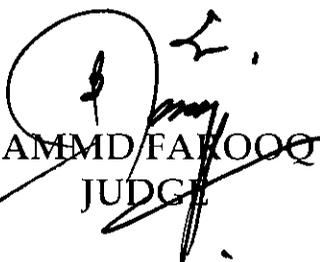
In wake of the above discussion, we have arrived at the conclusion that the prosecution has miserably failed to prove the charge beyond any reasonable doubt and the findings of the learned trial court

suffers from misreading and mis-appreciation of evidence, not sustainable in the law.

These are the reasons of our following short order dated 30.5.2018, reproduced herein below;

"Heard arguments. For reasons to be recorded later in the detailed judgment, the appeal is allowed. Consequently, the appellants namely Tariq Hussain son of Jalil-ur-Rehman and Shakir son of Muhammad Shafique are acquitted of the charge of this case. They are in jail. The concerned Superintendent Jail is directed to release them forthwith from jail, if they are not required in any other case."


SHAUKAT ALI RAKHSHANI
JUDGE


SYED MUHAMMAD FAROOQ SHAH
JUDGE

Islamabad, 30.5.2018

M.Akram/

Approved for reporting

