IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT:

MR.JUSTICE SH.NAJAM UL HASAN, CHIEF JUSTICE
MR. JUSTICE SHAUKAT ALI RAKHSHANI

CRIMINAL APPEAL NO.17/I OF 2018.

GOHAR KHAN SON OF SHAHJEHAN,
RESIDENT OF TARU JABBA ,
TEHSIL PABBI, DISTRICT NOWSHERA.
(NOW CONFINED IN CENTRAL PRISON MARDAN)

APPELLANT

VERSUS

1) THE STATE.
2) AJMAL KHAN SON OF NAQEEB KHAN,RESIDENT OF MOHALLAH TAPU KURVAI DISTRICT NOWSHERA

RESPONDENT S

COUNSEL FOR THE APPELLANT	MR.SHAIBER KHAN, ADVOCATE
COUNSEL FOR THE STATE	ABIDA SAFDAR, ASSISTANT ADVOCATE GENERAL KPK.
COMPLAINANT IN PERSON	AJMAL KHAN
FIR NO. AND DATE & POLICE STATION	NO.113/2015 , DATED 31.8.2015, P.S. AKBARPURA, DISTRICT NOWSHERA
DATE OF IMPUGNED JUDGMENT OF TRIAL COURT	27.4.2018
DATE OF PREFERENCE OF APPEAL	01.11.2018
DATE OF HEARING	21.02.2019
DATE OF DECISION	21.02.2019
DATE OF JUDGMENT	22.02.2019

JAIL CRIMINAL APPEAL NO. 01/I OF 2019

ZEESHAN SON OF MIRAJ ALI KHAN,
RESIDENT OF TARU JABBA, TEHSIL PABBI,DISTRICT NOWSHERA.
(NOW CONFINED IN CENTRAL PRISON MARDAN)

APPELLANT

VERSUS

1. THE STATE
2. AJMAL KHAN SON OF NAQEEB KHAN,RESIDENT OF MOHALLAH TAPU KURVAI DISTRICT NOWSHERA

RESPONDENTS

COUNSEL FOR THE APPELLANT.	MR. ANEES MUHAMMAD SHAHZAD, ADVOCATE
COUNSEL FOR THE STATE	ABIDA SAFDAR, ASSISTANT ADVOCATE GENERAL KPK.
COMPLAINANT IN PERSON	AJMAL KHAN
FIR NO. AND DATE & POLICE STATION	NO.113/2015 , DATED 31.8.2015, P.S. AKBARPURA, DISTRICT NOWSHERA
DATE OF IMPUGNED JUDGMENT OF TRIAL COURT	27.4.2018
DATE OF PREFERENCE OF APPEAL	15.01.2019
DATE OF HEARING	21.02.2019
DATE OF DECISION	21.02.2019
DATE OF JUDGMENT	22.02.2019

JUDGMENT

SHAUKAT ALI RAKHSHANI, J: Through this consolidated judgment, we intend to decide the Criminal Appeal bearing No.17/I of 2018 filed by appellant Gohar Khan and Jail Criminal Appeal No.1/I of 2019 filed by Zeeshan, assailing the validity and legality of the judgment rendered on 27th of April, 2018 ("impugned judgment")by learned Sessions Judge/JST/ASJ at Nowshera ("Trial Court") in case bearing FIR No.113 of 2015, dated 31st of August, 2015 registered with Police Station Akbarpura under sections 302 and

411 of Pakistan Penal Code (Act XLV of 1860) ("The Penal Code"), under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979 (Act-VI of 1979) ("Hudood Ordinance") and section 15 of the Arms Act, 2013, whereby the appellants have been convicted and sentenced in the following terms:-

i) Under section 302(b)/34 of The Penal Code, to suffer imprisonment for life, with payment of Rs.200,000/-(Rupees two lacs) to the legal heirs of the deceased as compensation under section 544-A of The Code of Criminal Procedure [Act V] of 1898 ("The Code") each. In default of payment of compensation amount, to further undergo S.I for six months each, recoverable as an arrear of land revenue.

ii) Under section 392/34 of The Penal Code, to suffer imprisonment for seven years R.I, with payment of fine of Rs.20,000/- (Rupees twenty thousand) each. In default of payment of fine to further undergo for two months S.I each.

Benefit of section 382-B of The Code was extended to the appellants. Both the sentences of imprisonment were ordered to run concurrently.

Appellant Zeeshan was also convicted and sentenced to imprisonment for three months R.I vide judgment of even date for an offence under section 15 of Arms Act, 2013, in a separate trial, which was also directed to run concurrently..

Initially appellant Gohar Khan preferred appeal in the Hon'ble Peshawar High Court Peshawar, which was transferred on 22nd of October, 2018 for want of jurisdiction to this Court, whereas appellant Gohar Khan filed appeal in this Court on 1st of November, 2018 and appellant Zeeshan filed Jail Appeal in this Court on 15th of January, 2019, through Superintendent Central

Prison, Mardan. Both the appeals were barred by time before this Court, however, the delay in filing the appeals was condoned in the larger interest of justice.

2. Precisely stated, the facts gleaned from the record are that on the report (Ex.PA/1) recorded by ASI Awal Khan (P.W.4), the instant FIR No.113 of 2015 (Ex.PA) was registered with Police Station Akbarpura, contending therein that complainant Ajmal Khan (P.W.10) had brought his deceased son namely Jami Ullah aged about 21/22 years in the Mian Rashid Hussain Memorial Hospital Pabbi, District Nowshera, with the help of his relatives, disclosing that through telephonic call complainant(P.W.10) was informed that some un-known culprits have committed murder of his son, at Aman Kot Nehir Poultry Farm, while his son was taking meal for his cousin, whereupon, complainant (P.W.10) rushed to the crime scene and found the dead body of his son lying in the pool of blood.

Complainant (P.W.10) neither named anybody nor did show suspicion upon any person, having any role in the murder of his son.

3. Investigation of the case was entrusted to S.I Abdul Wali Khan (P.W.9), who went to the crime scene, prepared site plan (Ex.PB), secured blood stained earth through recovery memo (Ex.PW.9/1) as well as took into possession two empties (Ex.P1) of .30 MM bore freshly discharged lying in scattered condition, by means of recovery memo (Ex.PW.9/2). He also took into possession blood stained garments of the deceased consisting of "Qamees" (Ex.P2), "shalwar" (Ex.P3) and white vest (Ex.P4) through recovery memo (Ex.PW.9/3), which were sent to Forensic Science Laboratory ("F.S.L.") through application (Ex.PW.9/4).

4. In the meanwhile, Causality Medical Officer (CMO), Dr.Muhammad Shafique, (P.W.8) of Mian Rashid Hussain Shaheed Memorial Hospital Pabbi, District Nowshera examined the deceased on 31st of August, 2015 at 4.00 p.m and issued postmortem report (Ex.PM), endorsing the inquest report (Ex.PW.4/2) and injury sheet (Ex.P.W.4/1) of the deceased. He observed the following injuries:

INJURIES:

1) A firearm entry wound of ½ x ½ CM on left parietal region (posteriorly) with exit wound of 1 x 1 CM on right side of occipital region.

2) A firearm entry wound of ½ x ½ CM on front right side of chest with exit wound on back of 1 x 1 cm in size on right side of chest.

3) A firearm entry wound of ½ x ½ CM on front right side of chest with exit of 1 x 1 CM on back right side of chest.

GRANIUM AND SPINAL CORD:

Scalp, skull, membrane and brain injured

THORAX:

Wall, ribs and cartilages, right lung and pleurae injured.

ABDOMEN:

Intact, Stomach contains semi solid food particles

MUSCLES,BONES AND JOINTS:

Skull and right scapula fractured.

He opined that the cause of death was due to brain and lung injuries.

5. Going ahead with the investigation, the Investigating Officer (P.W.9) through application (Ex.PW.9/6) made a request to the Incharge Computer Lab. (S.P Investigation) of District Nowshera to detect the Call Data Record ("CDR") of mobile Phone No. 03119865946, being in use of the deceased, bearing IMEI No.35603006018022 and IMEI No.352868042078902 with suspected mobile numbers 03005374706 and 03159386658.

While tracking the CDR, one Zia-ur-Rehman (P.W.12) came surface on 8th of September, 2015, who produced Q Mobile, M-90 (Ex.P5), black in colour belonging to the deceased and receipt No.1883 (Ex.P8) dated 03.09.2015, whereby he had purchased the said mobile, which was secured through

recovery memo (Ex.PW.9/8), disclosing that he had purchased from Shop-Keeper Attaullah (P.W.14). The shop-keeper Attaullah (P.W.14) furnished the extract of the record of Register of sale and purchase (Ex.P6 and Ex.P7) of the said mobile, which was taken into possession vide recovery memo (Ex.PW.7/3). Attaullah (P.W.14) stated that he had purchased the mobile in question from appellant Zeeshan.

6. On 10th of September, 2015 Complainant Ajmal Khan(P.W.10), Zia-ur-Rehman(P.W.12) and Attaullah (P.W.14) got recorded their statements under section 164 of The Code before Mr. Sheraz Tariq, Judicial Magistrate Nowshera (not produced).

Ajmal Khan (P.W.10) in his statement under section 164 of The Code added that on the fateful day, when his son was murdered by unknown culprits, they also snatched his unregistered motorcycle "Grace" 70 CC, having Engine No.CTE 37858, and Frame No.37858, Model 2014 red in colour and M-90, Q Mobile set as well as Rs.1500/-. He further added that a couple of days before the occurrence his son told him that he had seen two decoits namely Zeeshan and Gohar Khan on the crime scene, whereupon he (P.W.10) had advised his son to change his path, but since there was no other approach to the Poultry Farm, therefore, he had to go on the same way.

7. The appellants were arrested on 10th of September, 2015 by SHO/I.P Akhtar Naseer Khan (P.W.7). During the course of investigation on the joint pointation of the appellants, parts of the motorcycle consisting of frame No.CTC 37858, fuel tank red in colour, two wheels alongwith tyres, two side covers, two shocks, mud guard, safeguard and silencer (Ex.PX to PX-7) were recovered from the scrap dealer Meer Afghan (P.W.3) which were secured through recovery memo (Ex.PW.5/1) in the presence of HC Gul Faraz (P.W.5) and Constable Umar Ayaz (P.W.13).

The appellants further got recovered the engine (Ex.P8) of the snatched motorcycle on their joint pointation, through recovery memo (Ex.P.W.5/2) in the presence of Constable Umar Ayaz(P.W.13) and HC Gul Faraz (P.W.5) from the garage of mechanic Shahzad Hussain (P.W.2).

Appellants Gohar Khan and Zeeshan also made pointation of the place of the occurrence, whereof memo of pointation of the place of occurrence (Ex.PW.5/4) and (Ex.PW.5/5) were prepared respectively.

8. On the same evening, a pistol .30 MM bore was recovered on the pointation of Zeeshan from the cupboard of his room, whereof parcel No.4 (P-10) was prepared and taken into possession through recovery memo (Ex.PW.5/6) in the presence of HC Gul Faraz (P.W.5) and Constable Umar Ayaz (P.W.13).

After recovery of crime weapon, two empties recovered already and secured from the crime scene were sent to the F.S.L through application (Ex.PW.9/17) on 11th of September, 2015 but received in the office of FSL on 15th of September, 2015, whereof Balistic report (Ex.PW.9/18) was issued on 1st of October, 2015.

9. On conclusion of the investigation, the appellants were booked and sent to face the consequence of their deeds and culpability before the Trial Court.

The appellants were indicted by framing a formal charge under section 17(4) of the Hudood Ordinance, which was denied by both the appellants, professing their innocence.

The prosecution in order to substantiate the culpability of the appellants, produced as many as fourteen (14) prosecution witnesses.

On closure of the prosecution evidence, the appellants were afforded opportunity as contemplated under section 342 of The Code to offer

explanation to the allegations brought forwarded by the prosecution against them. The appellants categorically denounced the allegations brought-forwarded against them by the prosecution, however, neither they opted to step into the witness box as their own witness as envisaged under section 340(2) of The Code nor produced any defence witness.

At the end of the trial, the appellants were found guilty of the charges, thus were convicted and sentenced in the terms mentioned in the para (supra).

10. We have heard, Mr.Shaiber Khan learned counsel for appellant Gohar Khan in Cr.Appeal No.17-I of 2018, Mr.Anees Muhammad Shahzad learned counsel for appellant Zeeshan in Jail Criminal Appeal No.01/I of 2019 as well as Abida Safdar, learned Assistant Advocate General, KPK for the State, at length and perused the record cover to cover with their valuable assistance.

11. Mr. Shaiber Khan Advocate, representing appellant Gohar Khan inter-alia contended that the prosecution has miserably failed to bring home the charge against the appellant Gohar Khan but the Trial Court on the basis of tainted circumstantial evidence, having no lawful justification and admissibility by misreading the evidence has held the appellant guilty of the charges. He maintained that the complainant Ajmal Khan (P.W.10) in his report (Ex.PA/1) had not mentioned about the factum of snatching of the motorcycle from his son (deceased) but at a subsequent stage through an improvised statement recorded under section 164 of The Code, nominated and roped the appellants on suspicion without disclosing any source and means as to how he came to know about the name of the appellants, henceforth the statement of the complainant Ajmal Khan (P.W.10) being an after-thought stance by no means can be considered as an impartial and confidence inspiring testimony. He

urged that the recovery of Rs.1500/- being the snatched money in no way can be believed to be true on manifold reasons, particularly that it seems improbable that a person would keep such a meager plundered amount of Rs.1500/- in his pocket for so many days, uptill his arrest.

Arguing further, he stated that the recovery of the motorcycle in no manner can be relied upon as the same has been made on the joint pointation of the appellants, having no sanctity in the eyes of law. He emphasized that the occurrence being un-seen and the case based on the circumstantial evidence must be proved in a manner that the chain of evidence must be linked and not broken at all, whereas in the instant case, prosecution has failed to establish such link, henceforth, on mere suspicion and tainted evidence the appellant cannot be held guilty of the charge and the conviction and sentence awarded by the learned trial court cannot hold field.

He placed reliance on the judgments reported in (i) 2018 YLR 2363(FSC), (ii) 2018 P.Cr.L.J Note 180(FSC), (iii) 2017 SCMR 986, (iv) 2015 SCMR 155, (v) 2011 SCMR 323, (vi) 2008 SCMR 707 and (vii) PLD 2008 S.C.349.

Mr. Anees Muhammad Shahzad Advocate, appearing on behalf of the appellant Zeeshan in Jail Criminal Appeal No.01/I of 2019 reiterated the contentions raised and flaws highlighted by Mr.Shaiber Khan, learned counsel for appellant Gohar Khan and added that the prosecution has failed to establish through admissible evidence connecting C.D.R and the recovery of plundered mobile phone set with the appellant Zeeshan. Neither the prosecution has established the ownership of mobile set of the deceased nor has proved the issuance of SIM No.03119865946 in his name or other SIM numbers attributed to appellant to be in his use.

Banking upon the recovery of the pistol and F.S.L report, the learned counsel for the appellant Zeeshan emphasized that the said recovery is of no

consequence as both empties and crime weapon were sent together and that too with a considerable delay, casting serious doubt regarding its safe custody, thus the said recovery is worthless and irrelevant, whereupon no explicit reliance can be placed. It was argued that the appellants have been made scapegoat of an unseen murder on the basis of concocted and tailored evidence, which is evident from the fact that Zia-ur-Rehman (P.W.12) and Attaullah (P.W.14) having been indulged in the sale and purchase of the mobile set have surprisingly not been interrogated and made accused. Similarly P.W. Shahzad Hussain (P.W.2) and Meer Afghan (P.W.3) were found in the sale and purchase of the parts of the motorcycle but astonishingly have also not been interrogated and made accused, which shows that the prosecution has not conducted the investigation in an impartial manner and have involved the appellant unjustifiably by making them scapegoats, thus sought acquittal of the appellant Zeeshan. He relied upon the reported judgments; (i) 2008 SCMR 707, (ii) 2018 SCMR 2039, and (iii) 2017 P.CR.L.J 114

In rebuttal learned Assistant Advocate General KPK Abida Safdar appearing on behalf of the State, vigorously refuted the arguments so advanced by the learned counsel for the appellants and urged that the prosecution has successfully discharged the onus of establishing the culpability of the appellants and added that the learned trial court has rightly convicted and sentenced both the appellants, which does not warrant interference by this Court. She urged that although the occurrence is unseen but the FIR was promptly lodged without any personal grudge, however, subsequently knowing about the culprits, the appellants were nominated, being responsible for the murder of Jami Ullah, and snatching of the motorcycle and mobile, which has been proved to the hilt on the basis of circumstantial evidence.

Continuing her arguments, learned Assistant Advocate General KPK maintained that the testimony of the prosecution witness is trustworthy and confidence inspiring, which has not been shattered in any manner by the defence, thus prayed for dismissal of the appeals for being devoid of merits. She relied upon the reported judgments: (i) 2017 YLR Note 272, (ii) 1982 SCMR 531, (iii) PLD 1987 Quetta 77, (iv) PLD 2006 SC 87 and (v) PLD 1993 FSC 44.

12. After cautious analysis of the evidence on record and considering the pros and cons so put forth by the learned counsel for the adversaries, we have gathered that entire case of the prosecution revolves and rests upon the circumstantial evidence. The unfortunate episode of murder of a young boy of 21/22 years for no valuable purpose is a drastic and unbearable trauma, having a stigmatic effect not only upon his old parents and family members but on the society as well. However, the courts have to decide the fate of a crime committed by a felon on the basis of impeachable evidence, and not at the cost of emotions.

13. Undeniably, the instant occurrence is unseen, witnessed by none. As such, the circumstantial evidence brought forward needs to be scanned and appreciated on the yardsticks enumerated by the Apex Courts through various judgments reported in the cases of IMRAN ALIAS DOLAY VERSUS THE STATE AND OTHERS (2015 SCMR 155), AZEEM KHAN AND ANOTHER VERSUS MUJAHID KHAN AND OTHERS (2016 SCMR 274) and NAHEED AKHTAR VERSUS THE STATE (2015 YLR 1279).

In view of the reported judgments referred hereinbefore, we have derived that the circumstantial evidence requires to be appreciated on the dictum that in such like matters, while appreciating the evidence and holding an accused guilty of the charge, the facts of the case must be consistent with guilt of the accused, chain of evidence must be complete in all respects leaving

no reasonable ground about the innocence of the accused. The suspicion, however, strong, cannot be given preference upon the proof. The chain of events shall not break, which must be conclusive beyond any shadow of doubt. For ready reference the relevant portion of para No.5 of Imran alias Dolays' case (supra) is reproduced herein below :

> *"5.By now, it is a consistent view that when any case rests entirely on circumstantial evidence then, each piece of evidence collected must provide all links making out one straight chain where on once end its noose fit in the neck of the accused and the other end touches the dead body. Any link missing from the chain would disconnect and break the whole chain to connect the one with the other and in that event conviction cannot be safely recorded and that too on a capital charge. As was held in the case of Fazal Elahi (ibid) and in view of the changed social norms and standard of ethics of the society, to which the witnesses belong and also the questionable credibility of the investigating agency and its incompetency to professionally investigate such blind crimes, by now, the Courts have to exercise more and more cautions before accepting and resting its opinion of being guilty on a circumstantial evidence collected apparently in a dishonest, dubious and rough manner"*

14. Case of the prosecution hinges upon the following pieces of evidence;

i) Testimony of complainant Ajmal Khan(P.W.10) and Imran Khan (P.W.11).
ii) Call Data Record (CDR) of the mobile of the deceased and appellant Zeeshan.
iii) Recovery of snatched amount of Rs.1500/- from appellant Gohar Khan.
iv) Recovery of plundered Q mobile set bearing Model No. M-90 of the deceased and record of sale and purchase of the said mobile.
v) Recovery of parts of robbed motorcycle recovered on the joint pointation of the appellants.
vi) Pointation of the place of occurrence.
vii) Recovery of crime pistol .30 bore effected from appellant Zeeshan.
viii) Positive FSL report of two empties and pistol .30 bore recovered from appellant Zeeshan.
ix) Medical evidence.

Imparting with the judgment, the aforesaid circumstantial evidence shall be dealt with bit by bit ahead while appraising the prosecution evidence.

15. Adverting to the statement of complainant Ajmal Khan (P.W.10), who lost his son in this tragic incident, though deserves sympathy but at the

same time truthfulness and fairness, without any improvisation in his statement is also expected from him. Unfortunately, after a due care and anxious analysis of his statement, we failed to find him up to the mark. In his prompt report, complainant (P.W.10) categorically stated that he knew nothing as to who committed murder of his son Jami Ullah (deceased). In his such report, he did not say anything about his son leaving his house towards crime scene on his motorcycle CD 70 CC and about the motorcycle having been lost or taken away. However, subsequently on 10th of September, 2015, after almost 10 days of the occurrence, he got recorded statement under section 164 of The Code before Judicial Magistrate, improvising his earlier statement by disclosing about snatching of the motorcycle, Q mobile set and Rs.1500/- as well as introducing the story that a couple of days before the occurrence, he was told by his son that appellant Zeeshan and Gohar Khan were seen on the crime scene earlier, as such he advised his son to change the path but since there was no other way, therefore, the instant occurrence happened.

It may not be irrelevant to make note of the fact that complainant (P.W.10) nominated and implicated the appellants through statement recorded under section 164 of the Code, when the appellants were arrested, casting doubt in his stance, whereupon no explicit reliance can be placed. The Courts have always depreciated such kind of statements, which are made with the purpose to strengthen the case of the prosecution on the behest of the police officials or some other ulterior motives to get the suspect convicted by hook or by crook. Nomination through supplementary statements has always been depreciated and disliked by the Hon'ble Supreme Court and has never been appreciated for the same being afterthought. Here, we would like to refer to the cases of KASHIF ALI VS. THE JUDGE, ANTI-TERRORISM, COURTNO.II, LAHORE

AND OTHERS (PLD 2016 SUPREME COURT 951) and AKHTAR ALI AND OTHERS VS. THE STATE (2008 SCMR 6).

Imran Khan (PW.11) is the first one to have arrived at the crime scene as he was present in the Poultry Farm. According to him, on the day of occurrence, he was informed regarding the occurrence as such he rushed to the spot, where he found Jami Ullah (dead). He also stated that a few days back before the occurrence, he was informed by deceased that he got scared as he was confronted with the appellants on his way, who were armed with Kalashnikovs.

During cross-examination, he categorically denied to have recorded any statement before police.

Believing that he has not got recorded his statement as provided under section 161 of The Code, then obviously, he cannot be confronted with his earlier statement, which is an indefeasible right as construed under section 162 of The Code, henceforth, unless such right is allowed to be exercised to contradict him, such statement of witness cannot be used against the accused facing trial. For convenience, section 162 of The Code is reproduced herein below:-

> *"162. Statements to police not to be signed; use of such statements in evidence.-- [2][(1) No statement made by any person to a police officer in the course of an investigation under this Chapter shall if reduced into writing be signed by the person making it; nor shall any such statement or any record thereof whether in a police0diary or otherwise or any part of such statement on record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:*
>
> *Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of Evidence Act, 1872 (I of 1872) When any part of such statement is so used, any part thereof may also be sued in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination:*

Provided further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.]

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Evidence Act, 1872 [1][or to affect the provisions of section 27 of that act.]

(Emphasis is ours)

In this case as he has admitted that he had not recorded his statement, therefore, his statement is of no consequence and as such it would not be safe to rely upon his testimony, while holding the appellants guilty of the felony attributed to them.

16. As far as, the Call Data Record (CDR) (Ex.PT/1 to Ex.PT/5) is concerned, it has added nothing to the case of prosecution on many counts. Firstly, the prosecution has failed to associate and produce the concerned official of the Cellular Company who issued the CDR (Ex.PT/1 to Ex.PT/5), secondly, the CDR (Ex.PT/1 to Ex.PT/5), does not figure even the sign **alone** and stamp of the concerned Authority, who issued the same. More so, the CDR also does not contain the name of the deceased as well as of the appellants, connecting them in any manner including the crime. The CDR, if for the sake of discussion is held to have been proved, which is not the case, even than the same cannot be considered either as substantive or corroborative piece of evidence except as an apparatus to locate the mobile alone, but has not served any other purpose. In this regard we are fortified with the dictum expounded the case of AZEEM KHAN AND ANOTHER VS MUJAHID KHAN AND OTHERS (2016 SCMR 274) and THE STATE VS BEHRAM KHAN (2016 MLD 63).

17. Next coming to the recovery of Q mobile set, it may be observed that the same has not been recovered directly from the possession of any of the appellants. Admittedly, the recovery has been effected from Zia-ur-Rehman (P.W.12), who disclosed that he had purchased the said mobile from Attaullah (P.W.14). The record reflects that both Zia-ur-Rehman (P.W.12) and Attaullah (P.W.14) were themselves suspect for having been found indulged in the sale and purchase of the said mobile set as such they were the prime suspects of the offence punishable under section 411 of The Penal Code, but to the utmost surprise the police never ever interrogated them as an accused or suspect.

Assuming but not conceding, if it is believed that both the prosecution witnesses namely Zia-ur-Rehman (PW.12) and Attaullah (PW.14) were initially interrogated, for being involved in the plundered articles, than there is every possibility that Attaullah (PW.14) to safe his skin, has maneuvered and manipulated his extract of the record of Register of sale and purchase (Ex.P6 and Ex.P7) by shifting his crime upon the shoulders of appellant Zeeshan.

Looking to the recovery of the said mobile set and sale by appellant Zeeshan from another angle, at the most and worst, it can merely prove the factum that Zeeshan had sold out the plundered mobile but in no way it connects the appellant Zeeshan with the murder of the deceased. As observed hereinabove, as the snatched mobile set has not been recovered from the possession of appellant Zeeshan and the link in between is mysteriously missing, therefore, recovery is unworthy of credence.

18. Referring to the recovery of Rs.1500/- from the possession of appellant Gohar Khan brought forwarded by the prosecution, we are persuaded with the arguments advanced by his counsel that the same is unworthy and does not add anything beneficial to the case of prosecution.

Primarily, the recovery of Rs.1500/- from the possession of appellant Gohar has not been proved, for being highly doubtful, evident from the fact that he was arrested on 10th of September, 2015, kept in police custody and produced on the next day before the Magistrate for remand but till than nothing was found including any amount of money but astonishingly, after remand once of a sudden, he takes out Rs.1500/- from his pocket and gives it to police by saying that it is the amount, which he had snatched from the deceased, which is obviously absurd and improbable, beyond imagination of a prudent mind, suggesting, padding by police to strengthen the case of the prosecution, intolerable and unacceptable, rather sterns legal action is necessitated against such officials for doing so.

19. The foremost and important piece of evidence, whereupon the prosecution rely; is the recovery of parts of robed motorcycle (Ex.PX to PX.7) secured on 11th September, 2015 on the pointation of appellants from the shop of Meer Afghan (PW.3) and garage of mechanic Shahzad Hussain (PW.2). It is astonishing that Meer Afghan (PW.3) and Shahzad Hussain (PW.2) from whose possession the parts of snatched motorcycle were recovered, had never been interrogated as suspects, like Attaullah (PW.14) and Zia-ur-Rehman (PW.12), which infer us to believe that to save their own skin, they have given statement at the behest of the Investigating Officer (PW.9), thus relying upon their testimony is not all safe. The recovery of said parts of the robbed motorcycle could have been relevant and considered as a corroborative piece of evidence, if the same had been effected individually, but not as effected in the instant case jointly by the appellants, which is not permissible under the law. Moreover, the recovery of the said parts (Ex.PX to Ex.PX-7) could have added to the case, if complainant (P.W.10) had reported about the robbery of the motorcycle in his promptly lodged FIR in the first place. The prosecution has also failed to

establish that the deceased was the owner and was seen riding the said motorcycle on the fateful day. The ownership documents pertaining to the invoice of the motorcycle in his name has also not been produced and exhibited during the trial.

Reverting back to the recovery of said parts of motorcycle, suffice it to observe that reliance on a joint recovery has never been appreciated. In this regard we are influenced and guided by the dictum enunciated by the Hon'ble Supreme Court in the case of MUHAMMAD MUSHTAQ VS MUSTANSAR HUSSAIN (2016 SCMR 2123), wherein it was held that the recovery of the dead body on the joint pointation of the several accused was inadmissible. This principle was followed in the case of SAJJAD BHATTI AND OTHERS VERSUS THE STATE (2017 P.CR.L.J 114), wherein joint recovery of a car coupled with other articles were held to be inconsequential and ruled out of consideration.

Be that as it may, appellant Gohar Khan during examination under section 342 of The Code, was not confronted with the query that he got recovered the parts of motorcycle from the shop of Meer Afghan (PW.3) and garage of mechanic Shahzad Hussain (PW.2), thus, such piece of evidence cannot at all be used against the appellant Gohar Khan.

20. The recovery of pistol .30 bore recovered from the room of house from appellant Zeeshan on his pointation is also inconsequential. Recovery of a pistol without license can merely constitute an offence for contravention of the Arms Act, 2013 as enforced within the jurisdiction concerned, but cannot be held relevant, unless matched with empties. We are conscious of the fact that there is a positive ballistic report (Ex.PW.9/18), but the same has been found to be violative of the directions of the Hon'ble Supreme Court, this Court, as well as Hon'ble High Courts, held that the recovered empties shall not be retained by police and wait for the recovery of crime weapon. It has categorically been

held that sending empties and crime weapon together for ballistic analysis makes the entire process suspicious and highly doubtful. In this case too, it was obligatory upon the Investigating Officer (PW.9) to have had sent the two crime empties recovered from the crime scene soon as possible without any delay to the F.S.L without waiting for the recovery of the crime weapon. More-so, apparent from record that the crime empties were secured from the crime scene on 31st of August, 2015 on the day of murder of the deceased but retained the same in its possession, whereas the crime weapon was allegedly recovered on 11th of September, 2015, whereafter the empties and alleged crime weapon were sent together alongwith two empties to the FSL for ballistic analysis, which has diminished its evidentiary value because it gives rise to manipulation and padding.

Above all, Investigating Officer sent the said parcels on 11th of September, 2015, whereas the FSL report (Ex.PW.9/18) reflects that the parcel of pistol and two empties in question were received on 15th September, 2015, whereof question arises that in between such period of time, commencing from 11th September, 2015 up-till 14th September, 2015, where the said parcel of empties and pistol were kept lying, creating suspicion into the recovery itself. As prosecution has failed to offer explanation to such effect, therefore, the entire proceedings have becomes dubious. The prosecution has also failed to produce the witness, who had taken and provided the said parcel of pistol and empties to the FSL for analysis, who could have explained such factum but no such effort has been made, which makes the report doubtful and not worthy of reliance. In this regard, we are guided with the dictum expounded in the case of ALI KHAN VERSUS THE STATE (1999 SCJ 502), MUHAMMAD FAROOQ AND ANOTHER VERS THE STATE (2006 SCMR 1707), ALI SHER AND OTHERS VERSUS THE STATE (2008 SCMR 707), and THE STATE THROUGH

REGIONAL DIRECTOR ANF VERSUS IMAM BAKHSH AND OTHERS (2018 SCMR 2039).

21. It may not be fruitless to mention that the record reflects that the appellants were produced for recording of their confessional statements under section 164 of The Code, but when they were produced before Judicial Magistrate, they declined to confess as such, were remanded to judicial custody, which factum also put question mark upon the aforesaid recoveries allegedly made on the voluntary pointation of the appellants.

22. The prosecution witnesses have visited the crime scene on the fateful day by complainant Ajmal Khan (P.W.10), Investigating Officer/S.I Abdul Wali Khan (PW.9) and Imran Khan (P.W.11) coupled with the people of the vicinity. On 31st of August, 2015, the day of occurrence, Investigation Officer (PW.9) prepared the site plan, therefore, subsequently, pointation of the place of occurrence by appellants, which was already known to the prosecution is of no consequence and relevance. As such the same cannot be termed as a corroborative piece of evidence, rather the same is inadmissible evidence, which is of no help to the case of prosecution.

23. The un-natural death of the deceased has not been questioned, therefore, the medico-legal evidence need not to be brought under scrutiny for it does not lead to identify or connect the appellants with the crime, particularly in the peculiar circumstances of the instant case. The Hon'ble Supreme Court of Pakistan in the case of HASHIM QASIM AND ANOTHER VS. THE STATE (2017 SCMR 986) has held that medical evidence was only confirmatory or of supporting nature and was never held to be corroboratory evidence, to identify the culprits(s) in this case as well the medical evidence has no corroborative value to connect the appellants with the crime.

In the instant case murder of the deceased has not disputed and there is no eye witness of the occurrence, therefore, the medical evidence has no corroborative value and need not to be scanned with regard to the conformity of the injuries received by the deceased.

24. The judgments referred by learned Assistant Advocate General, KPK for State have also been thoroughly examined, which have been found to be inapplicable to the attending circumstances of this case.

25. Undeniably, one tainted evidence cannot corroborate the other tainted evidence, as in this case. The Hon'ble Supreme Court of Pakistan, while extending benefit of doubt to the appellant in the case of Muhammad Mansha Vs. The State (2018 SCMR 772), observed in the following words:-

> *"Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "It is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made upon the case of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749)"*
>
> *(Underline is ours)*

26. In wake of the above discussion, we arrived at the conclusion, that the prosecution has miserably failed to prove the case beyond any reasonable doubt, whereas the learned trial court has erred in law as well as on facts, holding the appellants guilty of the charges by misreading the evidence, which is unsustainable, resulting into the annulment of the impugned judgment and acquittal of the appellants.

Above are the reasons of our short order dated 21st of February, 2019 which is reproduced herein below:

"Arguments tendered by learned counsel for the parties have been heard.

For reasons to be recorded later in the detailed judgment, these appeals against conviction of appellants Gohar Khan (Crl.Appeal No.17-I of 2018) and Zeeshan (Jail Crl.Appeal No.01-I of 2019) are accepted. Conviction and sentence recorded under sections 302(b),392,34 PPC by the learned Sessions Judge/ASJ at Nowshera vide his judgment dated 27.04.2018 in case FIR No.113/2015 dated 31.08.2015 registered at P.S Akbarpura District Nowshera is set aside and both the appellants are acquitted of the charges. They are confined in jail. They be released forthwith if not required in any other case."

(SH.NAJAM UL HASAN)
CHIEF JUSTICE

(SHAUKAT ALI RAKHSHANI)
JUDGE

Islamabad, 22nd February,2019.
M.Akram/

Approved for reporting.