

**IN THE FEDERAL SHARIAT COURT**  
**(Appellate /Revisional Jurisdiction)**

**PRESENT:**

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE  
MR. JUSTICE SYED MUHAMMAD FAROOQ SHAH  
MR. JUSTICE SHAUKAT ALI RAKHSHANI

**CRIMINAL APPEAL NO.15/I OF 2018.**

MUHAMMAD FARAZ ALIAS FAIZE SON OF MUHAMMAD SHAFIQ ALIAS  
MASTER, RESIDENT OF MOHALLAH, KASHMIRI, TAIDI GATE, GANJ,  
PESHAWAR.

APPELLANT

VERSUS

1. THE STATE
2. GHULAM ABBAS SON OF GHULAM SABIR, RESIDENT OF  
MOHALLAH SETHIYAN, PESHAWAR

RESPONDENTS

**CRIMINAL APPEAL NO.27/I OF 2018**

ZAIN UL ABIDEEN ALIAS ZAIN SON OF SYED ARIF SHAH, RESIDENT OF  
MOHALLAH AULIA, ILAQA GANJ, PESHAWAR

APPELLANT

VERSUS

THE STATE

RESPONDENT

**CRIMINAL APPEAL NO. 28/I OF 2018**

SYED HAIDER ALI SHAH SON OF SYED SHOUKAT ALI SHAH,  
RESIDENT OF GANG MOHALLAH KASHMIRI, PESHAWAR

APPELLANT

VERSUS

THE STATE

RESPONDENT

**CRIMINAL REVISION NO.07/I OF 2018**

GHULAM ABBASS SON OF GHULAM SABIR, RESIDENT OF MOHALLAH  
SETHIYAN, DISTRICT PESHAWAR

PETITIONER

VERSUS

1. ZAIN UL ABIDEEN ALIAS ZAIN SON OF SYED ARIF SHAH,  
RESIDENT OF MOHALLAH AULIA, ILAQA GANJ, PESHAWAR
2. SYED HAIDER ALI SHAH SON OF SYED SHOUKAT ALI SHAH,  
RESIDENT OF GANG MOHALLAH KASHMIRI, PESHAWAR
3. MUHAMMAD FARAZ ALIAS FAIZE SON OF MUHAMMAD SHAFIQ  
ALIAS MASTER, RESIDENT OF MOHALLAH, KASHMIRI, TAIDI  
GATE, GANJ, PESHAWAR.
4. THE STATE THROUGH A G OFFICE PESHAWAR

RESPONDENTS

IN THE FEDERAL SHARIAT COURT  
(Appellate/Revisional Jurisdiction)

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4. THE STATE THROUGH A G OFFICE PESHAWAR

RESPONDENTS

COUNSEL FOR THE APPELLANT  
IN CR. A. NO.15/I OF 2018

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IN CR A. NOS 15,27,28/I OF 2018 AND  
FOR PETITIONER IN CR REV NO.  
07/I OF 2018

MR SHAH NAWAZ KHAN,  
ADVOCATE

FOR THE STATE

MALIK AKHTAR  
HUSSAIN AWAN,  
ASSISTANT ADVOCATE  
GENERAL, KPK

FIR NO AND DATE  
POLICE STATION

NO 316,DT 28 04 2014  
P S FAQIRABAD,  
DISTRICT, PESHAWAR

DATE OF JUDGMENT  
OF TRIAL COURT

21 06 2018

DATE OF INSTITUTION OF  
CR A. NO 15/I OF 2018

24.10 2018

DATE OF INSTITUTION OF  
CR A NOS 27, 28/I OF 2018 AND  
CR. REV. NO 07/I OF 2018

17 12.2018

DATE OF HEARING

15 10.2019

DATE OF DECISION

15 10 2019

DATED OF JUDGMENT

18 10 2019

JUDGMENT

SHAUKAT ALI RAKHSHANI, J: Zain ul Abideen alias Zain, Syed

Haider Ali Shah and Muhammad Faraz alias Faize have preferred the

captioned appeals, seeking annulment of the judgment dated 21<sup>st</sup> of June, 2018 ("Impugned Judgment") authored by learned Sessions Judge/Judge on Special Task Peshawar ("Trial Court"), whereby the appellants have been convicted and awarded sentences in the following terms,

- i) Under section 449 read with section 34 of Pakistan Penal Code (Act XLV of 1860) ("The Penal Code") each sentenced to imprisonment for life with fine of Rs 30,000/- or in default thereof to further undergo S I for six months
- ii) Under section 387 read with section 34 of The Penal Code each sentenced to seven years R I with fine of Rs 30,000/- or in default to further undergo S I for six months
- iii) Under section 302(b) read with section 34 of The Penal Code each sentenced to imprisonment for life with fine of Rs 300,000/- (rupees three lacs) as compensation payable to the legal heirs of the deceased as required under section 544-A of The Code of Criminal Procedure [Act V] of 1898 ("The Code") or in default to further undergo S.I for six months.
- iv) Under section 412 read with section 34 of The Penal Code each sentenced to seven years R.I with fine of Rs.30,000/- or in default to further undergo S I for six months.

All the sentences of imprisonment were ordered to run concurrently with the benefit of section 382-B of The Code

Whereas the petitioner Ghulam Abbas also being aggrieved from the Impugned Judgment filed a Criminal Revision Petition No. 07/I of 2018 with regard to quantum of sentence, seeking enhancement of the sentence from life to death penalty on the premises that while convicting and awarding sentence to the appellants no reason has been assigned for awarding lesser punishment, lacking any mitigating circumstance allowing the trial court to extend leniency

2 Bound by a common thread, the titled appeals and the revision for enhancement of sentence are being decided through this consolidated judgment as the same arises out of an Impugned Judgment

3 Ghulam Abbas complainant (PW 1) on 28<sup>th</sup> of April, 2014 at about 03 30 p.m got lodged an FIR bearing No 316 (Ex PA/1) within the remits of Police Station Faqirabad, Peshawar, against unknown culprits with regard to murder of her wife Mst Sumaira Abbas aged about 35/36 years with the averments that he runs a shop at Peoples Mandi Peshawar and that in the morning at about 9 30 a m he left his house whereas his children went to school, at about 4 00 p m, he was informed by his son that nobody is opening the door of the house as such he rushed and after scaling the wall, entered into the house where he found his wife Mst Sumaira Abbas in a pool of blood, whose throat was cut by a "churri" placed beside her He further reported that on his cursory search he found ten tolas gold, one lac rupees and three mobile phones having SIM numbers 0335-9745945, 0342-9750678 and 0315-0190455 missing

He nominated none nor did he claim any animosity with anyone

4 Toheed Ullah, Inspector/SHO (P.W 11) of Police Station Faqirabad, Peshawar on 28<sup>th</sup> of April, 2014, was informed about the occurrence, while he was on patrol duty, he arrived at the house of the Ghulam Abbas, complainant (PW 1), who reported the occurrence which was reduced into writing as 'murasila' (Ex PA), he prepared the injury sheet and inquest report of deceased Mst. Sumaira Abbas (Ex PW.11/1) and (Ex PW 11/2) and sent the dead body for autopsy He also prepared the recovery memo (Ex PW 11/3) whereby he took into possession blood stained "churri", whereon "Abbas" was written; which was duly sealed into parcel No.1, whereas a white rope about 32



feet long was sealed into parcel No 2 Dr Yasmin Orakzai, Medical Officer (PW 17) conducted autopsy (Ex.PM), who made the following observations -

**"External Examination.**

A middle age female 35 to 40 years age, good built wearing printed blue Qamees & Dopatta and blue shalwar, white bra Clothes fully torn & blood stained Rigor mortis and PM lividity developed

**Injuries.**

Ligature mark present on both hands at wrist joint (fully) 14x2 cm in size on both hands

- 1 Cut lacerated wound on front of the neck 14x4 cm in size, 4 cm deep, 8 cm below both ears and 9 cm below chin All vital organs of neck and vessels were cut

**Thorax:**

Larynx, trachea and blood vessels of the neck were injured

**Abdomen:**

Esophagus injured

Stomach was healthy and semi digested food.

Vaginal swabs and shalwar taken for semen analysis

Result Laboratory No 2421014, negative for semons

**OPINION**

In my opinion the deceased died due to injury to vital neck structure and blood vessels due to sharp cutting object

Probable time between injury & death Immediate

Probable time between death and PM . 05 to 10 hours"

Maqbool Jehan, S I (PW 16) was entrusted with the investigation of this case, who on arrival on the crime scene prepared site plan (Ex PB) at the instance of Ghulam Abbas, complainant (PW.1) and his son, took into possession blood swabs (Ex P-6) and a cigarette smoked bud produced as (Ex PW 8/1), secured garments of the deceased Mst Sumaira Abbas (P-3) through recovery memo (Ex PW 6/1), submitted an application (Ex PW 16/1)

for obtaining CDR data of mobile numbers of the deceased Mst Sumaira Abbas. Subsequently, on 31<sup>st</sup> of May, 2014 mobile set of Nokia 5130/C-2, IMEI No 359074049978460 (Ex.P-5) provided by Haroon (PW 19) was secured through recovery memo (Ex.PW 10/1) Thereafter, the investigation was handed over to Bahader Khan, S.I (PW.13), who sent the mobile set of the deceased alongwith its IMEI No 359074049978460 to CKC to determine that as to whether said IMEI is being used or not, whereof he received data (Ex.PW 13/1) with the opinion that the SIM No 0300-5151680 has been used by one Ahsan Javed (Not produced/dropped), who was contacted by police officials and his statement under section 164 of The Code as witness was got recorded by Mr Muhammad Ilyas Khan, Judicial Magistrate (PW 5) and similarly also got recorded statement of a witness namely Kamran Khan (Not produced) under section 164 of The Code. Ghulam Abbas complainant (PW 1) through his supplementary statement got recorded under section 164 of The Code nominated the appellants Zain ul Abideen alias Zain, Syed Haider Ali Shah and Muhammad Faraz alias Faize as culprits, thenceforth appellants Zain ul Abideen alias Zain and Syed Haider Ali Shah were arrested by Diyar Khan, S I (PW.4) and issued their arrest card (Ex.PW.4/1 and Ex PW 4/2) Gul Arif, Inspector (PW.15), being third Investigating Officer, after receipt of case file on 18<sup>th</sup> of June, 2014 proceeded ahead with the investigation and obtained their four days remand on 22<sup>nd</sup> of June, 2014. Appellant Zain ul Abideen alias Zain got recovered plundered amount of Rs.25000/- (Ex RS) from an iron almirah of his house through recovery memo (Ex.PW 9/1). Similarly, appellant Syed Haider Ali Shah got recovered Rs 8500/- (Ex RS/1) from the wooden almirah of his house, secured through recovery memo (Ex PW 9/2) He also claimed to have got recorded the confessional statement of appellants Zain ul Abideen

alias Zain and Syed Haider Ali Shah by Mr Muhammad Ilyas Khan Judicial Magistrate, Peshawar (PW.5) on 23<sup>rd</sup> of June, 2014, who produced the questionnaire as (Ex.PW.5/1) put to appellant Syed Haider Ali Shah, confessional statement as (Ex PW 5/2) and Certificate as (Ex PW 5/3), he (PW 5) also produced questionnaire as (Ex PW 5/4) put to appellant Zain ul Abideen alias Zain, confessional statement as (Ex PW.5/5) and certificate as (Ex PW.5/6).

Appellant Muhammad Faraz alias Faize remained away from the law, who was subsequently arrested on 5<sup>th</sup> of July, 2014 by Gul Arif, Inspector (PW 15), and issued arrest card (Ex PW 15/3) He submitted application (Ex.PW 15/4) before the court of Mr Muhammad Ilyas Khan, Judicial Magistrate (PW 5) and obtained three days remand on 6<sup>th</sup> of July, 2014 Appellant Muhammad Faraz alias Faize allegedly got recovered plundered amount of Rs.26000/- (Ex RS/2) and gold ornaments weighing 3 6 tolas from almīrah of his house through recovery memo (Ex PW.7/1), whereof site plan (Ex PB/3) was prepared The record further reveals that Gul Arif, Inspector (PW 15) through an application (Ex PW 15/6) produced appellant Muhammad Faraz alias Faize before the Court of Mr Muhammad Ilyas Khan, Judicial Magistrate (PW 5) for recording his confessional statement but he refused to record his statement and as such was sent to judicial lockup vide order dated 23<sup>rd</sup> of July, 2014

On conclusion of the investigation, the appellants were sent to the trial Court to face the consequences of their deeds After denial of the indictment as incorporated in the formal charge, the prosecution in order to substantiate the charges produced as many as twenty two (22) witnesses and on conclusion of the prosecution side, the appellants were examined under section



342 of The Code, who refuted the allegations and pleaded their innocence but none of them opted to step into the witness box in defense

On 21<sup>st</sup> of June, 2018 at the end of the trial the learned trial court finding the appellants guilty of the charges; convicted and awarded sentences in the terms mentioned in the preceding para (supra).

5 We have heard the adversaries at length, perused the record minutely cover to cover inclusive of the Impugned Judgment with all due scrutiny in view of the submissions advanced by both the sides

6. Mr. Aamir Sabir, learned counsel appearing on behalf of appellant Zain ul Abideen alias Zain inter-alia contended that the occurrence has not been witnessed by anyone and the entire case is based on circumstantial evidence in the form of confessional statement of appellants Zain ul Abideen alias Zain and Syed Haider Ali Shah and recovery of mobile set, money and gold ornaments but strenuously urged that neither the confessional statements were voluntarily recorded by the appellants nor the same are true, which cannot be made basis of conviction. He maintained that the alleged confessional statements were recorded during illegal confinement of the appellants, which were extorted through torture and duress, making the confessional statements inadmissible. Adding further, he submitted that while appreciating circumstantial evidence, the chain of events must link each other, which shall not break at any level, but in the instant case from the arrest of appellants on the basis of Call Data Record ("CDR"), to the recovery and confessional statements, the requisite links are missing, which in no manner reconcile. He also argued that while making recovery of the Rs.25000/- from appellant Zain ul Abideen alias Zain from his house neither the prosecution has established the ownership of the house in question nor substantiated that the recovered amount was actually the looted

money, thus, the said recovery is inconsequential and of no help to the case of the prosecution, henceforth requested for acquittal of appellant Zain ul Abideen alias Zain. In support of his arguments, he has referred the following reported judgments (i) 2017 SCMR 986, (ii) PLD 2019 Peshawar 17 and (iii) 2019 P Cr L J 535.

Mr. Mauzzam Butt, learned counsel representing appellant Syed Haider Ali Shah, while adopting the arguments so put forth by Mr. Aamir Sabir, counsel for the appellant Zain ul Abideen alias Zain, added that while lodging the FIR, Ghulam Abbas complainant (PW 1) did not mention that the SIMs used in the mobile set taken away by the culprits were in the name of the deceased or else nor did he furnish any description of the mobile sets including the IMEI Nos, etc, thus subsequent recovery of the mobile set cannot advance the case of the prosecution. According to him, the record transpires that the SHO had shifted the appellants to jail, negating the certificates issued by Mr. Muhammad Ilyas Khan, Judicial Magistrate (P W 5) and strengthening the plea of the appellants that the confessional statements have been extorted through fear, duress and torture, having no legal sanctity and evidentiary value. He further argued that the entire episode of murder of deceased Mst. Sumaira Abbas points towards his husband Ghulam Abbas (PW 1) as his testimony is self-contradictory, regarding opening of the main gate of the house which was found to be locked from inside, scaling over the wall with the help of the ladder as well as leaving and coming back home through any independent evidence as no one from the neighborhood has been produced to corroborate his version. He maintained that Ghulam Abbas complainant (PW.1) is actually behind the murder of his wife for the reason best known to him. Lastly, annulment of the

Impugned Judgment and acquittal of appellant Syed Haider Ali Shah was prayed

Syed Shakil Khan Gillani, learned counsel for appellant Muhammad Faraz alias Faize inter-alia contended that the retracted confessional statement of the co-appellants without any corroboration is unworthy of reliance. He added that the confessional statements are contradictory to the testimony of Ghulam Abbas complainant (PW 1) which makes the confessional statements untrue, whereupon no explicit reliance can be placed at all. He emphasized that Article 43 of the Qanoon-e-Shahadat Order X of 1984 ("Order of 1984") is inapplicable to the case of the appellant and that too when retracted. He further submitted that the recovery of gold ornaments is not only highly doubtful but in conflict with the testimony of Ghulam Abbas complainant (PW.1). Regarding identification of the gold ornaments, learned counsel urged that entire proceedings of the identification of the gold ornaments is fascinating and contrary to the requisites as enunciated by the apex court, thus, no reliance can be placed upon such piece of evidence, henceforth prayed for setting aside the impugned judgment and asked for acquittal of appellant Muhammad Faraz alias Faize.

On the other hand, learned counsel appearing on behalf of Ghulam Abbas complainant (PW 1) as well as petitioner in Criminal Revision No 7/I of 2018 filed for enhancement of the sentence of appellants inter-alia contended that although there is no eye-witness of the occurrence but the prosecution has proved the culpability of the appellants through tangible circumstantial evidence to the hilt. He maintained that the appellants Zain ul Abideen alias Zain and Syed Haider Ali Shah have voluntarily got recorded their confessional statements before Mr Muhammad Ilyas Khan, Judicial

Magistrate (P.W 5) without any duress, pressure or torture He referred to the questionnaire of the confessional statements, where in reply the appellants have denied being subjected to any torture and promise before recording confessional statements, thus submitted that the confessional statements alone by itself were sufficient enough to warrant conviction of the appellants, henceforth the return verdict of guilt by the learned trial court by all means is legal and sustainable except with regard to quantum of sentence According to him, the confessional statements can be used not only against the maker but the co-appellant Muhammad Faraz alias Faize as well in view of Article 43 of Order of 1984, repelling the arguments so advanced by the learned counsel for the appellants. He also argued that the appellants were traced out through CDR and recovery of mobile set of the deceased, which followed in their arrest and recovery of plundered amount and gold ornaments made on their pointation, which pieces of evidence have gone un-shattered He also stated that the medical evidence and the recovery of "Churri" being crime weapon are in line with the prosecution story He repudiated the contentions raised by the learned counsel for the appellants, attacking the confessional statements on various counts so reflected in the preceding paras and negated the stance of defence, that the complainant Ghulam Abbas is behind murder of his wife, which is ill-founded

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Concluding his arguments, while challenging the quantum of punishment, learned counsel for the complainant Ghulam Abbas drew our attention that while convicting the appellants under section 302 (b) of The Penal Code and awarding sentence of life imprisonment, learned trial court has failed to adhere to the requisite as contemplated under section 367(5) of The Code by not assigning any reason for not awarding death sentence, thus, prayed for



enhancement of the sentence from life to capital punishment. In support of his arguments learned counsel has placed reliance upon the citations reported as (i) 1992 SCMR 1983, (ii) 2016 YLR 1543, (iii) PLD 2005 S.C 168, (iv) 2013 P Cr L J 1082 and (v) 1994 P.Cr.LJ 2182.

Malik Akhtar Hussain Awan, learned Assistant Advocate General Khyber Pakhtunkhwa, while adopting the arguments so advanced by the learned counsel for the complainant Ghulam Abbas contended that the findings arrived at by the learned trial court are based on proper appreciation of evidence as there is overwhelming of circumstantial evidence to prove the culpability of the appellants. He added that the confessional statements, recoveries of the plundered amount as well as gold ornaments corroborate the prosecution version as they are consistent, free from any glimpse of doubt, and as such made prayer for dismissal of the appeals, however, in respect of petition for enhancement of sentence, he did not support the contentions advanced by the learned counsel for the Petitioner Ghulam Abbas

7. Undeniably, the murder of Mst Sumaira Abbas and plundering her house has gone un-witnessed and the entire episode of this unfortunate occurrence is entirely dependent upon the circumstantial evidence, so collected by the prosecution, commencing from the recovery of blood stained "Churri" nearby the deceased being the crime weapon used to slit the throat of the deceased in a gruesome manner, autopsy report, recovery of a mobile set of the deceased, CDR and thenceforth surfacing the appellants, amongst whom appellants Syed Haider Ali Shah and Zain-ul-Abideen alias Zain got recovered looted amount on their pointation as well as got recorded confessional statements before Mr Muhammad Ilyas Khan Judicial Magistrate (PW 5), also arraying co-appellant Muhammad Faraz alias Faize to be one of the culprit



along their side taking active part in the crime as alleged, who on his arrest also made recovery of looted amount of Rs 26000/- and 3 6 tola of gold ornaments on his pointation from his house. He was produced before the court of Judicial Magistrate for recording his confessional statement but on his refusal he was remanded to judicial custody.

8. The paramount question before looking into the factual aspects and admissibility of the evidence brought forward by the prosecution to drive home the charges against the appellants, it would not be unworthy to observe here that in such like blind murder cases, where the entire case hinges upon the circumstantial evidence, the apex Court through numerous judgments has settled that the circumstantial evidence should be like a well knit chain whose one end should point to the accused and the other to deceased.<sup>1</sup> It has further been expounded that when any case is entirely based on circumstantial evidence then, each piece of evidence collected must provide all links making out one straight chain where one end of its noose fitted in the neck of the accused and the other end touched the dead body and that 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 could not be safely recorded and that too on capital charge.<sup>2</sup> Similar view was reiterated in the words that for placing reliance of circumstantial evidence, in cases involving capital punishment, such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single unbroken chain, and that any missing link in the chain would destroy the whole and would render the same unreliable as there were chances of procuring and fabricating evidence,

<sup>1</sup> IBRAHIM AND OTHERS VERSUS THE STATE (2009 SCMR 407)

<sup>2</sup> IMRAN ALIAS DULLY AND ANOTHER VERSUS THE STATE AND OTHERS (2015 SCMR 155)

therefore, Courts were 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.<sup>1</sup>

9. Being aware of the bedrock principles and parameters ascribed by the apex Court, we have examined the prosecution evidence based on circumstantial events thoroughly and minutely, going deep into the bottom by re-appraisal of the evidence, put so-forth in view of the arguments so advanced by the adversarial parties

Commencing from the crime scene, where the corpse of the deceased Mst. Sumaira Abbas was found lying by her husband Ghulam Abbas complainant (PW 1) in a pool of blood, throat slitted in an inhuman manner He neither arrayed any culprit nor stated to have rivalry with anyone, thus his report did not incriminate any of the appellants until he arrayed them through his supplementary statement got recorded on 17<sup>th</sup> of June, 2014 before a Judicial Magistrate as culprits merely on his gut satisfaction. He failed to explain as to how he got to know about the appellants, having any connection with the alleged crime Neither he disclosed any source by which he reached to a conclusion with regard to the culpability of the appellants nor provided any other detail, whereby he was let to know about the names of the culprits Looking into the admissibility of the supplementary statement made by Ghulam Abbas complainant (PW 1), suffice it to observe that such of his statement has absolutely no appreciation and weightage, having no evidentiary value, for such statements have always been depreciated and considered as

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<sup>1</sup> HASHIM QASIM AND ANOTHER VERSUS THE STATE (2017 SCMR 986)

afterthought<sup>1</sup> Supplementary statement either recorded under Section 161 Cr.P C or under Section 164 of The Code has never been approved, having no legal sanctity and admissibility Supplementary statement recorded subsequently to the FIR has been held in view to be an improvement,<sup>2</sup> more particularly when without disclosing any source of information several persons are named as culprits, whom he had earlier not known to be assailants

10. As far as the recovery of blood stained "churri" is concerned, since it was already recovered lying beside deceased Mst Sumaira Abbas, having her blood on it, which may at the best be relevant to prove the factum of slaughtering her with such tool but it does not in any manner connect the appellants with the commission of alleged crime Though not highlighted during the arguments by learned counsel for the parties but record reflects that finger prints were obtained from the crime scene, which did not match with the appellants finger prints, more so cigarette bud was also taken into possession whereof DNA profile of identification was sought of a suspect namely Raham Dad, apprehended and interrogated during the investigation, which did not match with his DNA vide report dated 2<sup>nd</sup> of February, 2015. But after the arrest of the appellants too no attempt was made to get analyze their blood with the high molecular weight DNA obtained from the cigarette bud; whereof no explanation has been offered by the prosecution, raising questions

Ghulam Abbas complainant (P W.1) has been subjected to a very lengthy cross-examination unnecessarily, as he was neither an eye-witness nor his supplementary statement recorded gathered any weightage per se to connect the appellants with the crime. The site plan prepared on his pointation

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<sup>1</sup> KASHIF ALI VERSUS THE JUDGE, ANTI-TERRORISM, COURT NO II, LAHORE AND OTHERS (PLD 2016 SUPREME COURT 951)

<sup>2</sup> KASHIF ALI VERSUS THE JUDGE, ANTI-TERRORISM, COURT NO II, LAHORE AND OTHERS (PLD 2016 SUPREME COURT 951)

has also no intrinsic value as he was not the eye witness of the occurrence. Learned counsel for the appellant Syed Haider Ali Shah during the cross-examination put all his efforts to establish that the murder of Mst Sumaira Abbas was committed by Ghulam Abbas complainant (P W 1) and that the appellants have been made scapegoats, which defence plea was also reiterated while being examined under Section 342 of The Code.

On scrutiny of the deposition of Ghulam Abbas complainant (PW 1); his statement was found to be intriguing and dubious, which shall be discussed ahead, while dealing with the recovery of mobile set of Nokia 5030/C-2 and gold ornaments taken away by the perpetrators.

11 Making reference to the CDR, it was argued by the learned counsel for the complainant, supported by Assistant Advocate General, KPK that appellants were traced as per CDR of the snatched mobile set having IMEI # 359074049978460 belonging to deceased Mst. Sumaira Abbas, being used by one of the appellant Zain ul Abideen alias Zain having SIM number 0300-5151680 in it, issued in the name of one Ahsan Javed, when Ahsan Javed was interrogated, albeit he did not deny issuance of SIM No 0300-5151680 in his name but clarified that it was given by him to his relative Zain ul Abideen alias Zain, the appellant, as such his statement was recorded under Section 164 of The Code. Imperative to note here that during trial said Ahsan Javed was abandoned for being won over, thus, not produced before the Court by either side. Article 129 (g) of The Qanun-e-Shahadat Order, 1984 construes that had he been produced before the Court, he would have not supported the prosecution version, thus in no way his statement recorded under Section 164 of The Code can be taken into account for not being subjected to cross-examination <sup>1</sup>

<sup>1</sup> LAL KHAN VERSUS THE STATE (2006 SCMR 1846)



12            Learned counsel for Ghulam Abbas complainant (PW.1) as well as learned Assistant Advocate General, KPK appearing on half of State taking credit of the achievement argued that the appellants were surfaced through CDR (Ex.PW.13/1), which lead to the recovery of mobile set Nokia 5130/C-2 having IMEI # 359074049978460 (Ex P-5), wherein SIM No 0335-9745945 was allegedly in use of deceased Mst Sumaira Abbas, from one Haroon (PW.19) He (PW.19) testified that he works in a gem stone shop situated at Namak Mandi, Peshawar and that the police officials of Police Station, Faqirabad called him and asked about his mobile phone of Nokia 5130/C-2 (Ex P-5), whereof he apprised them that he had bought the same in exchange of his mobile from one of a co-worker namely Muhammad Ibrahim (PW 20) According to Muhammad Ibrahim (PW.20), he received the said mobile set in exchange of his mobile from another co-worker Ghulam Muhammad (PW 21) Ghulam Muhammad (PW 21) deposed that the mobile set in question was bought from one of his relative Mehran (PW 22) in lieu of rupees 700/- Mehran (PW.22) testified that he has a showcase at Kabari Bazaar, Peshawar and that in the evening time three persons came and sold a mobile set of Nokia 5130/C-2 with 8 GB card at the sum of Rs.1000/-. According to him, the sellers did not have their CNICs, therefore, he noted their SIM number, name, IMEI number on a receipt as (mark-P), which he sold out to his relative Ghulam Muhammad (P W 21) in a sum of Rs 700/- Mehran (PW 22) while testifying before the Court neither gave the names, SIM number and IMEI number nor after the arrest of the appellants, they were put to an identification parade for identification. So much so that while deposing before the Court, he did not identify the appellants to be the persons, who came and sold the mobile set of Nokia 5130/C-2 in question to



him, thus the testimony of the aforesaid witnesses with regard to recovery of the mobile set is inconsequential for indicting the appellants

13           So it be, the CDR collected during the investigation can also not be read in evidence on manifold reasons, firstly CDR (Ex PW.13/1) has neither been proved as a primary nor as a secondary evidence. Secondly, no one from the concerned department has been associated as attesting or marginal witness to it to prove that the same was issued by the concerned authority. Thirdly, it has also not been proved that the number mentioned in the CDR belongs to appellants or to the deceased. The Call Data Record (P W 13/1) is a computer generated document not verified by CKC, Peshawar, thus no authenticity and sanctity is attached therewith

In this regard, we are clear in mind that such 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 substantive or corroborative piece of evidence except as an apparatus to locate the mobile alone, but doesn't to serve any other purpose<sup>1</sup>

14           The recovery of Rs.25000/- made from appellant Zain ul Abideen alias Zain on his pointation from an iron almīrah in his house and Rs 8500/- made from appellant Syed Haider Ali Shah on his pointation from a wooden almīrah in his house, it may be observed that before making recovery on the pointation of the aforesaid appellants no memo of disclosure were prepared, which makes the recovery irrelevant to the crime as it does not squarely falls within the ambit of disclosure as contemplated under Article 40 of Order of 1984. Moreover, as earlier to the recovery of the amount in question neither the numbers of the notes, denominations nor any identification marks were

<sup>1</sup> AZEEM KHAN AND ANOTHER VERSUS MUJAHID KHAN AND OTHERS ( 2016 SCMR 274)

provided, therefore, it is hard to conclude that it is the same amount which was plundered or otherwise.

As far as the recovery of Rs 26000/- and gold ornaments 3.6 tola made on the pointation of appellant Muhammad Faraz alias Faize from the almirah of his house is concerned, it does not in any manner connect him with the alleged crime. As discussed, the recovery of money is worthless because no details were provided of the denominations and numbers of the looted notes by Ghulam Abbas complainant (PW 1), therefore, it is very difficult to ascertain as to whether the amount recovered is the plundered amount or not, more, particularly in absence of any memorandum of disclosure, connecting the appellant with the said amount and gold ornaments. Similarly, since Ghulam Abbas complainant (PW 1) has not provided the description as well as the receipt of the stolen gold ornaments in question, therefore, identification of the gold ornaments by him in the presence of Farman Ullah (PW 18) and Ghulam Dastagir (Not produced) in the police station has been found by us to be astonishing. According to Farman Ullah (PW 18), while he was present alongwith Ghulam Abbas complainant (PW 1) and Ghulam Dastagir gold ornaments were shown in the shape of neckles etc and a box containing jewelry by the police officials, asking as to whether the same belongs to the deceased, which was confirmed by the Ghulam Abbas complainant (PW.1) to be so, whereof memo of identification of the recovered gold articles was prepared as (Ex PW.15/7)

Since the complainant had not given any description of the gold ornaments including the purchased receipt, therefore, subsequently identification of the gold articles in question in the aforesaid manner is absolutely unworthy of reliance It was incumbent upon the police officials after

the recovery of gold ornaments; to have had mixed it with alike articles and then should have asked Ghulam Abbas complainant (PW 1) to pick the gold ornaments belonging of the deceased lying in the row, but the way said gold ornaments in question were got identified by the police is not acknowledged in any manner, as such the recovery of gold ornaments and identification thereof is ruled out of consideration. Besides above, we agree with the contention of learned counsel for the appellant Syed Haider Ali Shah that no explanation has been offered by complainant (PW 1) regarding the house being locked from inside and scaling over the ladder, which didn't find mention in his police report; and there being no independent witness from the neighbourhood to witness such event as narrated by him, which makes the testimony of Ghulam Abbas, complainant (PW 1) mysterious and suspicious.

15. Adverting to the most crucial piece of evidence whereupon prosecution mainly relied upon is the confessional statements, got recorded by appellants Zain ul Abideen alias Zain and Syed Haider Ali Shah. Before going into the voluntariness, admissibility and truthfulness of the confessional statements of the appellants, we deem it proper to make reference to the guiding touchstone laid down by the Hon'ble Supreme Court of Pakistan to appreciate a confessional statement, which can be relied upon to hold an accused guilty in a case of culpable homicide.

The Apex Court in Azeem Khan's case<sup>1</sup> expounded illustratively that the mandatory precautions laid down under the High Court Rules and Orders must be strictly followed with the purpose to remove any fear inculcated by the police in the mind of the accused to ensure that if he was not guilty or was not making confession voluntarily then in that case he was not to

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<sup>1</sup> AZEEM KHAN AND ANOTHER VERSUS MUJAHID KHAN AND OTHERS (2016 SCMR 274)

be handed over back to police. Moreover, an accused shall be given time for reflection one after the other with intervals for three times. All police officials in uniform or otherwise, including Naib Court attached to the Court must also be kept away from the Court and beyond the view of the accused, whereafter the required questions as pointed out by the High Court Rules and Orders should be put to him and the answers given be recorded in the words spoken by him, which shall be reduced by the Recording Magistrate with his own hands. In case, the accused was illiterate, after recording his statement either in Urdu or English, the same should be read-over and explained to the maker in the language he fully understood and thereafter certificate as required under Section 364, Cr P.C. with these proceedings should be given by the Magistrate under his seal and signature. On conclusion of the process, at no occasion the accused shall be handed over to any police official whether he was Naib Court wearing police uniform or any other police officer, because such careless dispensation would considerably diminish the voluntary nature of the confession. In Hashim Qasim's case<sup>1</sup> it was laid down that for accepting a confession, two essential requirements by all means to be fulfilled. Firstly that the confession was made voluntarily and was based on true account of facts leading to the crime and the second, the same was proved at the trial.

16 We are mindful of the legal proposition that a confessional statement is to be believed in wholisty but not in quantification, meaning thereby that either a confession is to be believed in toto or rejected in the same manner. The Judicial Magistrate (PW 5) testified that on 23<sup>rd</sup> of June, 2014 he firstly after fulfillment of the codal formalities got removed the handcuffs, turned out the police from the court room and gave one and a half hour as time

<sup>1</sup> HASHIM QASIM AND ANOTHER VERSUS THE STATE (2017 SCMR 986)



for reflection to appellant Syed Haider Ali Shah, then after being satisfied that he voluntarily intends to record his confessional statement, he proceeded to put questions mentioned in the questionnaire and recorded his confessional statement and thereafter sent him to judicial lockup. In the similar fashion, according to him he got recorded the confessional statement of appellant Zain ul Abideen alias Zain. Admittedly he had only once given one and half hours as time of reflection which offends the principle enunciated in the case of Azeem Khan *ibid*, wherein it was categorically held that an accused must be given time for reflection thrice with intervals.

As per admission by Judicial Magistrate (PW 5) on 19<sup>th</sup> of June, 2014 he had granted four days police remand to the appellants, whereas perusal of the questionnaire of Syed Haider Ali Shah in reply to question number 8 (eight) finds mention that he has been kept in custody since last 7 (seven) days whereas to similar question, appellant Zain ul Abideen alias Zain stated to be in police custody since last 2 (two) weeks, but astonishingly despite knowing about illegal detention of the appellants no action was initiated by him. As observed either the statement is to be believed in toto or disbelieved in the similar fashion. If the answers to question number 8 eight (*supra*) are believed to be correct than illegal detention of the appellants cannot be ignored and we are persuaded to believe that they were kept in custody till they were pressurized, coerced and compelled to make confessional statements according to the whims of police and complainant (PW.1). Another fascinating element which has cropped up while replying question number 9 (nine) of the questionnaires both the appellants have stated in same words that "I have engaged a counsel and I do not want to meet him at the moment". This sort of conduct on the part of appellants is strange and unconvincing which definitely



required explanation but prosecution failed to do the needful Recording Magistrate (PW.5) also admitted in cross-examination that he has not mentioned in the certificates appended with both the confessional statements regarding the language in which their statements were read-over to the accused, however admitted during the cross-examination that the accused recorded his statement in pushto. Be that as it may, it was incumbent upon the Judicial Magistrate (PW.5) to have had mentioned in the certificate that he himself was acquainted with and conversant to pushto language, which he failed to do so and that also offends the dicta laid down in the case of Hashim Qasim.<sup>1</sup> The Judicial Magistrate (PW 5) also admitted that after recording of confessional statements, he handed over the appellants to Naib Court for further transmission to judicial custody. He also admitted during cross-examination that he did not call any of the jail personnel for handing over the custody of the appellants to them, showing that he was absolutely not definite as to how the custody of the appellants were handed over in the attending circumstances; he seems to be unaware that what happened outside the Court room, which also infers us to conclude that the pressure of police was never over during such process of recording of confessional statement. During cross-examination, Gul Arif, Inspector (PW.15) denied that he had shifted the makers of the confession to jail and also denied that his narrative is contrary to the case diaries prepared on 23<sup>rd</sup> of June, 2014 by him. On the request of learned counsel for appellant Syed Haider Ali Shah, we have gone through the case diary No 23/2014 dated 23<sup>rd</sup> of June, 2014 and found mentioned that after recording of the confessional statements by Zain ul Abideen alias Zain and Syed Haider Ali Shah, he shifted them to Central Jail and came back to police station.

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<sup>1</sup> HASHIM QASIM AND ANOTHER VERSUS THE STATE (2017 SCMR 986)

17           Next coming to the truthfulness of the retracted confessional statements, we have found material diversing narratives, creating doubt in our minds with regard to the confessional statements being untrue. Ghulam Abbas complainant (PW.1) in his report as well as before the Court stated that the perpetrators took away Rs 100,000/- (one lac) cash whereas perusal of the confessional statement of Zain ul Abideen alias Zain reveals that they entered the house of deceased Mst Sumaira Abbas opened the door whereupon Syed Haider Ali Shah put hand on her mouth and took her in a room where Muhammad Faraz alias Faize tied her mouth and eyes, and on demand of money deceased Mst Sumaira Abbas gave them Rs.35000/- but nowhere mentioned that they took away Rs 100,000/- (one lac) from the house, whereafter deceased was done to death In almost similar words appellant Syed Haider Ali Shah stated only to have taken away Rs.35000/- given by the deceased to them The alleged retracted confessions by both the appellants is also contrary to the recovery made on the pointation of three appellants, appellant Zain ul Abideen alias Zain got recovered of Rs.25000/- (Ex.RS) from an iron almirah of his house, appellant Syed Haider Ali Shah got recovered Rs.8500/- (Ex.RS/1) from the wooden almirah of his house and appellant Muhammad Faraz alias Faize got recovered Rs.26000/- (Ex.RS/2) from the almirah of his house, which is excessive to the amount allegedly plundered by them so confessed in their confessional statements recorded under Section 164 of The Code, which renders the entire narrative of the prosecution highly improbably and extremely doubtful Thus, irresistibly without any doubt in mind, we believe that the confessional statements which has been retracted as well, is involuntary, untrue and inconsistent with the other circumstantial

evidence, breaking chain of events are discarded and ruled out of consideration. In so far as the citations referred by Mr Shah Nawaz Khan, learned counsel for the complainant are concerned, those have been minutely examined, but found by us to be irrelevant and distinctive, having no applicability in the instant case. However, undeniably there can be no departure from the dicta expounded by the Apex Court in Ch. Muhammad Yaqoob's case<sup>1</sup>, Muslim Shah's case<sup>2</sup> and Muhammad Ashraf's case<sup>3</sup> of this Court but the facts of the case being different are of no help to him. It is worthy to observe that since the prosecution has failed to prove the confessional statements to be true and having been recorded voluntarily, therefore, the arguments advanced by both the sides with regard to applicability of Article 43 of Order of 1984 becomes redundant to the extent of appellant Muhammad Faraz alias Faize.

18           The epitome of the above discussion is that the prosecution failed to drive home the charges against the appellants and the findings arrived at by the learned trial Court were not found to be based on proper appraisal of the evidence; rather contrary to the bedrock of criminal jurisprudence, thus benefit of doubt has been extended, following the dicta laid down in the case of Muhammad Mansha<sup>4</sup> on the basis of maxim that "It is better that ten guilty persons be acquitted rather than one innocent person be convicted"

19           Resultantly, the captioned appeals filed by appellants were allowed, impugned judgment overturned and their acquittal

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<sup>1</sup> CH. MUHAMMAD YAQOOB AND OTHERS VERSUS THE STATE AND OTHERS (1992 SCMR 1983)

<sup>2</sup> MUSLIM SHAH VERSUS THE STATE (PLD 2005 SUPREME COURT 168)

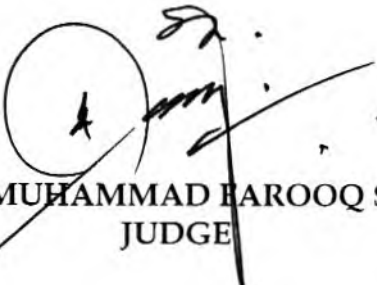
<sup>3</sup> MUHAMMAD ASHRAF VERSUS THE STATE (2016 YLR 1543)

<sup>4</sup> MUHAMMAD MANSHA VS THE STATE (2018 SCMR 772)

recorded whereas the Revision Petition for enhancement of sentence as a natural corollary was dismissed by means of our short order dated 15<sup>th</sup> of October, 2019, following the above reasons.

  
(MUHAMMAD NOOR MESKANZAI)  
CHIEF JUSTICE

  
(SHAUKAT ALI RAKHSHANI)  
JUDGE

  
(SYED MUHAMMAD BAROOQ SHAH)  
JUDGE

Islamabad, the  
Dated 18<sup>th</sup> of October, 2019  
Akram/-

Approved for reporting  
