

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

MR. JUSTICE MUHAMMAD ZAFAR YASIN
MR. JUSTISCE SYED AFZAL HAIDER

CRIMINAL APPEAL NO. 212/I OF 2005

Muhammad Fahad Waqas son of Khizar Hayat
r/o Chak No.18 Shumali, Tehsil & P.S. Bhalwal,
District Sargodha

... Appellant

Versus

The State ... Respondent

Counsel for appellant ... Mr.Muhammad Sharif Janjua,
Advocate

Counsel for State ... Raja Shahid Mehmood Abbasi,
Deputy Prosecutor General

FIR No. Date & ... 20, Dated 10.04.2004
Police Station Lilla, Jhelum

Date of judgment of ... 15.06.2005
trial court

Date of Institutions ... 16.07.2005

Date of hearing of Appeal ... 15.04.2009

Date of decision by ... 21.04.2009
Federal Shariat Court

JUDGMENT

SYED AFZAL HAIDER, J.- Appellant Muhammad Fahad

Waqas has through this appeal challenged the judgment dated 15.6.2005, delivered by learned Additional Sessions Judge-I, with power of Juvenile Court, Jhelum, in Sessions Case No. 07/2004, Sessions Trial No.11 of 2004. by which he has been convicted for Qatle Shibh-i-Amd under section 316 of the Pakistan Penal Code and sentenced to “Diyat and imprisonment (Simple) for 14 years as Tazir” and also sentenced to pay a sum of Rs. 20,000/- as compensation to the legal heirs of the deceased or in default of payment to suffer additional term of 6 months simple imprisonment. The benefit of section 382-B of the Code of Criminal Procedure was extended to the appellant.

2. The facts of this case, as initially stated in “Ruppt” No.11 dated 10.03.2004 recorded in the daily diary register at 11.00 p.m. maintained at police station Lillah, on the oral statement of complainant Muhammad Ehsan, PW.9 are that on his return home on 05.3.2004 at 2.30 p.m. from duty as pointsman at Railway Station Dhudithal, his wife Mst. Muniran Bibi informed him that their minor son Suleman had gone out and had not come

back so far. The complainant alongwith his wife and relatives commenced a search for Muhammad Suleman. An announcement was also made on the loudspeaker to the same effect. A lot many people gathered and a joint comb through the village was undertaken. At about 3:30 p.m., on reaching the Baithak of Zafar Iqbal Councillor, the dead body of Muhammad Suleman was seen lying on a plastic "pallee" in the corner of the western room of his dera. The dead body was brought home. The head and the buttocks of the deceased were blood stained. Unaware of the real facts the complainant took customary steps for the burial of the child though he kept on ruminating as to why and how the unfortunate incident had taken place. The complainant proceeded to state further that Muhammad Yaseen son of Miran Bakhsh, grand father of the victim, PW.12, Dost Muhammad son of Lal Khan P.W.13 and Muhammad Javaid son of Bhai Khan, the given up witness, had informed him on that day that Muhammad Fahad Waqas accused, a man of ill repute, was seen by them with Muhammad Suleman victim in the baithak of Zafar Iqbal, Councillor on the fateful day. The witnesses claimed having interrogated Fahad Waqas the accused as well, who after making an extra-judicial confession, sought their help and narrated the whole incident by

admitting that he had committed un-natural offence with deceased Muhammad Suleman. It is further alleged that the accused stated that the child had cried and was making noise, so in order to silence the wailing victim, he suffocated him to death. It was further stated by the complainant that the accused apologized for his action and requested for a compromise, which was refused by the complainant. The complainant also stated that he visited the police station alongwith Zafar Iqbal Councillor for action against the accused in accordance with law and for exhumation of dead body. This information was recorded in the Daily Diary by PW.16 Gulzaman ASI who brought this incident to the notice of senior officers. However a formal FIR was registered on 10.04.2004 because according to "Karwai Police" the information related to the death of a human being and exhumation of dead body which called for enquiry under the law to seek corroboration of the statement of complainant as well as procuring result of the post-mortem examination. All the facts, according to the "Ruppt" were brought to the notice of Inspector S.H.O. and DSP/SDR who have directed necessary procedural action.

3. Gul Zaman P.W.16 after recording the information, initiated investigation even though formal FIR had not been registered. He proceeded to the place of occurrence, took into possession the plastic "pallee" P.1 vide memo Ex.P.G. and made it in "two sealed parcel of the blood stained portions of the said "pallee" after separating and cutting the same." He interrogated the case generally and on 11.3.2004 an application for exhumation of the dead body of Muhammad Suleman was moved by him and necessary witnesses were also produced before the Judicial Magistrate for his satisfaction before securing an order for exhumation. The dead body of Muhammad Suleman was exhumed under the supervision of Judicial Magistrate PW.17 on 17.03.2004. The post-mortem was conducted by PW.4 Dr. Zulfiqar Ali on the same day. The witness also prepared the inquest report Ex.PK. However the serial number of the FIR could not be written on top of the Inquest Report because no FIR had been registered by then. Reference was made only to the "ruppt" No.11 dated 10.03.2004 in the inquest report Ex.PK. The witness also received three phials, 09 small boxes of plastic and two sealed envelopes from the doctor whose possession was assumed vide memo Ex.PA. The said articles were handed over to

Moharror of the police station the same day for onward transmission to the concerned quarters. The medical expert deferred giving his opinion as to the cause of death till he received the report of Chemical Examiner. The record shows that the samples taken from the dead body were dispatched to the Chemical Examiner on 17.03.2004 and the latter vide Ex.P.D. reported that Tranquilizer was detected in the viscera of dead body but its quantitative estimation was not possible. This report was prepared on 22.04.2004. However the police had already registered FIR No.20/2004 on 10.04.2004 formally on the basis of earlier "ruppt" No.11 dated 10.03.2004. The case was registered under section 302 of the Pakistan Penal Code 24 days after the information recorded in Ruppt and 30 days after the occurrence.

4. PW.15 Abdul Ghaffar SI, thereafter took up the investigation. After visiting the place of occurrence he recorded the statement of witnesses and took into possession pyjama P3, pair of plastic softee chappal P-2/1-2 of the deceased vide memo Ex.PG dated 10.04.2004. Search was made for the arrest of the accused. The draftsman Akhtar Naqash, Pw.6 was taken to the place of occurrence who took rough notes on the pointation of witnesses. Blood stained "pallee" was sent for analysis. He investigated the case till

15.04.2004 when the file was handed over to Muhammad Riaz PW.7. The complainant and the witnesses nominated Muhammad Aslam and Muhammad Baqar as companions of accused Fahad Waqas in the supplementary statement. On 18.04.2004 Bahli Khan S.I. PW.14 arrested Fahad Waqas and added section 377 as well as section 201 of Pakistan Penal Code in the crime report. The accused was medically examined for potency.

On 22.04.2004 the accused was sent to jail on judicial remand. Report under section 173 of the Code of Criminal Procedure was submitted in the Court on 27.04.2004 by local police requiring accused Muhammad Fahad Waqas alone to face trial.

5. The trial court originally framed charge against the accused Muhammad Fahad Waqas under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979, as well as sections 377 and 302 of the Pakistan Penal Code on 31.8.2004. During his examination in chief, the complainant PW.9 on 27.11.2004 attributed the role of erasing the foot prints at the place of occurrence to Muhammad Baqar who had allegedly locked the door and Aslam accused was saddled with the responsibility of bringing "pallee" for removal of dead body at night time. On an application being moved in the

trial court both the newly nominated accused were summoned. The trial court then framed amended charge against three accused on 04.1.2005 under section 377 read with section 511, section 302/34 and section 201/34 of the Pakistan Penal Code. The accused did not plead guilty and claimed trial.

6, The prosecution in order to prove its case produced nineteen witnesses at the trial. The gist of deposition of witnesses for the prosecution is as under:-

i. P.W.1 Ghulam Rasool stated that in his presence the postmortem of dead body of Muhammad Suleman was conducted and he signed the recovery memo Ex.PA through which various articles were placed in sealed envelopes which were handed over to Gul Zaman ASI.

ii. P.W.2 Ahmad Khan, constable No.413 stated that he received one Khakee envelope and two phials from Riaz Moharrar Head Constable on 19.03.2004 for onward transmission to the Chemical Examiner on the same day.

iii. Dr. Muhammad Ali, Medical Officer Rural Health Centre appeared at the trial as P.W.3. He stated that on 18.4.2004 he medically examined accused Fahad Waqas to test his potency and found him fit to perform sexual intercourse.

iv. Dr. Zulfiqar Sherazee appeared as P.W.4 to state that on the instructions and presence of Nazar Abbas Gondal, Judicial Magistrate Pind Dadan Khan, exhumation of the dead body of Muhammad Suleman deceased from his grave was effected on 17.3.2004. Thereafter he examined

the dead body from all angles and took anal swabs and sent the same through police to the Chemical Examiner for analysis.

v. Muhammad Aslam, Constable appeared as P.W.5 and stated that he was handed over nine sealed tins of plastic, one envelope and one sealed phial which items were deposited by him intact in the office of the Chemical Examiner on 19.3.2004.

vi. P.W.6 Akhtar Naqash, Draftsman visited the place of occurrence on the direction of the police and on pointation of the witnesses took rough notes at the crime site on 12.04.2004 for preparing the requisite site plan which was completed on 15.04.2004.

vii. Muhammad Riaz Moharrir Head Constable appeared as P.W.7 and stated that on 10.03.2004 at about 3.30/4.00 p.m. Gul Zaman, ASI handed over to him two parcels said to contain blood stained pieces of Palli i.e. plastic bag for safe custody. He also received “ nine tins of plastic, three phials and two envelopes after the post-mortem” which he kept in safe custody in the malkhana. On 19.03.2004 he handed over “ nine tins, one phial and one envelope to Muhammad Aslam 665/C for its deposit in the Office of Chemical Examiner, Lahore”. On the said date he also delivered two phials and one envelope to Ahmad Khan 413/C, for its deposit in the Office of Chemical Examiner, Rawalpindi. These were said to contain swabs of semen”. He also formally drafted FIR Ex.PE on 10.04.2004.

viii. Asif Khan 159/C appeared as P.W.8. He stated that on 14.04.2004 Muhammad Naeem Moharrir handed over to him a sealed parcel of palli for its onward transmission to the Office of Chemical Examiner, Lahore which was deposited on the same day.

ix. Muhammad Ehsan PW. 9, the complainant, repeated the facts narrated by him in the crime report with certain improvements.

x. Mst. Muniran Bibi wife of the complainant, appeared at the trial as PW.10 and supported the deposition of her husband. She also identified the clothes of her son on 4.10.2004.

xi. Muhammad Naeem 33/HC appeared as P.W.11 and stated that on 14.04.2004 he handed over a sealed parcel said to contain palli for its deposit in the Office of Chemical Examiner, Lahore to Asif Khan P.W. intact.

xii. P.W.12 Muhammad Yaseen grand father of the victim, a Wajtakar witness deposed a) that he had seen the victim with accused Fahad Waqas on the fateful day and b) that the accused had confessed having caused death of Muhammad Suleman.

xiii. Dost Muhammad appeared as P.W.13 to state that he, along with Yaseen and Javed, had also seen Muhammad Suleman deceased in the company of accused at the dera of Zafar Iqbal on the fateful day. Both of them are Wajtakar witnesses of last seen as well as the extra judicial confession.

xiv. PW.14 Bahli Khan, S.I. partly conducted Investigation of this case. He arrested the accused on 18.04.2004, got him medically examined, recorded statements of the prosecution witnesses under section 161 of the Code of Criminal Procedure and sent the accused to jail on judicial remand.

xv. Abdul Ghaffar SI, PW.15 too investigated the case. He also visited

the place of occurrence, prepared rough site plan, recorded statements of witnesses and took into possession the clothes and chappal worn by the deceased vide memo Ex.PH.

xvi. Gul Zaman, ASI appeared as P.W.16. He had investigated the case. The role played by him in the case has already been discussed in para 3 of this Judgment.

xvii. Mr. Nazar Abbas Gondal, Judicial Magistrate appeared as ¹⁸⁷ P.W.17. The dead body of Suleman deceased was exhumed in his presence.

xviii. Muhammad Aslam appeared as P.W.18. He stated that on 05.03.2004 he was working with a "mistri" on the roof top of Muhammad Iqbal when at 10.15. a.m. he saw Fahad Waqas with Suleman deceased in the compound of Dera of Zafar. They were sitting together. Thereafter he states that at 10.45.a.m. he saw Fahad Waqas while coming down from stair case but Suleman was not with him at that time. He further states that at 2.00/2.30.p.m. an announcement was made on the loudspeaker about the non availability of Suleman the missing child.

xix. Sardar Muhammad Ali, Inspector appeared as P.W.19. On 10.03.2004 Gul Zaman ASI had recorded the report in Roznamcha on the basis of the statement made before him by the complainant. The matter was reported to this witness and to the DSP and this witness had directed the registration of the case.

Amjad Ali constable, Muhammad Aslam son of Siddique and Muhammad Javed P.Ws were given up by prosecution being un-necessary.

7. Learned trial court after close of the prosecution evidence examined Fahad Waqas accused under section 342 of the Code of Criminal Procedure wherein he made the following statement:-

“This case, infact, was registered against me and my co-accused on the instigation of Zafar Iqbal Councilor and one Muhammad Riaz s/o Muhammad Nawaz. My uncles namely Muhammad Aslam and Muhammad Baqar co-accused were having enmity with Muhammad Riaz s/o Nawaz. Real brother of said Muhammad Riaz, namely Muhammad Mumtaz registered a case against my co-accused Muhammad Aslam and my maternal grandfather namely Mehdi Khan for the murder of Ahmad Yar alias Bala who was personal employee of said Riaz. Muhammad Mumtaz was the complainant of that case u/s 302, 148/149 of PPC which was registered against Muhammad Aslam s/o Mehdi Khan, Mehdi Khan s/o Ghulam Muhammad, Muhammad Bakhsh s/o Kamil Din, Khuda Bakhsh s/o Muhammad Bakhsh, Allah Bakhsh s/o Lal Khan, Muhammad Iqbal s/o Allah Bakhsh, Nazar Muhammads/o Muhammad Khan, Muhammad Safdar and Ehsan Ali sons of Muhammad Din, Muhammad Yaseen s/o Ghulam Muhammad, Muhammad Ziarat s/o Ghulam Muhammad, Gul Muhammad s/o Muzaffar Khan, Munawar Khan s/o Din Muhammad. Said Allah Bakhsh is maternal uncle of Muhammad Aslam, co-accused. Muhammad Iqbal is mamoonzad of my co-accused. Nazar Muhammad, Muhammad Safdar and Ehsan Ali are Khalazad of my co-accused. The story of last seen and extra judicial confession is false one. In fact the deceased was a patient of EPILEPSY as admitted by P.W.17 namely Abdul Ghaffar in his cross-examination. The complainant party administered some

wrong medicine containing tranquilizer which resulted in his death. It is clear from the report of Chemical Examiner Ex.PL which found mentioning that tranquilizer is detected in the above viscera. However quantitative estimation is not possible. All the P.Ws are related inter-se. They have deposed against me and my co-accused due to enmity and relationship with the complainant party”.

The accused did not take the advantage contemplated under section 340(2)

of the Code of Criminal Procedure. However Ahmad Yar second Headmaster, Govt. Elementary School Bhalwal Sargodha was produced in defence as DW1 who in his statement, took up the plea of alibi and stated that on the day of occurrence the accused Fahad Waqas remained in school from 8.45.a.m. to 2.45.p.m. and that the accused was innocent and not involved in the murder of Muhammad Suleman deceased.

8. The defence as well as the prosecution addressed the learned trial Court at the conclusion of the proceeding. Learned trial Court considered the arguments of the parties in the light of the record of the case and ultimately found the accused Muhammad Fahad Waqas guilty of the offence under section 316 of the Pakistan Penal Code alone and recorded the conviction and sentence as indicated in the opening paragraph of this judgment. Hence this appeal wherein the conviction and sentence recorded

by learned Additional Sessions Judge, Jehlum on 15.06.2005 has been challenged.

9. The learned trial court while convicting the accused found that the prosecution a) "failed to prove the voluntary made by accused" and b) also found that the motive i.e the commission of sodomy attributed to the accused Fahad Waqas was not proved by the prosecution because the medical report about the commission of sodomy was negative and c) that the cause of death was respiratory arrest by the use of tranquillizer.

10. We have gone through the file and perused the evidence as well as the impugned judgment along with the statement of accused and the deposition of the defence witness. Learned counsel for the parties including the complainant were heard at length on two different dates.

11. Learned counsel for the appellant stated that it was a case in which there was no direct evidence available on record in proof of either the offence of sodomy or of killing the minor victim after being subjected to sodomy. The sodomy had not been found proved by the learned trial court. This case therefore according to him depended upon indirect evidence which consists of a) ocular account, b) medical examination, c) "Wajtakar"

evidence of chance witnesses, d) last seen evidence, e) the chemical report, f) motive for the crime; g) the extra Judicial confession which was not believed, h) the probability of the story in the given facts and circumstances of the case and of course i) the recoveries. He also stated that the first information report was lodged with considerable delay.

12. The facts and situation in a case like this necessitates cautious handling because in assessing the culpability of an accused person in an unwitnessed but a grave offence, the parties tend to believe in every intriguing gossip. Under the circumstances the chains in the story have to be established to bring home the guilt to the accused without any reasonable doubt.

13. The learned trial court has already held that the Motive part of the story attributed by the complainant is shrouded in mystery because sodomy was not proved to have been committed with the minor. In the absence of sodomy there was no occasion for the victim to raise hue and cry to attract extraneous support. Therefore the contention of prosecution that killing of the minor was resorted to by the accused to silence the wailing victim is of no avail. The learned trial Court also found that the medical

evidence and the report of the Chemical Examiner did not support the sodomy theory put forward by the prosecution party. However, according to the report of the Chemical Examiner Ex.PD, tranquilizer was detected in the viscera which element had occasioned respiratory arrest and this element became the cause of death. From this disclosure about the cause of death learned trial Court had inferred that "it is clear that the accused, under trial, administered tranquillizer to facilitate the commission of sodomy with the victim. Hence the medical evidence has supported the prosecution case." It is not at all possible to arrive at the conclusion that the appellant administered sedative to the minor to facilitate sodomy particularly when the learned trial judge has himself, very correctly, refused to accept the sodomy theory of the prosecution. The inference has therefore no basis.

14. Learned trial court has believed the last seen theory advanced by the prosecution party without of course considering the impact of the fact that the three persons in the same village who claimed having seen the accused sitting in the "baithak" of Zafar Iqbal Councilor on 05.03.2004, during the morning hours along with the deceased, intriguingly kept quiet till 10.03.2004 even though the gory dead body of the minor victim had been

picked up from the same "baithak" on the same day at 2.30 p.m. During the search of the missing minor, his mother PW.10 tended to make others believe that on 05.03.2004 at 10.30 a.m. she saw accused "coming down from the stair case and on her asking about the missing child the accused in a "suspicious condition" claimed ignorance". PW.18 another chance witness, purports to support her but the question arises as to why the accused was not confronted with searching questions on 05.03.2004. Was the accused not present in the village? PW.18 and PW.10 strangely enough, made statements to the police *a month after the registration of the crime report* to allege the fact that they had seen the accused emerging from the "baithak" i.e. the place of occurrence. It is therefore not clear from which material available on the record of the case the learned trial court arrived at the "irresistible conclusion" that the accused "caused the death of Muhammad Suleman by administering tranquillizer to him for the purpose of satisfying un-natural lust". Learned trial court, it appears, was not persuaded by the principle of safe administration of criminal justice enunciated by the superior judiciary. The fundamental principle of universal application in cases, whose decision depends on circumstantial evidence, is that conviction can be recorded only

if the incriminating fact is incompatible with the innocence of the accused and that the guilt is not capable of any other reasonable explanation. The circumstantial evidence, if this is the only piece of evidence, must be of sterling value without omitting any link in the chain of events. Judicial conscience abhors situations where the lacunas are capable of being filled by cooked up statements manipulated after the occurrence on account of substantial consultation. In order to cover such situations Allah Almighty, in His Wisdom, has guided human beings in verse 12 Chapter 49, Sura Al-Hujrat of Holy Quran in the following terms:-

“O you who believe! avoid most of suspicion, for suspicion in some cases is a sin, and donot spy nor let some of you backbite others”

In this view of the matter it must be kept in mind that efforts on the part of the trial court or the complainant party to stretch evidence in favour or against the accused person should be scrupulously eschewed in criminal trials.

15. This last seen evidence advanced by Wajtakar witnesses was sought to be supported by the evidence of decrepit and artificially secured extra judicial confession. Such an effort will not stand the complainant in

good stead, particularly when in this case the learned trial court refused to believe the extra judicial confession made before Muhammad Yasin PW.12, Dost Muhammad PW.13 and Javed the given up witness for the prosecution.

16. PW.10 Mst Muniran Bibi, mother of the victim admitted in her cross-examination that it was within her knowledge that Muhammad Suleman was last seen by her with Fahad Waqas accused but despite this fact the complainant had accepted the first burial meal from the accused after the deceased was laid to rest, instead of confronting the accused with the last seen element. At that time she did not make a mention even to her husband regarding the coming down of Fahad Waqas from the stair case, on the day of occurrence. It is therefore difficult to accept that on the one hand she claims having seen the accused emerging from the bloody place of occurrence and on the other hand she accepted the first meal from the accused party after the burial.

17. The recovery of blood stained "pallee" on 10.03.2004 or the production of clothes of deceased before the Investigating Officer on 10.04.2004 do not by any stretch of imagination connect the accused with

the offence for the simple reason that recovery of blood stained "pallee" lends support only to that portion of the story which speaks of the dead body having been found lying on the "pallee" and further that it was stained with the blood of deceased who probably met an un-natural death. The fact that softi foot wear, belonging to deceased remained outside the "baithak" of Zafar Iqbal Councillor for a five weeks and was finally retrieved on 10.04.2004 and produced before police will not be considered material for fixing liability on any one. I am fortified in this view by decision of the Supreme Court of Pakistan given in the case of Bashir Ahmed alias Munno Vs. The State, reported as NLR 1996 criminal 234 where the recovery of blood stained Churri and clothes was effected five days after the occurrence and such recovery was not deemed a reliable piece of evidence for the purpose of conviction. It is therefore not at all safe to rely on such a recovery.

18. An incisive appraisal of the site plan Ex.P.D. prepared by Akhtar Naqash PW.6 on 15.04.2004, read with relevant portions of the prosecution evidence displays the following features:-

i/ That the place of occurrence is a room built on a four feet raised platform which is accessible from the open space adjoining the street through a stair case;

ii/ The Wajtakar witnesses were at points No.4,5 and 6 at ground level in the street from where it is well nigh impossible to casually see two human figures sitting side by side in the middle of a room constructed on a raised platform.

iii/ The persons sitting at point No.3 of the room cannot in fact be spotted from the street;

iv/ There is no reason advanced by the Wajtakar witnesses as to why, on their way, they side tracked about 20-30 feet only with the object of peeping in the "baithak" of Zafar Iqbal Councilor. Was it known to these witnesses that a bloody scene will occur shortly for which they must preserve whatever they had seen in this room so that they should be able to testify whatever they had seen? It is also difficult to believe that all the three witnesses would be converging their attention only one and the same object while going in the street without there being any thing in the room to attract their attention.

v/ The victim, aged four years, does not have that height which could be spotted by a passer by from outside the room while the observers were four feet lower than the floor of raised platform.

19. The last seen theory does not inspire confidence also for the following reasons:-

i. PW 18 Muhammad Aslam, is a chance witness who strangely enough with minute precision of time deposed that he saw the deceased in the company of accused firstly in the compound of Zafar Iqbal *at 10.15 a.m.* and then secondly he saw the accused coming down the stair case *alone at 10.45 a.m.* and then at the third occasion the same witness saw the accused standing for a while besides PW.10 Mst. Muniran Bibi, mother of the accused. This sort of time-precision coming from the mouth of a chance witness is certainly uncanny particularly when the witness admitted in his cross-examination that even though announcement about the missing child was made in the village on the loudspeaker yet he did not tell any body that he had seen the child with the accused only a short while ago. Even on 10.3.2004, when the police officer Gul Zaman ASI PW 16 came to the village, this chance witness admits that he did not tell him that he had last seen the child with accused on the fateful day.

ii. PW.16 Gul Zaman ASI stated that “no mention was made in the said “Ruppt” for the deceased Suleman as having been last seen by Mst. Muniran with Fahad Waqas accused.”

iii. The complainant PW.9 admitted in the cross-examination that he did not produce Muhammad Yasin, Javaid and Dost Muhammad before the S.P, D.S.P and SHO Pind Dadan Khan on 10.04.2004. There is no explanation for this lapse.

iv. It is in the evidence of PW.10 herself that the parents of accused live in Sargodha and she did not know about the arrival of accused in village Kahana.

v. It was for the first time on 12.04.2006 that the information was given to the draftsman PW6 *about the places from where the three* Wajtakkar witnesses reportedly saw the deceased last sitting with accused on 05.03.2004.

vi. Out of three other witnesses of last seen Muhammad Javed has not been produced. Muhammad Yasin PW.12 is maternal grand father of the deceased. He is in fact a witness of extra judicial confession along with Dost Muhammad PW.13 and Javaid remains the given up witness. The extra-judicial confession theory has not been accepted by the learned trial court.

vii. On 10.04.2004 PW.15 Abdul Ghaffar S.I. started investigation. On 15.04.2004 he obtained the copy of site plan Ex.PD and Ex.PD/1

prepared by the draftsman. He also recorded statements of police officials.

He remained at the spot for five days. In cross examination he stated as under:-

"No one stated before me that Suleman deceased was last seen with Aslam and Baqar accused. No one recorded statement before me regarding extra judicial confession."

This witness, at the trial, also deposed that it is correct that on 10.04.2004, SSP Range Crime, ASP City (acting DPO), Jhelum, DSP. P.D.Khan, visited the place of occurrence in his presence. He further stated that Muhammad Ehsan, Javaid, Dost Muhammad, Muniran Bibi, Yaseen and Muhammad Aslam son of Ashraf appeared before them. *In his presence, no one stated about the extra judicial confession of accused Fahad Waqas before them.*

The witness expressed no opinion regarding the guilt or non-involvement of the accused in the case.

20. The following points also need consideration:

- i. The Wajtaker witnesses reportedly met Fahad accused on 08.03.2004 when the latter is said to have made the extra judicial confession. This was precisely the day when the accused was in Chak No.18 Shumali, Bhalwal, District

Sargodha and had appeared in the examination as shown in Ex.DW1/C, copy of the Daily Attendance Register.

- ii. The complainant stated in the Rupt dated 10.03.2004 that accused Fahad did not enjoy good reputation. In response to a pointed question about the reputation of Fahad accused, PW.13 the Wajtakar witness stated that he did not know whether any case involving moral turpitude of such like nature was registered against Fahad accused.
- iii. PW.13 admitted in his cross-examination that they had "guessed" about the involvement of accused in this case.

21. In this view of the matter the last seen occurrence has no intrinsic worth. Mere allegation, and that too made belatedly, that the deceased was last seen alive with the accused would not be sufficient to maintain conviction. The instant case rests entirely on circumstantial evidence but the chains in the story are not unbroken. The lack of motive, only the last seen alive together theory but disbelieved extra judicial confession not lead to the conclusion of guilt. The complainant himself admitted that no one had either seen Fahad Waqas accused committing sodomy or committing murder of the Child. Dead body was not discovered on the pointation of the accused. Nothing incriminating had been recovered

from the accused. Medical evidence did not corroborate the theory of sodomy. The trial court had rightly not believed the extra-judicial confession because on the date the accused was alleged to have confessed before the PWs in the village, he was in fact else where in the school and had appeared in the examination. It means important links in the story, based upon circumstantial evidence were missing. The concatenation is not all complete. Such a deficiency is fatal for the prosecution. No conviction can be recorded on the contents of the crime report alone.

22. The question as to the cause of death is central in this case. Did the victim die as a result of suffocation caused by an unfriendly hand who attempted sex assault? Did the child die due to epilepsy attack? Was it caused by the use of excessive dose of intoxicant? Was the death of the child result of any injury found on the person of deceased? The first information conveyed to police was that there was blood on the head and buttocks of the victim but the complainant opted not to discover the cause of bleeding. In order to determine the cause of death in this case the following points deserve consideration:-

i. The opinion of the medical officer after the post mortem report Ex.PC excludes the possibility of sodomy as the swabs were not found stained with semen and it was observed: "anal ring is round, no tear visible",

ii. The tongue of dead body was found pressed between the teeth and it was protruding which obviously indicates a fit which constricted the muscles.

iii. Chemical Examiner's report Ex.PD is specific: "Tranquillizer is detected in the above viscera. However quantitative estimation is not possible."

iv. The deceased was stated to be suffering from epilepsy. The suggestion of epilepsy put on behalf of the accused was however denied a) by Pw.12 Muhammad Yasin, the grand father of the victim, b) Pw.13 Dost Muhammad claimed ignorance whether the father of victim and Zafar had informed the police that the deceased suffered ill-health due to epilepsy; c) PW.15 Abdul Ghaffar S.I., who had partly investigated the case, stated categorically that the complainant, Muhammad Iqbal and Zafar Councillor appeared before him and stated that *they had already informed the police on telephone that Suleman deceased was a patient of epilepsy and had died due to fits*. The witness further stated that on 10.04.2004 eleven persons, including PWs and complainant, had stated before him *"that the rupt was not registered due to the reason that Suleman died due to epilepsy fits."*

23. The only inference that can be drawn is that the cause of death indeed was respiratory arrest due to the effect of tranquillizer. Whether it was an innocent over-dose administered by some family member or

otherwise is not free from doubt. There is no evidence that any tranquillizer was recovered from accused or some shop keeper ever sold it to any one in the village. The tranquilizing theory however came to light only after 22.04.2004 when the report of the Chemical Examiner was sent by him but the knowledge of the victim suffering from epilepsy had become known by 10.04.2004 i.e., 12 days before the report of the chemical examiner became public. In this view of the matter what is apparent is that the child did not die a natural death but how it happened is not clear at all. Hence it is not safe to attribute the cause of death to the accused because the mode and manner of death under the circumstances is capable of alternate explanation.

24. The deposition of witnesses in this case has not inspired confidence. Confidence develops as a result of reliability. Reliability of a witness depends upon a number of factors. The following elements inter-alia may be considered by courts in assessing the intrinsic worth of a witness:

- i. who does not make calculated improvements,
- ii. who does not inflate the incident,
- iii. who does not un-necessarily involve innocent persons,
- iv. who appears natural in his deposition,
- v. whose testimony inspires confidence,
- vi. who is by and large consistent and does not contradict his

- previous statement at crucial points,
- vii. who does not suppress material facts,
 - viii. who is steadfast in his statement and his deposition does not suffer from infirmities,
 - ix. who is not a motivated witness,
 - x. who appears to be independent and not under pecuniary influence of the party calling him,
 - xi. who does not bear grudge against the accused,
 - xii. who conducts himself in a balanced manner and his demeanour in court is not questionable,
 - xiii. who is not a stock witness, and
 - xiv. does not deliberately evade answering a question whose reply will be beneficial to the accused or detrimental to the case being supported by him.

25. The following chart will indicate the various steps taken by the complainant and the prosecution in this case from the date of occurrence upto the trial.

<u>SUBJECT</u>	<u>DATE</u>	<u>TIME</u>
- Death of child	05.03.2004	10.00 a.m.
- Recovery of blood stained dead body from the Baithak of Zafar Iqbal	05.03.2004	3.30 p.m.
- Burial	05.03.2004	night time
- Fahad accused nominated in the "Ruppt" No.11 P.S. Lilla: Ex.PE on the strength of information given to the complainant by Muhammad Yasin, Dost Muhammad and Muhammad Javed the three Wajtakkar Witnesses. They are persons before whom accused had allegedly confessed.	10.03.2004	1.00 p.m.
- Visit of PW16 ASI Gul Zaman to the Place of occurrence. Recovery of		

- | | | |
|---|------------|-------------|
| Blood stained plastic "pallee"
Vide memo Ex.P.G. | 10.03.2004 | |
| - Exhumation of dead body and
post mortem by PW.4. | 17.03.2004 | 12.30 p.m. |
| - Formal FIR 20/2004 P.S. Lillah
under Section 302 PPC registered
on the strength of Rupt No.11
dated 10.03.2004 | 10.04.2004 | 12.05. p.m. |
| - Supplementary statement of PW.9,
the complainant when he nominated
additionally Muhammad Baqir and
Muhammad Aslam alongwith
Muhammad Fahad Waqas
(Both brothers) as accused. | 10.04.2004 | |
| - Pyjama and soffee
of the deceased reportedly found
from the place of occurrence lying
near the dead body: produced
before PW15. | 10.04.2004 | |
| - Draftsman PW.6 took notes for
preparing site plan which was
made on 15.04.2004. | 12.04.2004 | |
| - Report Ex.PM Chemical Examiner
that plastic pallee was stained
with blood which was found to be
of human origin by Serologist vide
Ex.PP dated 02.03.2005. | 15.04.2004 | |
| - Potency Test of accused after
arrest | 18.04.2004 | |
| - Accused Fahad sent to Judicial
lock up | 22.04.2004 | |
| - Report of Chemical Examiner
that Tranquilizer was detected
in the viscera | 22.04.2004 | |
| - Report under section
173 Code of Criminal Procedure
only against Fahad accused | 27.04.2004 | |
| - Accused Fahad Waqas alone
Charged u/s 12 of Zina Ordinance
and 377 PPC and 302 PPC and 201 PPC | 31.08.2004 | |
| - Baqar and Muhammad Aslam
introduced as accused by
Complainant PW.9 | 27.11.2004 | |
| - Accused Baqar and Muhammad
Aslam were charged along-
with Fahad by learned trial court
under section 377/511 302 +201(34) | 4.1.2005 | |
| - Report Ex.PM | 15.04.2004 | |

that plastic "pallee" was stained with blood.

This chart illustrates the following things:-

- i. Dead body of a child was found from a house other than his own. There was blood on the head and buttocks of the dead body.
- ii. Police investigation ensued before formal registration of FIR.
- iii. Police investigation commenced immediately after the recording of Rupt No.11 dated 10.03.2004.
- iv. The date of unnatural death is 05.03.2004 whereas Rupt No.11 was lodged on 10.03.2004 and FIR lodged still a month later i.e. on 10.04.2004.
- v. For all practical purposes the Rupt No.11 dated 10.03.2004 was the First Information Report.
- vi. Cause of death was not known till 22.04.2004 when the report of chemical examiner was signed.
- vii. It was known that the deceased child suffered from fits of epilepsy.
- viii. The names of two additional accused did not find mention in the "Challan" dated 27.04.2004. These accused were nominated in the examination in chief of the complainant on 27.11.2004 where after these newly added accused were summoned by learned trial court and a fresh charge was framed against all the three accused on 04.01.2005.

26. This case, as is apparent from what has been discussed above, does not depend upon direct unimpeachable evidence. It rests upon disjointed circumstantial evidence. The broken claims in the story, as narrated by prosecution suggest chequered behavior which is indeed not the staff of a natural chronicle. The Motive theory and the extra-judicial confession relied upon by the prosecution, were not accepted by the learned trial court. The medical evidence did not support the allegation of sodomy.

Nothing incriminating was recovered from the accused. The FIR, if we choose to call the second report dated 10.04.2004 an FIR, was lodged after considerable delay and deliberation and even after registration of crime report, the improvements on the part of prosecution did not abate. The last seen evidence is not worthy of credence. The deposition of the witnesses does not inspire confidence. Under the circumstances the impugned judgment cannot be maintained. It is not possible for us to agree with the learned Deputy Prosecutor General that we should presume intoxicant was administered by the accused to facilitate the offence of sodomy. There is no evidence whatsoever on record in support of this contention. In fixing criminal liability conjectures cannot be employed. The prosecution has to stand on its own legs. The ingredients of the offences must be proved. Benefit of doubt accrues only to the accused. The complainant has never been considered a beneficiary of doubts or speculations. The half hearted assertion that police investigation was faulty also does not help the complainant party. No private complaint was filed by Pw.9, Muhammad Ehsan if he thought that the police was biased.

27. We are consequently not persuaded to maintain the conviction and sentence recorded by the learned trial court. By giving benefit of doubt we accept Criminal Appeal No.212/I of 2005 and set aside the judgment dated 15.6.2005 delivered in Sessions Case No.07 of 2004, Sessions Trial No.11 of 2004. The appellant is already on bail. His bail bonds are cancelled.

S. Haider

JUSTICE SYED AFZAL HAIDER

M. Z. Yasin

JUSTICE MUHAMMAD ZAFAR YASIN

Announced in open Court
on 21st April, 2009 at Islamabad
*Mujeeb ur Rehman**

S. Haider

Fit for reporting