IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT:

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

JAIL CRIMINAL APPEAL NO.19/I OF 2017.

SALEEM ULLAH SON OF RASOOL BAKHSH,CASTE HARONI, RESIDENT OF KILLI DON,SURAB.
(NOW PRESENTLY CONFINED IN CENTRAL JAIL, KHUZDAR).

APPELLANT

VERSUS

THE STATE.

RESPONDENT

COUNSEL FOR THE APPELLANT	MR.ABDUL KARIM KHAN YOUSAFZAI, ADVOCATE.
COUNSEL FOR THE STATE	MR. MUHAMMAD NAEEM KHAN KAKAR, ADDITIONAL PROSECUTOR GENERAL BALOCHISTAN.
COUNSEL FOR THE COMPLAINANT	MR.ASGHAR KHAN PANEZAI, ADVOCATE.
FIR NO. AND DATE & POLICE STATION	NO.48/2016 DATED 24.10.2016, P.S. SURAB, DISTRICT KALAT.
DATE OF IMPUGNED JUDGMENT OF TRIAL COURT	31.05.2017
DATE OF PREFERENCE OF APPEAL	08.09.2017
DATE OF HEARING	06.12.2018
DATE OF DECISION	06.12.2018
DATE OF JUDGMENT	11.12.2018

CRIMINAL REVISION 03/Q OF 2017

MUHAMMAD MURAD SON OF SULEMAN,
CASTE SUMALANI, RESIDENT OF SURAB,
DISTRICT KALAT.
.

PETITIONER

VERSUS

1. SALEEM ULLAH SON OF RASOOL BAKHSH , CASTE HARONI, RESIDENT OF KILLI DON, SURAB, DISTRICT KALAT,

2. THE STATE.

RESPONDENTS

COUNSEL FOR THE PETITIONER	MR. ASGHAR KHAN PANEZAI, ADVOCATE
COUNSEL FOR THE STATE	MR.MUHAMMAD NAEEM KHAN, KAKAR,ADDITIONAL PROSECUTOR GENERAL BALOCHISTAN
DATE OF PREFERENCE OF CRIMINAL REVISION	14.11.2018
DATE OF HEARING	06.12.2018
DATE OF DECISION	06.12.2018
DATE OF JUDGMENT	11.12.2018

JUDGMENT

SHAUKAT ALI RAKHSHANI, J: Through this consolidated judgment, we intend to dispose of Jail Criminal Appeal No.19/I of 2017 filed by appellant Saleem Ullah as well as Criminal Revision No. 03/Q of 2017 filed by petitioner Muhammad Murad for enhancement of the sentence of the appellant.

Questioning the legality and factuality through Jail Criminal Appeal No.19/I of 2017, appellant Saleem Ullah has impugned the judgment dated 31st of May, 2017 (hereinafter called as the "impugned judgment") handed down by learned Sessions Judge/Juvenile Court, Kalat (hereinafter referred as "the trial court"), in FIR bearing Crime No.48/2016 of Police Station Surab, District Kalat, whereby the appellant has been found guilty, as such convicted under section 302 (c) of the Pakistan Penal Code (hereinafter referred as "The Penal Code") and sentenced to suffer fourteen (14) years R.I as ta'zir and under section 394 read with section 397 of the Penal Code, sentenced to suffer seven (7) years R.I with a fine of Rs.20,000/- (Rupees twenty thousand only). In case of default of payment of fine to further suffer S.I for six (6) months inclusive of the benefit of section 382-B of the Criminal Procedure Code (hereinafter referred as "The Code") as well as directed the sentences to run concurrently.

2. The resume of the facts, apparent on the record suggests that on 24th of October, 2016 at 05.30 p.m (evening), complainant Muhammad Murad (P.W.1) lodged an FIR No.48/2016 (Ex.P/12-A) with Police Station Surab, District Kalat, complaining that his son Niamat Ullah (deceased) was student of 10th class in Government High School, Surab, who on the same day alongwith his close relative Habib-ur-Rehman (P.W.5) went to school on his Irani motorcycle but did not return home. According to him, Habib-ur-Rehman (P.W.5) told him on query that his son had left the school at 11.00 a.m, saying that he had some work with appellant Muhammad Saleem, who has a mobile shop in Surab bazaar.

He maintained that at about 4.45 p.m, he along with Habib-ur-Rehman (P.W.5) reached at Civil Hospital Surab, where they found the dead body of his son lying in a pool of blood and was let to know that Abdul

Hakeem (P.W.2) had seen the appellant Muhammad Saleem alongwith the deceased going towards "***Tariqi Mountains***" where appellant Muhammad Saleem snatched the motorcycle of his deceased son and murdered him.

The deceased was examined by Dr. Muhammad Sharif (P.W.8), who issued medico-legal certificate (Ex.P/8-A) and observed an entrance bullet injury on the anterior surface, right side of chest wall measuring $^{1}/_{4}$" x $^{1}/_{4}$" with a wound on posterior surface right side of chest wall, measuring 1"x1" and a lacerated wound on the right occipital region of skull measuring 2"$^{1}/_{2}$" x $^{1}/_{4}$" with the opinion that the cause of death was due to excessive loss of blood.

3. After being entrusted with investigation, S.I Abdul Khaliq (P.W.12) recorded the statement of Habib-ur-Rehman (P.W.5), prepared Inquest report (Ex.P/12-B), went to the crime scene at "***Tariqi Dam***" and in the presence of H.C Abdul Khaliq (PW.9) and ASI Ghulam Muhammad (not produced) prepared memo of inspection of place of crime as (Ex.P/9-A), un-scaled site plan (Ex.P/12-C) of crime scene and subsequently got prepared scaled memo of crime scene (Ex.P/12-D). An empty shell (Art-P/7) alongwith a live cartridge (Art.P/6) contained in parcel No.1, was also secured from crime scene through recovery memo (Ex.P/9-B) in the presence of H.C Abdul Khaliq (PW.9) and ASI Ghulam Muhammad (not produced), blood stained stones (ten in number) (Art-P/10) contained in parcel No.2 were taken into possession through recovery memo (Ex.P/9-C).

On 25th of October, 2016, the appellant was arrested and secured the parts(Art.P/11 to P/23) of the motorcycle alongwith spanner (Art.P/24), allegedly belonging to the deceased from the house of the appellant in the presence of H.C Abdul Khaliq (P.W.9) and ASI Ghulam Muhammad through recovery memo (Ex.P/9-D).

Proceeding ahead with the investigation, on 26th of October, 2016, on the disclosure of appellant blood stained clothes (Art.P/27) contained in parcel No.03 of the deceased were taken through recovery memo (Ex.P/10-A) in the presence of Abdul Hameed (P.W.10) and Abdul Rehman. On the same day a Nokia mobile phone No.CE-0168, (Art-P/28) black in colour without SIM stated to be of the deceased was got recovered from an iron box on the pointation of the appellant, which was taken into possession through recovery memo (Ex.P/11-A) in the presence of Riaz Ahmed (P.W.11) and Rehmatullah.

The parts of the motorcycle were stated to be identified by father of the deceased Muhammad Murad (P.W.1), whose supplementary statement was also recorded and produced as (Ex.P/1-B).

On 28th of October 2016, the investigation was transferred to I.P/SHO Muhammad Yousaf (not produced). The appellant allegedly made disclosure regarding recovery of T.T Pistol. The memo of disclosure was produced as (Ex.P/7-A) and in consequence thereof recovery of T.T pistol (Art.P/3) was effected vide memo (Ex.P/7-B) contained in parcel No.4, from the room of his house beneath a plastic bag alongwith an empty magazine.

On the same day, on the pointation of the appellant, the memo of place of occurrence (Ex.P/7-C) was prepared in the presence of Abdullah (P.W.7) and Abdul Wahid.

On 30th of October, 2016, investigation was re-entrusted to S.I Abdul Khaliq (P.W.12), who on 2nd of November, 2016 got recorded the statement of injured Abdul Hakeem (P.W.2) under section 164 of the Code from the Judicial Magistrate Surab(not produced) and on 5th of November, 2016 remanded the accused to judicial custody and send parcel Nos.2 and 3 to Forensic Science Laboratory, Quetta for analysis.

The incomplete challan was produced as (Ex.P.12/E), positive F.S.L report of the pistol as (Ex.P/12-F), report of the blood stained clothes (Ex.P/10-A) and stones (ten in number) as (Ex.P/9-C), complete challan as (Ex.P/12-H).

4. On receipt of challan, in consequence of an enquiry initiated under section 7 of the Juvenile Justice System Ordinance, 2000, by the trial court, the appellant was declared as juvenile and thereby tried in accordance with the provision of the said Ordinance of 2000.

The trial court formally charged the appellant under section 17(4) of the Offences Against Property (Enforcement of Hudood) Ordinance, 1979, (hereinafter referred as "Ordinance No.VI of 1979") whereafter the prosecution was called upon to produce the evidence in order to substantiate the charge. The prosecution in course of substantiating the charge, produced as many as twelve witnesses; Muhammad Murad (P.W.1), Abdul Hakeem (P.W.2), Raza Muhammad (P.W.3), Abdul Nabi, Constable (P.W.4), Habib-ur-Rehman (P.W.5), Abdul Wahab (P.W.6), Abdullah (P.W.7), Dr.Muhammad Sharif (P.W.8), Abdul Khaliq, Head Constable (P.W.9), Abdul Hameed (P.W.10), Riaz Ahmed, Head Constable (P.W.11) and S.I Abdul Khaliq, I.O (P.W.12).

5. Refuting the allegations and evidence, so brought forwarded by the prosecution, while being examined under section 342 of The Code, the appellant professed his innocence, however, did not step into the witness box in his defence as envisaged under section 340(2) of the Code.

The trial court held the appellant guilty of the charge, thus on 31st of May, 2017, convicted and sentenced him in the terms mentioned hereinbefore in para No.1, which judgment has been impugned before this Court, through Jail Criminal Appeal No.19/I of 2017 by appellant and Criminal Revision No.03/Q of 2017 by petitioner Muhammad Murad.

6. We have heard Mr.Abdul Karim Khan Yousafzai Advocate, representing the appellant as well as Mr.Asghar Khan Panezai Advocate, representing complainant and the petitioner in Criminal Revision No.3/Q of 2017 as well as Mr. Muhammad Naeem Khan Kakar, Additional Prosecutor General Balochistan, at length and perused the record cover to cover with their valuable assistance.

Mr.Abdul Karim Khan Yousafzai Advocate, representing the appellant inter-alia contended that the occurrence is unseen and except the recovery of the crime weapon and positive F.S.L report, there is no other evidence on record. He urged that before the recovery of pistol from the house of the appellant on his pointation, the police officials on the alleged pointation had recovered parts of the motorcycle of the deceased from his house but on the said day the pistol could not be recovered and subsequently recovery of the crime weapon seems to have been foisted against him to strengthen the case. He also maintained that the F.S.L report remained in an unsafe custody of police and sending the same alongwith empty shell to Forensic Science Laboratory after a long delay without any explanation, has depreciated the credibility of recovery of crime weapon and the report of F.S.L. According to him, disclosure is hit under Articles 38 and 39 of the Qanun-e-Shahadat Order, 1984 when the recovery itself and the F.S.L report thereof loses its evidentiary value. He emphasized that the facts and circumstances of the case has made Abdul Hakeem (P.W.2) a suspect as the deceased and the said witness (P.W.2) have received injuries, which shows that there had been a fight inbetween them but such crucial aspect has not been investigated by police, rather the appellant has been made scapegoat, involving him as a culprit. Lastly, he requested for setting aside the impugned judgment, being result of mis-reading of the evidence and prayed for acquittal of the appellant.

Conversely, Mr.Muhammad Naeem Khan Kakar, learned Additional Prosecutor General Balochistan assisted by counsel for the complainant Mr.Asghar Khan Panezai, Advocate, strenuously rebutted the arguments so put forth by the counsel for the appellant by maintaining that although there is no eye witness of the occurrence, committing the murder of the deceased but the circumstantial evidence soon after the occurrence furnished by Abdul Hakeem(P.W.2) does substantiate the culpability, corroborated by the recovery of the parts of the motorcycle of the deceased recovered from the house of the appellant as well as recovery of crime weapon made on his pointation, supported by medical evidence and F.S.L report of the crime weapon. Lastly, requested that the instant appeal being meritless, requires dismissal.

Mr.Asghar Khan Panezai, Advocate, appearing in Criminal Revision No.03/Q of 2017 filed by Muhammad Murad for enhancement of the sentence argued that the reason of tender age attributed and assigned by the trial court for awarding lesser punishment is not permissible as it cannot be considered as a mitigating circumstance. He added that since the appellant has been extended the premium as a "child" under the Juvenile Justice System Ordinance, 2000, therefore, such further relief of age is an undue favour, causing miscarriage of justice, which is illegal, henceforth requires interference by this Court.

7. The occurrence of murder of deceased Niamatullah is admittedly unseen. None has seen the appellant committing murder of the deceased with his own eyes. The case of the prosecution is dependent on the circumstantial evidence. Complainant Muhammad Murad (P.W.1) was told by Habib-ur-Rehman (P.W.5) that he alongwith deceased Niamatullah went to meet appellant but when they did not find him, he returned home, which

circumstance led the complainant Muhammad Murad (P.W.1) to suspect the appellant as culprit.

After scanning of the evidence in depth, we have concluded that the incriminating circumstantial evidence, so collected and brought before this Court can be classified in the following pieces of evidence:-

i) Testimony of Abdul Hakeem (P.W.2).
ii) Recovery of unassembled parts of the snatched motorcycle (made in Iran), having no registration and Nokia mobile set.
iii) Disclosure and recovery of pistol (crime weapon) effected from the house of the appellant on his pointation.
iv) Report of Forensic Science Laboratory of the crime weapon.
v) Pointation of place of occurrence by appellant, and
vi) Medical evidence.

8. While, unfolding the prosecution case, the story begins with Abdul Hakeem (P.W.2), who is the star witness of the entire episode of instant crime. He testified that on 24th of October, 2016, while he was present in "***Tariqi Mountains***" with his camel to get woods, he met Niamatullah (deceased) alongwith appellant Muhammad Saleem at "***Tariqi Riven***" (dry) near "***Tariqi Dam***" and that appellant Muhammad Saleem on query told that they are going to sell the motorcycle of Niamatullah (deceased), whereafter they left. He maintained that at about 2.00 p.m, when he reached near the road, appellant came on the motorcycle and told him that Niamatullah(deceased) has fallen from the motorcycle and asked him to accompany, so to bring him. He deposed that when he refused to accompany him on the excuse that he cannot leave the camel alone, appellant pushed him, resultantly he fell down into the Riven (dry), whereafter the appellant started hitting him on his head with stones, whereby he got severely injured. He further stated that subsequently he was brought to the Civil Hospital. In reply to a question, he admitted that

he did not see appellant Muhammad Saleem committing murder of Niamatullah.

The testimony of Abdul Hakeem (P.W.2) can at the best be considered as incriminating evidence to his extent, being injured by the appellant but cannot be used as incriminating evidence with regard to the murder of Niamatullah (deceased) for he has not seen the appellant causing injury or committing murder.

It may not be irrelevant to make note of the fact that Abdul Hakeem (P.W.2) has got registered a separate case vide crime No.47/2016 registered under the offences of section 324 of the Penal Code for which appellant was booked, tried and after conclusion of the trial, he was convicted under section 337-A(i) of Penal Code and sentenced for one (1) year R.I with payment of Daman of Rs.10,000/-(Rupees ten thousand only) to be paid to injured Abdul Hakeem, rendered by learned Sessions Judge/Juvenile Court, Kalat vide judgment dated 31st of May, 2017. The appellant assailed the said judgment, before this Court, however on 6th of December, 2018, when the matter came up for regular hearing, the counsel for the appellant did not press the appeal on the ground that the appellant has served out the sentence. Henceforth, the appeal was dismissed for not being pressed.

Reverting to the testimony of Abdul Hakeem (P.W.2), a careful examination of his deposition has made us to understand that the deceased was lastly seen by him with the appellant and that after a while he was approached by the appellant to help him in rescuing Niamatullah (deceased), who statedly had fallen from the motorcycle, receiving injuries. We are conscious of the fact that mere presence of the appellant with the deceased or lastly seen in his company alone does not hold him culpabable, unless strong corroborative

evidence is available, convincing enough with unbroken chain of events, relating the dead body with the appellant. Last seen evidence has always been considered as a very weak form of evidence, provided there is strong impeachable and overwhelming corroborative evidence.

The statement of Abdul Hakeem(P.W.2) recorded under section 164 of The Code itself cannot be considered as a piece of evidence except that it is usually recorded by the prosecution, when there is apprehension of disappearance and whose appearance cannot be procured before the Court. Imperative to add here, that sometimes the prosecution record the statement of the witness under section 164 of The Code, apprehending that the witness may resile from his statement before the court. If the witness appears in the witness box during the course of trial and supports his statement recorded either under section 161 or under section 164 of The Code, the statement recorded before the court needs to be appraised in view of their earlier statement, which can merely be used for contradicting him but for no other purpose.

Suffice it to add here that the case of the prosecution mainly rests upon deposition of Abdul Hakeem (P.W.2),of last seen evidence coupled with the corroborative evidence of recovery of crime weapon and articles of the deceased. The Hon'ble Supreme Court of Pakistan in the case of FAYYAZ AHMAD VERSUS THE STATE (2017 SCMR 2026) has enunciated certain principles requiring to be followed, while dealing with such like cases, which for the purpose of ready reference is reproduced herein below:

i) *"There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the prosecution.*

ii) *The proximity of the crime scene played a vital role because if within a short distance the deceased was done to death then, ordinarily the inference would be that he did not part ways or separate from the accused and onus in such regard would shift to the accused to furnish those*

circumstances under which, the deceased left him and parted ways in the course of transit.

iii) The timing when the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.

iv) There must be some reasons and objects on account of which the deceased accompanied the accused towards a particular destination, otherwise deceased being in the company of the accused would become a question mark.

v) There must be some motive on the part of the accused to kill the deceased otherwise the prosecution had to furnish evidence that it was during the transit that something abnormal or unpleasant happened which motivated the accused to kill the deceased.

vi) Quick reporting of the matter without any undue delay was essential, otherwise the prosecution story would become doubtful for the reason that the last seen evidence was tailored or designed falsely to involve the accused person.

vii) Last seen evidence must be corroborated by independent evidence, coming from an unimpeachable source because uncorroborated last evidence was a weak type of evidence in cases involving capital punishment.

viii) The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts.

ix) If the murder was not a pre-planned and calculated, the court had to consider whether the deceased had any contributory role in the cause of his death."

The conduct of Abdul Hakeem (P.W.2) is also very mysterious. The statement of Abdul Hakeem (P.W.2) has been recorded with a delay of 7 (seven) days without any cogent explanation. His injuries were not so, which could present him to record his statement promptly. If believed, that he was the only person present on the crime scene and that the cause of attack by appellant upon him was not helping him to rescue the appellant than his story seems unconvincing, compelling us to infer differently. It is strange to observe that as to why a murderer would come, asking for help to save the deceased and on refusal would attack upon him and cause him injuries. There was enough time and space for the appellant to make his escape good after committing murder of the deceased as nobody had seen him committing murder and if he had killed him, why would he rush to Abdul Hakeem (P.W.2) for help. In the attending circumstances of this case, the story narrated by the

said witness (P.W.2) seems improbable, unreasonable and absolutely unconvincing, rather on the contrary suspicion goes upon him as argued by the counsel for the appellant that there is a possibility that the deceased had an altercation with him, which resulted into the death of the deceased and to absolve himself, he has concocted and tailored such story of last seen and causing injuries by appellant.

Raza Muhammad (P.W.3) deposed that he had been waiting for Abdul Hakeem (P.W.2) and when he did not arrive, he went to the house and knowing that said witness (P.W.2) had gone to get wood on his camel, he went out in search for him and found Abdul Hakeem (P.W.2) in an injured condition under a bridge, who was brought to hospital, not making an effort to even look for the deceased. His testimony is unworthy to rely upon as his deposition is nothing but hearsay, merely based on the information provided by Abdul Hakeem (P.W.2), whereof, obviously he is not definite as to whether the information is correct or false. Before discarding the testimony of Abdul Hakeem (P.W.2), we would appropriately further analyze his statement in view of the other pieces of evidence, which has been presented as corroborative piece of evidence to reach and understand the case in its entirety.

9. Appraisal of the testimony of H.C Abdul Khaliq (P.W.9) and Investigating Officer, S.I Abdul Khaliq (P.W.12) regarding disclosure and recovery of unassembled parts of the motorcycle and Nokia mobile set, transpires that on 25th of October, 2016, the appellant was arrested from his house situated at Killi Don, Surab, where they found the frame, engine and other parts of the motorcycle of the deceased Niamatullah, which were taken into possession through recovery memo (Ex.P/9-D), producing the frame and other parts of the said motorcycle in the court as (Art.P/11 to Art.P/23), but

neither colour nor other description of the motorcycle has been given by any prosecution witnesses prior to the recovery. Admittedly, the motorcycle has not been registered being non-custom paid motorcycle. The recovery of the said articles have not been effected on the basis of proper disclosure memo and pointation of the appellant, therefore, it would be difficult and hard to consider the same as corroborating evidence. It could have been relevant, if the engine and chassis number had been produced earlier by the prosecution witnesses and matched with the said numbers, which in the instant case has not been disclosed by any prosecution witness, including father of the deceased Muhammad Murad(P.W.1). Although, father of the deceased Muhammad Murad (P.W.1) has recorded a supplementary statement (Ex.P/1-B), stating therein that he identified the parts of the motorcycle of the deceased but merely his such statement cannot be believed unless the description, engine No and chassis No. had been given by him earlier before recovery of such parts of the said motorcycle, that too, subject to an identification test, keeping the said articles(Art.P/11 to Art.P/23) with the similar parts of another motorcycle, but since no such proceedings have been carried out. Therefore, identification by Muhammad Murad (P.W.1) in such a manner would not be worthy to explicitly place reliance,connecting the appellant with the crime.

Similarly, the recovery of Nokia Mobile Set No.CE-0168 (Art.P/28) recovered in consequence of the disclosure, made from the house of the appellant on 26th of October, 2016, from an iron box on the pointation of the appellant secured through recovery memo (Ex.P/11-A) in the presence of H.C Riaz Ahmad (P.W.11) and Constable Rehmatullah is also immaterial in the peculiar circumstances of the instant case. None of the prosecution witnesses including Muhammad Murad (P.W.1), provided the details of make, serial No., colour and other description of the Nokia mobile phone before the recovery.

Thus identification after recovery of the said Nokia mobile phone, even if believed to be correct, cannot be considered as a corroborative piece of evidence. Nowadays it is a usual practice of the police to foist such recoveries to strengthen the case, which seems to have been done in the instant case as well. Reliance is placed upon the cases "MST.ASKAR JAN AND OTHERS VERSUS MUHAMMAD DAUD AND OTHERS (2010 SCMR 1604), and MUHAMMAD ABID AND OTHERS VERSUS THE STATE AND OTHERS (2016 P.CR.L.J 257).

The supplementary statement (Ex.P/1-B) with regard to identification of the Nokia mobile set recorded after the recovery of Nokia mobile is un-worthy of credence and is of no help for the prosecution because it has not been kept alongwith similar kind of mobile phones and has not gone through a proper identification test. Thus, such recovery even if made in consequence of disclosure cannot be considered as a corroborative piece of evidence because it has no evidentiary value at all. Initial part of the disclosure, relating to admission of crime is inadmissible as it amounts to confession before police, as it offends Articles 38 and 39 of the Qanun-e-Shahadat Order of 1984, not falling within the purview of Article 40 of the said Order of 1984.

10. The disclosure (Ex.P/7-A) and recovery of pistol (Ex.P/7-B) on the pointation of the appellant in the presence of Abdullah(P.W.7) and Abdul Wahid has been presented as the most crucial corroborative piece of evidence. Abdullah (P.W.7) testified that on 29th of October, 2016 while he was present with regard to his personal affair in the police station, during interrogation the appellant disclosed that he can get recover the pistol with which, on 24th of October, 2016, he killed Niamatullah (deceased) at ***'Tariki riven'*** (dry) and snatched his motorcycle and cash amount. He maintained that appellant also disclosed to make pointation of the place of crime, where he committed his

murder. He produced the memo of the disclosure (Ex.P/7-A). He testified that the appellant led them to his house and got recovered a pistol alongwith empty magazine having No.6727, which was marked by him and Abdul Wahid vide recovery memo (Ex.P/7-B), whereafter, they were led by appellant to the crime scene, where memo of pointation of place of occurrence (Ex.P/7-C) was prepared.

The prosecution has made a failed attempt to make us believe that the recovery of pistol had been made voluntarily by the appellant inconsequence of the disclosure in the presence of the private witness Abdullah (P.W.7) and marginal witness Abdul Wahid (not produced). Their presence in police station seems to be by chance as there is no detail on record as for what particular purpose both of them were present in the police station absolutely not justifying their presence at all.

Another aspect, which makes the said disclosure and recovery of pistol doubtful is, that on 29th of October, 2016, the proceedings of disclosure and recovery of pistol were made, whereas a couple of days back on 26th of October, 2016, the appellant was arrested and during his arrest, allegedly unassembled parts of the said of the deceased were recovered and on the same day on the alleged pointation of the appellant Nokia mobile phone of the deceased was recovered from an iron box lying in the house of appellant. But surprisingly, despite disclosure and search of the house, on 26th of October, 2016, the pistol was not recovered, which suggests that subsequently the prosecution just to strengthen the case has foisted the disclosure and recovery of pistol as crime weapon against the appellant.

11. As discussed, since the recovery of pistol has been discarded, therefore, the report of Forensic Science Laboratory (Ex.P/12-F) of the said

pistol(crime weapon) becomes immaterial and of no consequence. However, looking the case from another angle, if the said recovery for the sake of discussion is not discarded, even then there are several infirmities in the Forensic Science Laboratory Report (Ex.P/12-F), making the same worthless on manifold reasons. The F.S.L (Ex.P/12-F) has lost its value, because both the empty and pistol were sent together, which has cast doubt and suspicion of manipulation and maneuvering of the said report. Moreover, the record transpires that the recovery of crime weapon was allegedly effected on 29th of October, 2016, but was received by the Forensic Science Laboratory on 25th of November, 2016, with an unexplained considerably delay, fatal for the case of the prosecution. In this regard we are guided by the principle expounded in the case of HASHIM QASIM AND ANOTHER VERSUS THE STATE (2017 SCMR 986), MUHAMMAD SALEEM VERSUS SHABBIR AHMAD AND OTHERS (2016 SCMR 1605), ALI SHER AND OTHERS VERSUS THE STATE (2008 SCMR 707) AND MUSHTAQ AND 3 OTHERS VERSUS THE STATE(PLD 2008 SC 1).

12. As for as the pointation of place of occurrence is concerned, that too has no evidentiary value as it is not covered within the meaning of Article 40 of the Qanun-e-Shahadat Order of 1984. On 24th of October, 2016, the prosecution witnesses, particularly, Investigating Officer, S.I Abdul Khaliq (P.W.12) visited the place of occurrence, prepared the un-scaled site plan (Ex.P/12-C) and subsequently scaled site plan (Ex.P/12-D), which establishes that the crime place was admittedly well within their knowledge, surely not a discovery of fact.

13. The principle has now been settled that medical evidence neither pin point the culprits nor establishes his identity and at the most it can be

looked to ascertain the locale of injury, duration, and distance but it can never be considered to be a corroborative piece of evidence and at the most can be considered as supporting evidence only to the extent of specification of seat of injury, the weapon used, duration and cause of death.

In the instant case, the cause of death has never been brought into a dispute, the unnatural death of the deceased has been proved on record, which has never been questioned by the defence except that the appellant has kept a distance away from the murder of the deceased. Reliance in this regard can be placed upon in the case of MUHAMMAD MANSHA VERSUS THE STATE (2018 SCMR 772).

14. Regarding, last seen in particular, the testimony of Abdul Hakeem (P.W.2) on the touch stone of principle does not meet with the criteria enumerated in the FAYYAZ AHMAD's case supra as well as the dicta laid down in the case of MUHAMMAD ABID VERSUS THE STATE AND ANOTHER (PLD 2018 S.C 813).

15. Circumstantial evidence has always been considered as a weak type of evidence, the conviction can be based on such evidence, only if the same is duly corroborative by such evidence, which maintain a complete chain of circumstances directly relatable to each other and when any link in the chain is missing in case of a circumstantial evidence, it is not safe to record or upheld conviction.

In order to act upon the circumstantial evidence regarding the guilt of accused facing the trial, following principles are required to be kept in view;

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

(ii) Circumstances must be conclusive and conclusion of guilt to be drawn must or should be established.

(iii) Suspicious, however, strong would not be substitute of proof.

(iv) Chain of evidence must be complete in all respect leaving no reasonable ground about the innocence of the accused.

(v) Evidence must have made one un-broken chain. One end must touch the crime and other neck of the accused.

SEE: "IMRAN alias DULLY and another Vs. The STATE and others"(2015 SCMR 155), and "AZEEM KHAN and another V.MUJAHID KHAN and others"(2016 SCMR"274)

Regretfully, in the instant case, the prosecution has miserably failed to establish the recovery of crime weapon coupled with unassembled parts of the motorcycle allegedly recovered from the house of the appellant as a corroborative piece of evidence, thus with no doubt in mind, we have concluded that the case of the prosecution based on circumstantial evidence is highly doubtful, as such the appellant has earned the benefit of such doubt, not as a matter of grace and concession but as a matter of right. The Hon'ble Supreme Court of Pakistan in the case of MUHAMMAD MANSHA VERSUS THE STATE (2018 SCMR 772), while extending the benefit of doubt, acquitted the appellant, referring to the maxim, which is reproduced herein below:

> ***"It is better that ten guilty persons be acquitted rather than one innocent person be convicted."***

For what has been discussed above, the judgment impugned is unsustainable and liable to be set aside, culminating into the acquittal of the appellant of the charges.

Criminal Revision No.03/Q of 2017

In consequence of acceptance of the Jail Criminal Appeal No.19/I of 2017, the Criminal Revision bearing No.03/Q of 2017 filed by the petitioner

Muhammad Murad for enhancement of the sentence, has become infructuous, resulting into dismissal in limine.

Above are the reasons for our short order dated 6th of December, 2018.

SYED MUHAMMAD FAROOQ SHAH
JUDGE

SHAUKAT ALI RAKHSHANI
JUDGE

Islamabad, 11th of December,2018
M.Akram/