

IN THE HIGH COURT OF SINDH, CIRCUIT COURT LARKANA

Criminal Appeal No.D- 21 of 2015
Cr. Appeal No.D-41 of 2015
Criminal Appeal D- 24 of 2020
Criminal Conf. Case No.D- 03 of 2015

Present:

Mr. Justice Mohammad Karim Khan Agha -J
Mr. Justice Zulfiqar Ali Sangi -J

Appellants: Muhammad Shahrukh, Faisal Mehmood @ Nafziyati, Syed Tahir Naveed Shah @ Polka and Syed Mohammad Ali Rizvi @ Ali, through Mr. Muhammad Imran Shamsi, Advocate in Cr. Appeal No. 21 of 2015.

Appellants: Faisal Mehmood @ Moota and S.M. Kamran @ Zeeshan through Mr. Aamir Mansoob Qureshi, advocate in Cr. Appeals No.D-41 of 2015 and Cr. Appeal No.D-24 of 2020.

Respondent The State through Mr. Ali Anwar Kandhro, Addl. P.G.

Date of hearing : 24.02.2021.
Date of judgment : 04.03.2021.

JUDGMENT

Muhammad Karim Khan Agha, J.- By this common judgment, we intend to dispose of these three Criminal Appeals and the confirmation case arising out of same judgment, of which Cr. Appeal No.D-21 of 2015 has been filed by appellants Muhammad Shahrukh, Faisal Mehmood @ Nafziyati, Syed Tahir Naveed Shah @ Polka and Syed Mohammad Ali Rizvi @ Ali, Cr. Appeal No.D-41 of 2015 has been filed by Faisal Mehmood @ Mota and Cr. Appeal No.D-24 of 2020 has been filed by appellant S.M Kamran @ Zeeshan, against impugned judgment dated 01.03.2014 passed by learned Judge, Anti Terrorism, Kashmore @ Kandhkot, in New Special Case No.81 of 2013 (Old No.32 of 2011) arising out of Crime No.08 of 2011 of Police Station Super Market, Karachi, registered for an offence under Sections 302, 149 PPC, whereby appellants Shahrukh, Faisal Mehmood @ Nafziyati, Syed Tahir

Naveed Shah @ Polka and Syed Mohammad Ali Rizvi @ Ali have been convicted for offence under Sections 302, 149 PPC read with Section 7(a) of Anti-terrorism Act, 1997 and sentenced to suffer imprisonment for life and pay fine of Rs.100,000/= each and in case of default in payment of fine they shall suffer S.I for two years more. In case the fine amount is realized, the same shall be paid to the legal heirs of deceased Wali Khan Babar as compensation under Section 544-A Cr.P.C and convicted absconding accused/appellants Faisal Mehmood @ Mota and S.M Kamran alias Zeeshan in their absentia and awarded both of them death sentences as and when they are arrested subject to confirmation by this court. Benefit of Section 382-B Cr. P.C. is also extended to the accused/appellants Shahrukh, Faisal Mehmood @ Nafziayati, Syed Tahir Naveed Shah @ Polka and Syed Mohammad Ali Rizvi @ Ali. However, under the same impugned judgment co-accused Muhammad Shakeel was acquitted of the charge by being extended the benefit of the doubt. Neither the State nor the complainant has filed any appeal against this acquittal.

2. The prosecution case as unfolded in the FIR are that:

"With reference to copy of report No.43 dated 13.01.2011 of the daily diary Police Station Super Market, I the ASI Ghouse Bakhsh, having conducted investigation and recorded statement under Section 154 Cr.P.C of complainant mentioned in column No.2 have come back at Police Station for registration of case. The copy of statement of complainant is as under:

From Mortuary of Abbasi Shaheed Hospital, Karachi.
Dated: 13.01.2011, @ 2345 Hours.

FIR No.08/2011.

Statement under Section 154 Cr.P.C.

Mr. Mohabat Khan Baber S/o Alam Khan Baber aged 30 years caste Baber Pathan R/o house No.B-194 Block-N street No.12 North Nazimabad, Karachi, having Phone No.0321-2600210, on enquiry stated that I reside at the above mentioned address and I am originally resident of village Girder Baber District Ghorob Baluchistan and I do serve as Engineer in Baluchistan Government. My younger brother named Wali Khan Baber S/o Alam Khan aged 28 years used to do work as reporter in Geo News, today on 13.01.2011, I was present in my Mohalla where I received information through Geo News Officials that bullet has hit to Wali Khan Baber and he has been

brought at Abbasi Shaheed Hospital in injured condition. I rushed to Abbasi Shaheed Hospital where the dead body of my brother Wali Khan Baber was lying in the Mortuary room of Abbasi Shaheed Hospital and he received five bullets at his forehead, neck and cheek. On enquiry, I came to know that my brother was coming to home in his car No.AEE-613 make Suzuki Cultus via S.M. Taufeeq road from his office Geo News, at about 0930 hours, when he came at opposite Apwa School Super Market Liaquatabad where the unknown accused person(s) killed him with their firearm weapons on account of unknown grudge. **I have no doubt or suspicion upon any one. My complaint is against the unknown accused person(s) having caused serious injury to my brother Wali Khan Baber with their firearm weapon and have killed him. Legal action may be taken against them.** This much is my statement, heard the same and it is correct.

Sd/-(In English)
Dated: 13-01-2011

Sd/-(In English)
ASI Ghouse Bakhsh Posted
at P.S. Super Market, Karachi
Dated: 13-01-2011

POLICE ACTION

I the ASI Ghouse Bakhsh do hereby certify that I being busy in the investigation report of daily diary reached at Abbasi Shaheed Hospital where I prepared memo regarding examination of dead body and obtained cause of death from MLO Dr. Sajid vide PM No.34/2011 dated 13-01-2011 and recorded the statement U/S 154 Cr. P.C of complainant, who admitted the same to be correct and signed thereon and handed-over the dead body to his legal heirs. On returning to police station, the said statement was copied in verbatim. From the text of statement nature of offence falls punishable U/S 302/34 PPC, therefore, after registering case against unknown accused person(s), copy of FIR alongwith original statement was sent to the SIO of above police station for further investigation through PC/17267 Rehan. Remaining copies of FIR shall be distributed as per rules.

Sd/-(In English)
ASI Ghouse Bakhsh Posted
at P.S. Super Market Karachi)
Dated:13-01-2011

3. During investigation of above case, accused Shahrukh, Faisal Mehmood @ Nafziyati, Syed Tahir Naveed Shah @ Polka, Syed Mohammad Ali Rizvi @ Ali and Muhammad Shakeel were arrested and sent up to stand trial before the Administrative Judge, Anti-Terrorism Court (Special Courts) High Court of Sindh, Karachi showing co-accused Liaquat Ali, Faisal @ Mota and S.M Kamran @ Zeeshan as absconders. Then the case was transferred to the Court of learned Judge, Anti-Terrorism Court-II, Karachi who after observing necessary formalities declared the absconding accused as proclaimed offenders and trial was proceeded against them in their absence under Section 512 Cr.P.C. Formal charge was framed against accused, to which they pleaded not guilty and claimed trial.
4. Thereafter the case was transferred to the Anti-Terrorism Court-III, Karachi, where learned advocate for the complainant and SPP jointly filed application under Section 227 Cr.P.C for amendment in the charge and after issuing notice on such application and hearing both the parties, same was allowed. Amended charge was framed for offence under Section 302, 34 PPC r/w Section 7(a) of Anti-Terrorism Act, 1997 against the accused, to which they pleaded not guilty and claimed to be tried. Ultimately the trial was transferred to Anti Terrorism Court Kashmore @ Kandhkot for disposal in accordance with law.
5. In order to prove its case, the prosecution examined 14 witnesses, who exhibited numerous documents and other items and thereafter prosecution side was closed. Thereafter, statements of accused were recorded under Section 342 Cr.PC, in which they denied the allegations and claimed their false implication by the Rangers and the police because they belonged to a particular political party. None of the accused examined themselves on oath and none of the accused called any DW in support of their defense cases.
6. On conclusion of the trial, learned trial court after hearing learned counsel for the parties and appraisal of prosecution evidence brought on record, convicted and sentenced the appellants/accused as mentioned earlier in this judgment vide Judgment dated 13.01.2011 which has lead to these appeals against conviction by the appellants.
7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 13.01.2011 passed by

the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Learned counsel for the appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan initially submitted that both the appellants had been convicted in absentia under the ATA despite not being properly served and as such their cases should be remanded back to the trial court for a de novo trial where they could cross examine the witnesses against them however after the evidence was read out they decided to contest their convictions on merit before this court rather than seek a remand of the case. These appellants contended that the only piece of evidence against them was a retracted judicial confession which had been made against them by one of their co-accused which was inadmissible under Article 43 of the Qanoon-e-Shahadat Order, 1984 and even other wise even if the confession was admissible they could only be convicted in a capital case if the retracted judicial confession was corroborated by some independent unimpeachable evidence which was lacking in this case and as such the appellants should be acquitted of the charge and their confirmation reference answered in the negative. With regard to the other appellants Faisal Mehmood aka Nafsiyat, Syed Tahir Naveed Shah aka Polka and Syed Muhammed Rizvi learned counsel contended that the only evidence against them was a retracted judicial confession by a co-accused and the fact that they had been picked out from an identification parade with assigned roles but the identification parade could not be safely relied upon because it suffered from procedural defects/irregularities and that the alleged eye witness who picked them out at the identification parade did not give evidence as he died before doing so and thus they had no chance to test his evidence by cross examining him and that in the case of appellant Syed Muhammed Rizvi his partial print on the water glass recovered from the alleged car which some of the appellants rode in order to commit the murder was planted and even otherwise inadmissible as there was no proof of safe custody. Appellant Sharukh aka Mani had retracted his judicial confession which he claimed had been made under coercion and was therefore not voluntary and thus could not be relied upon and even other wise for the reasons mentioned above his being picked out at the identification parade could not be safely relied upon ; that there was no other evidence against the appellants who were completely innocent having been falsely implicated in the case and as such all these appellants

who had been sentenced to life imprisonment for any of the above reasons should be acquitted of the charge by extending them the benefit of the doubt. In support of their contentions, they placed reliance on Article 43 Qanun-e-Shahadat Order, 1984 as well as cases reported as **Faqir ullah V Khalil-Uz-Zaman** (1999 SCMR 2203), **Azeem Khan V Mujahid Khan** (2016 SCMR 275), **Muhammad Pervez V The State** (2007 SCMR 670), **Khalid Javed V The State** (2003 SCMR 1419), **Mushtaq Masih V The State** (2015 M L D 1727) and **Hazrat Bilal V The State** (2000 P Cr. L J 865).

9. On the other hand learned Addl. Prosecutor General who was also representing the interests of the complainant fully supported the impugned judgment and contended that the confession of the co accused Sharukh aka Mani had been given voluntarily, was truthful, fitted in with the prosecution case and could be safely relied upon against both its maker and the co-accused (which included all of the appellants) and that the confession as against the appellants who had been sentenced to life imprisonment had been fully corroborated by them being picked out with specific roles at a lawfully held identification parade by an eye witness Hyder Ali as confirmed by PW 6 Nasarullah the judicial magistrate and PW 14 Noor Sabir the final IO in his evidence who brought the accused before the identification parade, the medical evidence was corroborated by the confession, the recovered empties and blood at the scene and as such all the appeals should be dismissed and all the convictions and sentences maintained of the appellants including the confirmation of the death sentence which had been handed down to appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan In support of his contentions he has placed reliance on **Akhtar v. The State** (2020 SCMR 2020), **Ibrarullah v. The State and another** (2020 P.Cr.L.J 141), **Nawab Khan and others v. The State and Sawal Khan v. Mian Khan and another** (1968 P.Cr.L.J 588), **Wilayat Ali v. The State and another** (2004 SCMR 477) and **Jafar Ali v. The State** (1998 SCMR 2669).

10. With regard to the complainant this was a capital case and the counsel for complainant as well as complainant had been served many times in the past. In-fact, complainant Mohabat Khan was contacted on 23.02.2021 which was the day before the appeals were heard by Reader/Court Associate of this Court Mr. Muhammad Saleh Dasti on his Cell No.0321-260021, who informed him that these appeals would proceed today (24.02.2021) and he (complainant Mohabat Khan) informed the Reader that he had full faith and

confidence in learned Additional Prosecutor General in arguing his case. In any event, it is not fair to continuously adjourn this matter in absence of complainant and his counsel when they have been duly served and when some of the accused have already been behind bars for eleven years and the complainant and his counsel have full notice of this matter.

11. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant's counsel, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

12. Before proceeding further, it is worth mentioning that appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan would have been within their rights to request that their case be remanded for re trial as they had not been given a chance to cross-examine witnesses, give evidence on oath and call witnesses in their defence since there seems to be evidence to suggest that they were not served in accordance with the law. Learned counsel for these appellants however has not objected to their appeals being decided on merit by this court and has argued his case on merits. We are also of the view that despite the appellants being convicted in absentia this court can decide this appeal on merits rather than remand the same especially as the appellants counsel has given no objection to proceeding to decide the appeal on merits and likewise the learned APG without remanding the same to the trial court. We also consider that such an approach would meet the ends of justice in this case. In this respect reliance is placed on **Muhammad Shoaib and others v. The State** (2013 MLD 1469), in which it was held as under:

"We have heard all the learned counsel and perused the impugned judgment. We have also examined Articles 9 and 10 of the Constitution of Islamic Republic of Pakistan 1973 and the provisions of sections 19(2) and 25 of the Anti-Terrorism Act, 1997 and have also gone through the case law relied upon by the learned Counsel for the appellant, which shows that in case of conviction recorded in absentia the convict has two options available in law, either (a) to approach the learned Trial Court within the stipulated period with a request to set aside his conviction recorded in absentia, in terms of Section 19(12) of the Anti-Terrorism Act, 1997, by showing that he did not abscond deliberately from the Court during the Trial or (b) to surrender before this Court by filing an appeal under Section 25 of the Anti-Terrorism Act, 1997 with a prayer to set aside the conviction awarded in absentia and to acquit him on merit or to

remand the matter to the Trial Court for fresh trial by setting aside the impugned judgment." (bold added)

13. The prosecution has also submitted that it is hard to find eye witnesses who are prepared to come forward in such type cases involving terrorism and dangerous organizations and the court should also take this into account in this case. We reject this contention. Prosecutors throughout the world face such difficulties in persuading eye witnesses to come forward so this is not a problem peculiar to Pakistan. It is up to the judicial system including the State by the police to ensure the protection of witnesses. Other methods of protection can also be resorted to such as the Sindh Witness Protection Act, evidence being given by video link and even relocation of witnesses in appropriate cases. **The court can only make its decision based on the evidence produced before it which is the duty of the prosecution to produce.**

14. Based on our reassessment of the evidence of PW's 1 Mohabat Khan Babar who is the complainant who registered the FIR which narrated the incident in which Wali Khan Babar (the deceased) was murdered, PW 2 Abdul Jabbar who was a police officer who was a first responder who found the dead body of the deceased in his car with firearm injuries, PW 3 Dr. Azam Khan who narrated the incident in which the deceased was murdered, PW 13 Syed Sajid Ali the MLO, post mortem, recovery of body at the scene, recovery of car at scene, recovery of blood from the car at the scene and recovery of 5 empties from the scene which lead to a positive chemical and FSL tests we find that the prosecution has proved beyond a reasonable doubt that Wali Khan Babar (the deceased) was murdered by firearm injuries at about 9.30pm on 13.01.2011 opposite APWA School Near Super Market , main S.M Toufiq Road, Liaquatabad Karachi.

15. The only question left before us therefore is who shot the deceased or otherwise participated in his murder as set out in the charge.

16. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan for which they were convicted in absentia for the following reasons:-

⚡

(a) The main evidence against these two appellants is the retracted judicial confession of their co-accused Sharukh aka Mani which is set out below for ease of reference;

Q. What have you to say?

Answer.

I was perturbed due to jobless that one day Habib Estate Agent took me to Faisal Mota and got me work of Estate Property in Allah Bux Village, from that day, I started work with Faisal Mota and I started work with Faisal Mota on monthly salary Rs.5000/- and on selling out of each plot cash Rs.10000/- since July 2009. During my job on 12.01.2011 Faisal Mota called me by making phone at his home situated in Gulshan-e-Wasim KBR; I reached at about 2:00 p.m there and Zeeshan was already present in his house. Faisal Mota asked me we have to see the house of one person namely Wali Khan and have to receive Rs.14,50,000/- from him, he has changed his house. Zeeshan and Faisal Mota took me together at the office of Jeo Channel. Faisal showed the picture of Wali Khan to me in his mobile and also showed me his Car Cultus No.AEE-613 and said me when he left from there you follow him and see his house and will inform me, where I remained waiting about 3 to 4 hours but neither I see Wali Khan nor his Car seen to me. At about Maghrib time, I made phone call to Faisal Mota and narrated entire facts and circumstances to him, he asked me to go to his home. On next day on 13.01.2011 I went at my office Allah Bux Goth, at about 2:00 P.M Faisal Mota called me at his office room and directed me again to go outside the Office of Jeo channel, one day before, I was asked for doing of that work and stated me that Zeeshan is already present there, you go there and meet with him. At about from 1445 hours to 1500 hours I came out from my office and proceeded towards the office of Jeo Channel and I arrived there at about 1600 hours, Zeeshan's phone call came to me who where are you and asked me to come at the way going to Habib Bank, when I reached to him, he was together with Liaquat in Cultus Car. Zeeshan showed me the Car of Wali Khan Babar where he was standing and said when Wali Khan Babar left from there I will inform him by making phone call and I was directed not to move from here, unless Wali Khan is coming out you will wait for him there and asked me to follow him upto his home and come back by seeing his house. He got me understood, if he went towards Defence or Clifton, don't follow him and you will go to his home. During this time, he got loaded balance of Rs.100/- in mobile phone, when Wali Khan Babar comes out from there, and will inform me through phone. Till about 0230 hours, I waited Wali Khan Babar at the outside of Jeo Channel, at that time, I saw Wali Khan Babar sitting in his Car bearing No.AEE-613, then I phoned to Zeeshan and Zeeshan said me to make phone call to Faisal Mota. I also informed Faisal Mota by making phone call that Faisal Mota asked from me, on which way he is; Is he not going by way of Defence or Clifton? Mobile Phone was fixed inside my helmet, when I reached in the area of Saddar that Babar Wali Khan stopped his car near fruit push carts and came towards me, then I told this position to Faisal because who was on line with me he said me to buy fruit he will pay fruits money, then I bought one dozen of orange. Wali Khan sat in his vehicle and started to

proceed, so, I again followed him, when Teen Hati's Mazar came that I informed to Faisal Mota, he said this is our Liaquatabad Road, therefore, you follow him upto his home. Hence, I remained going pursue him, when the area of Dakhana Super Market came, again Faisal asked me where you reached, I replied him I am at Dackhana Super Market and traffic was jam that Faisal Motay said me to keep pursue Wali Khan Babar. During this time, towards from my right side hand and from Green Belt side, I saw Zeeshan by going towards the side of Wali Khan Car. Having went near to Car of Wali Khan Babar, made straight 6 to 7 fires at Wali Khan Babar, panic spread in public and people hearing the voice of firing gathered there and 6/7 persons came ahead together with the support of Zeeshan and said to public do your own business and said our enmity with him, almost all persons had weapons, seeing this incident I became embarrassed. I saw each namely Faisal Motta, Liaquat, Faisal Nafsiyati, Ali Naveed, Shakeel, Fahad and two other persons I became very much confused and kept going ahead on my motorcycle, after short while, I made phone call to Faisal Motay. Faisal Motay said me to come near my home, I went in park situated near his house, where all persons had come there; I reached little late because due to fear motorcycle was not being driven by me. When I reached there that Faisal Motay asked all to go their homes and he stopped me. Faisal took me at his house, all things had not to be done but it happened, don't worry and if any matter happened that I will send you Lahore by giving you rupees 20 and 25 thousands, there is no any guilt of you in this matter. But he said me don't state this incident with anyone, the same will be committed with me as was committed with Wali Khan Babar, you will be seen in the pool of blood. If I will state this incident with anyone, that same will be done with me and said me go and stay in your home and so also don't state your family. On 2nd day when I contacted on his number, his number was switched off and then I became so feared and I left to Lahore without saying his family members, where I stayed two months with my friend. When my contact took place with Faisal Mota after two months 10 days, he asked me to come at Karachi, at Gulshan Office; when I went there that Naveed, Shakeel and Ghani were already present there. Faisal Mota said to all us to go to Hyderabad, where I send you to Liaquat. I was embarrassed, therefore, Faisal said to take care some days all will be OK, don't worry. He also asked me to sit in gray colour Khyber Car and said me go to Liaquat at Hyderabad alongwith Faisal Nafsiyati, Shakeel, Ali and Naveed. When we started to proceed from there; at about between 1330 Hours to 1330 Hours; police arrested us from Gulshan-e-Iqbal".

(b) Article 43 of the Qanun-e-Shahadat Order, 1984 reads as under:

"43. Consideration of proved confession affecting person making it and others jointly under trial for same offence. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons is proved.

- (a) such confession shall be proof against the persons; making it; and
- (b) the Court may take into consideration such confession as circumstantial evidence against such other person.

Explanation. "Offence", as used in this Article, includes abetment of, or attempt to commit, the offence."

In this case, we find that Article 43 is applicable and since the appellants Faisal Mehmood aka Mota and S.M.Kamran aka Zeeshan were **not** being tried jointly with the other co-accused as they were being tried in absentia this retracted judicial confession cannot be used against them.

(c) Even otherwise it is well settled by now that a judicial confession made by one co-accused against another co-accused in a capital case cannot be used to convict the persons named in the confession by the maker without unimpeachable independent corroborative evidence.

In this respect, reliance is placed on **Federation of Pakistan V Muhammed Shafi Muhammedi, Advocate** (1994 SCMR 932) which held as under at P.938 Para 10.

"10. The above judgments are in line with the stream of judgments of the Superior Courts of Indo-Pak. The rule of prudence that the testimony of an approver or accomplice is to be corroborated in material particulars by independent evidence has almost hardened into a rule of law with the passage of time and because of the invariable insistence of the Superior Courts to have corroboration. Though in theory section 133 of the late Act provided that the conviction of an accused person on the basis of uncorroborated evidence of an accomplice was not illegal, but in practice this was not acted upon. There may be a few cases in which the above provision of the late Act might have been pressed into service **but overwhelming judicial consensus has been that conviction on the basis of the sole testimony of an approver or accomplice is not safe.** (bold added)

In this respect, reliance is also placed on the following cases, **Arif Nawaz Khan and 3 others v. The State** (PLD 1991 Federal Shariat Court 53), **Jehangir Malik v. The State** (2005 YLR 3258), **Altaf Ashraf v. The State** (PLD 2009 Lahore 549), **Pir Mazhar-ul-Haq v. The State** (1992 P.Cr. L.J 1910) and **Muhammed Ismail V State** (2017 SCMR 898).

While addressing this Issue under Islamic law in the case of **Faqir ullah V Khalil-Uz-Zaman** (1999 SCMR 2203), at P.2213, at Para 18, it was held as under:

"Para-18. The first question is whether the confessional statement of the convict was to be accepted in toto or might have been accepted in part. The basic principle of Islamic Law is provided in Majallah-al-Ahkam-al-adliyyah, (section 78) that the Bayyinah or evidence is a proof whose implications may extend to others while the confession

is a proof whose implications are limited to the one who makes it. Under this principle the confessional statement of a person can only inculcate himself and no other person can be inculpated merely because some other person has made any admission. This principle is based on the well-known incident reported by almost all the compilers of the Ahadith in which the Holy Prophet (P.b.u.h) punished a person with Hadd on the confession of the commission of Zina. But in spite of the fact that he had mentioned a particular woman by name with whom he had admitted to have committed Zina, the Holy Prophet (p.b.u.h) did not convict the woman on the basis of this confession by the co-accused. He appointed a judicial officer to investigate and to independently find out whether the woman had committed Zina or not. The Holy Prophet (p.b.u.h) directed the judicial officer to punish the woman only on her own free and independent admission. **On the basis of Hadith and several other Ahadith, Muslim Jurists have developed the principle that the implications of the confession of a person are confined to himself and cannot be extended to some body else. It also means that the confession made by a person may be accepted to the extent to which it affects himself and may be rejected to the extent to which it implicates some body else.**(bold added)

(d) Thus, even if we consider the judicial confession as being voluntarily made and truthful and fitting in with the prosecution case and therefore admissible which we will come to later in this judgment so far as the appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan are concerned there must be some independent corroboration in order to uphold their convictions.

(e) In this case no mobile phones of the appellants have been recovered let alone any CDR connecting the phones of the confessor with the appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan has been collected or exhibited, they were not part of any identification parade, the car allegedly used to transport some of the appellants to the murder scene is not in their names, no DNA or finger print evidence has been proved against them.

17. In short there is absolutely no evidence to corroborate the judicial confession of accused Sharukh aka Mani in so far as it relates to the appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan. The aspect of the charge concerning appellant Faisal Mehmood aka Mota hiding the murder weapons is not substantiated by any evidence. It does not appear even in the confession and the IO was not able to recover any such weapons

despite digging up the area where they were allegedly hidden and as such this is just a bald unsubstantiated allegation.

18. The requirements of circumstantial evidence connecting the appellants to the offence have not been met. In this respect reliance is placed on **Fayyaz Ahmed V State** (2017 SCMR 2026), at P.2030, para's 5 and 6, which are reproduced as under:

"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. **If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing link, otherwise at random reliance on such evidence would result in failure of justice.**

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts have to discard and disbelieve the same." (bold added)

19. The fact that both the appellants were absconders is also irrelevant based on the particular facts and circumstances of the case. In this respect reliance is placed on **Muhammed Aslam V State** (1972 SCMR 194).

20. Thus, based on the above discussion we hereby acquit appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan of the Charge,

allow their appeals, set aside the impugned judgment insofar as it relates to them, who shall be released unless wanted in any other custody case. The confirmation reference in respect of appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan is answered in the negative.

21. With regard to appellants Faisal Mehmood aka Nafsiayat, Syed Tahir Naveed Shah aka Polka and Syed Muhammed Rizvi after our reassessment of the evidence we find that the prosecution has NOT proved beyond a reasonable doubt the charge against the aforesaid appellants for which they were convicted for the following reasons:

22. There are two main pieces of evidence against these appellants (i) the retracted judicial confession and (ii) being picked out at an identification parade by Hyder Ali as taking part in the murder and being given particular roles.

23. **Turning firstly to the retracted judicial confession.** Even if we find this to be admissible (which we will come to later in this judgment) since the aforesaid appellants are co-accused its needs to be corroborated by independent evidence which in this case mainly rests on the identification parade carried out by PW 6 Nasarullah who was a judicial magistrate and all the aforesaid appellants were identified by Hyder Ali as playing a particular role in the murder.

24. We find that we **cannot** safely rely on the identification of any of the appellants by Hyder Ali at the identification parade and as such the identification parade results cannot corroborate the retracted judicial confession for the following reasons:

(i) The key issue is not the evidence of the judicial magistrate PW 6 Nasarullah who carried out the identification parade or the IO who allegedly took the appellants and the eye witness to the identification parade **but whether we can believe the identification of the eye witness as correctly identifying the appellants as being involved in the murder.**

(ii) The FIR which was lodged promptly after the incident was against unknown person's.

(iii) No eye witness came forward for over six weeks which was

allegedly following an advert in a newspaper the day before the accused was arrested and there is no explanation on record why the eye witness waited six weeks before coming forward.

(iv) The eye-witness who came forward Hyder Ali is not named in the FIR and there is no evidence that he knew any of the accused before the incident.

(v) The eye-witness Hyder Ali did not give his S.161 statement Cr.PC statement for at least 6 weeks after the incident. Such delay in recording the S.161 Cr.PC statement of an eye witness is quite fatal to the prosecution case as his complete evidence could have been concocted along with the police and the complainant who were under pressure to solve this case since the deceased was a member of a popular T.V channel and news paper publication who regularly aired this news story and the lack of progress of the police in finding the murderers of the deceased. In this respect reliance is placed on **Noor Mohammed V State** (2020 SCMR 1049) which held as under at P.1052;

"Similarly, Mst. Amina Bibi and Mst.Imtiaz Fatima introduced eye-witnesses of the occurrence also made their statements under section 161, Cr.P.C. on 31.12.2018 with the delay of more than one and half year. **It is established principle of law that delayed recording of statement of the PW under section 161, Cr.P.C. reduces its value to nil.** Reliance in this regard is placed upon case titled as "**Abdul Khaliq v. The State**" (1996 SCMR 155) wherein it has been held as under:-

"---S.161--- Penal Code (XLV of 1860), S.302/34--- Late recording of statement under S.161, Cr.P.C.---Value--- Late recording of a statement of a prosecution witness under S. 161, Cr.P.C. reduces its value to nil unless delay is plausibly explained."

Likewise, in the more recent Supreme Court case of **Muhammed Asif V State** (2017 SCMR 486) it was held at P.492, Para 15, as under;

"15. There is a long line of authorities/precedents of this Court and the High Courts that even one or two days unexplained delay in recording the statement of eye-witnesses would be fatal and testimony of such witnesses cannot be safely relied upon". (bold added)

(vi) It was a nighttime incident at 9.30pm in January and therefore would have been dark. No evidence of source of light has been given.

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No evidence has been given to show how far away the alleged eye-witness was from the incident and thus under these circumstances his identification of 4 of the accused must be in doubt. In this respect reliance is placed on **Azhar v State** (2017 SCMR 135) and **Gulfam V State** (2017 SCMR 1189)

(vii) That in his S.161 Cr.PC statement made six weeks after the incident the eye witness gave no 'hulia' or description of the appellants. Instead he apparently relied on sketches which he drew from memory. Such sketches were not exhibited at trial and as such this further casts doubt on the safeness of his identification of the appellants. In this respect reliance is placed on **Javed Khan alias Bacha V State** (2017 SCMR 524) which held as under at P-529, Para 8;

"8. The Complainant (PW-5) had not mentioned any features of the assailants either in the FIR or in his statement recorded under section 161 Cr.P.C, therefore there was no benchmark against which to test whether the appellants, who he had identified after over a year of the crime, and who he had fleetingly seen, were in fact the actual culprits. Neither of the two Magistrates had certified that in the identification proceedings the other persons, amongst whom the appellants were placed, were of similar age, height, built and colouring. The main object of identification proceedings is to enable a witness to properly identify a person involved in a crime and to exclude the possibility of a witness simply confirming a faint recollection or impression, that is, of an old, young, tall, short, fat, thin, dark or fair suspect." (bold added)

(viii) It does not appeal to logic, reason, commonsense and natural behavior that in the middle of a brutal murder and chaotic scene with armed men shouting at night that the eye witness was carefully able to examine and remember fully the faces of aforesaid appellants. This conduct is just not believable. Natural conduct in such scenario would have been to flee and keep away from the murder scene. In this respect reliance is placed on **Muhammed Asif V State** (2017 SCMR 486)

(ix) The eye-witness did not give evidence under oath and the aforesaid appellants had no chance to cross examine him and test his evidence. This eye-witness may have been shattered on cross-examination.

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(x) From the evidence it is unclear who this eye witness was. Was he a chance witness? Why was he at the scene? Nothing is known about his creditability e.g. profession, job, trade etc. He is a complete unknown quantity

(xi) In their evidence all the aforesaid appellants claim that they were shown to the eye witness prior to the identification parade which circumstance cannot be ruled out especially as all the appellants remained in police custody prior to the identification parade.

(xii) The fact that the eye witness came forward **a day before** the aforesaid appellants were conveniently all arrested whilst all sitting in one car also raises doubts that he was a planted witness under police pressure. No explanation has been given as to why he took so long to come forward.

(xiii) In trial identification by other witnesses has been deprecated by the superior courts as being unsafe, unreliable and could not be approved. In this respect reliance is placed **on Gulfam V State** (2017 SCMR 1189)

25. The next question is therefore what other corroborative material/evidence is there against the aforesaid appellants on record?

- (i) No weapon was recovered from any of them and as such the FSL report cannot connect them to the offense despite the fact that it was positive.
- (ii) No CDR was produced in evidence to link any of them at the given time of the crime.
- (iii) The positive blood test goes to the death of the deceased and is irrelevant for purposes of connecting the appellants to the crime.
- (iv) No motive has been asserted by the prosecution for the murder and none has been proved.
- (v) None of the recoveries were put to any of the appellants during their S.342 Cr.PC statements and as such cannot be used to convict them.
- (vi) Taking the police to the place of wardat is irrelevant as the police already knew the place of wardat which had also been shown on the T.V and written about in newspapers.

- (vii) There extra judicial confessions before the police during interrogation are inadmissible in evidence
- (viii) That although appellant Syed Muhammed Rizvi's **similar** finger print was found on a glass allegedly recovered from the vehicle used in the crime we exclude this piece of evidence from consideration. This is because it was not found on the first search of the vehicle and then surprisingly about 3 weeks later whilst the vehicle had been left outside PS Market where all and sundry had access to it the glass and slippers are found in the vehicle. There is no chain of safe custody and any one could have planted the slippers and the water glass in the car. It is just not believable that two such obvious items were missed on the first search of the car which belonged to deceased Laiquat. Even otherwise, the glass and the finger print were not put to the appellant during his S.342 Cr.PC statement and as such cannot be used to convict him.

26. The requirements of circumstantial evidence connecting the appellants to the offence have not been met. In this respect reliance is placed on the case of **Fayyaz Ahmed (Supra)** as referred to earlier in this judgment.

27. Thus, there is no other corroborative evidence to link the aforesaid appellants to the offence and as such the aforesaid appellants Faisal Mehmood aka Nafsiayat, Syed Tahir Naveed Shah aka Polka and Syed Muhammed Rizvi are all acquitted of the charge, their appeal is allowed, the impugned judgment is set aside insofar as it relates to them and they shall be released unless wanted in any custody case.

28. Turning to appellant Sharukh aka Mani who gave the retracted judicial confession. As discussed earlier it is settled by now that this confession can be used against him if we find it to be voluntary, true and tying into the facts of the case and there are only minor procedural irregularities. In this respect reliance is placed on **Azeem Khan V Mujahid Khan (2016 SCMR 274)**.

29. In the case of **Bahadur V State (PLD 1996 SC 336)** although it was suggested that a judicial confession alone can be made the basis of conviction the safer course was to look to see if there was any corroborative material available to determine its truthfulness. Reliance in this respect is also placed on **Muhammed Ismail V State (2017 SCMR 898)**.

30. In this case the main procedural defect is that **after** making the confession the appellant was handed back to the police and was not

remanded to judicial custody. The appellant also claims in his S.342 Cr.PC statement that his confession was not voluntary as in effect he and his family were threatened. There was also an unexplained 7 day delay in recording the confession which is not signed by him. In situations where the appellant has not been warned that he will not be handed back to the police if he confesses or if he was handed back to the police after his confession the courts have found such situations to be very damaging to the voluntariness of the retracted judicial confession. In this respect reliance is placed on **Muhammad Pervez and others v. The State and others** (2007 SCMR 670), **Gangoo Ram v. The State** (2003 P.Cr.L.J 1608) and **Syed Azeem Shah v. The State** (PLD 1987 Quetta 96).

31. Thus, we have some doubts about this retracted judicial confession and are of the view that it would be unsafe to convict the appellant Sharukh aka Mani based on his retracted judicial confession alone due to the above defects and it would require independent corroboration as mentioned earlier in the case of **Bahadur V State** (PLD 1996 SC 336) if any reliance was to be placed on it as regards the maker.

32. What other corroborative material is there against appellant Sharukh aka Mani?

(a) We have already held that the identification of the appellants by eye witness Hyder Ali is unsafe and cannot be relied on for the reasons mentions above especially in the case of the appellant Sharukh aka Mani whose role he gives as pointing out the deceased to be shot which is contrary to the role assigned to himself by appellant Sharukh aka Mani in his own confession.

(b) As with the other appellants who were convicted for life the same considerations apply regarding corroborative evidence. Namely;

- (i) No weapon was recovered from him and as such the FSL report cannot connect him to the offense despite the fact that it was positive.
- (ii) No CDR was produced in evidence to link him to any other appellant at the given time of the crime.
- (iii) The positive blood test goes to the death of the deceased and is irrelevant for purposes of connecting the appellant to the crime.

- (iv) No motive has been asserted by the prosecution for the murder and none has been proved.
- (v) None of the recoveries were put to the appellant during his S.342 Cr.PC statement and as such cannot be used to convict him.
- (vi) Taking the police to the place of wardat is irrelevant as the police already knew the place of wardat which had also been shown on the T.V and written about in newspapers.

(c) The requirements of circumstantial evidence connecting the appellant to the offence have not been met. In this respect reliance is placed on the case of **Fayyaz Ahmed** (Supra) as referred to earlier in this judgment.

33. Thus, there is no other corroborative evidence to link the appellant Sharukh aka Mani to the offence appellant Sharukh aka Mani is acquitted of the charge, his appeal is allowed, the impugned judgment is set aside in so far as it relates to him and he shall be released unless wanted in any custody case.

34. It cannot be lost sight of that in a criminal case the burden lies on the prosecution to prove its case beyond a reasonable doubt. The defence can raise as many defences as it wants and even need not raise any defence except to plead not guilty and deny the allegations as unlike in civil cases if a piece of evidence is not challenged in a criminal case it will not be deemed to be an admission. In this respect reliance is placed on **Mst. Asia Bibi V State** (PLD SC 2019 64).

35. The defence case in essence is that the appellants have been falsely implicated on political grounds and that they were not the ones who shot or planned the murder of the deceased or were present at the time of the murder and we find that the prosecution has not been able to prove otherwise beyond a reasonable doubt. As in all criminal cases the benefit of the doubt goes to the accused and in this case there is a **major doubt** about the correct identification of the appellants at the scene of the murder. In this respect reliance is placed on the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which

creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

36. We find in many key aspects of the prosecution case as discussed in this judgment there are **grave and major doubts** especially in terms of the correctness of the identification of the appellants at the scene of the murder which must go to the benefit of the appellants which has lead us to the findings which we have reached in this judgment.

Conclusion.

37. For the reasons discussed in this judgment, all the appeals of the appellants are allowed, the impugned judgment is set aside in respect of all the appellants, all the appellants are acquitted of the charge and shall be released from custody unless wanted in any other custody case. The confirmation references against appellants Faisal Mehmood aka Mota and S.M. Kamaran aka Zeeshan are answered in the negative.

38. The appeals stand disposed of in the above terms.