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IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi

CRIMINAL APPEAL NO.334 & 336 OF 2021.

Appellant:	Waqar Ali alias Bantoo s/o Irshad Ali through M/s. Maroof Hussain Hashmi and M.S. Anjum, Advocates.
Respondent:	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.

CRIMINAL APPEAL NO.335 OF 2021.

Appellant:	Asad alias Chota s/o Muhammad Irshad through M/s. Maroof Hussain Hashmi and M.S. Anjum, Advocates.
Respondent:	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.

CRIMINAL ACQUITTAL APPEAL NO.383 OF 2021.

Appellant:	Muhammad Waqar-ul-Islam s/o. Muhammad Irshad Abbasi through Syed Lal Hussain Shah, Advocate.
Respondent:	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.

CRIMINAL REVISION APPLICATION NO.152 OF 2021.

Appellant:	Muhammad Waqar-ul-Islam s/o. Muhammad Irshad Abbasi through M/s. Maroof Hussain Hashmi and M.S. Anjum, Advocates

Respondent:	**1) Waqar Ali alias Bantoo s/o Irshad Ali through M/s. M/s. Maroof Hussain Hashmi and M.S. Anjum, Advocates** **2) The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.**
Date of Judgment	**19.09.2022**

JUDGMENT

Mohammad Karim Khan Agha, J:- Syed Lal Hussain Shah, Advocate files Vakalatnama on behalf of Sikander alias Babloo, who is respondent in appeal against acquittal bearing No.383 of 2021.

2. Appellants Waqar Ali alias Bantoo and Sikandar alias Babloo were tried in the Model Criminal Trial Court / Court of 1st Additional Sessions Judge (East) Karachi in Session Case No.2327 of 2020 in respect of Crime No.275/2018 u/s 302/397/34 PPC registered at PS Brigade, Karachi and vide judgment dated 14.06.2021 Waqar Ali @ Bantoo was convicted u/s.302-B PPC and sentenced to life imprisonment. In addition he was directed to pay compensation to the tune of Rs.10000/- to the legal heirs of the deceased and if he failed to make such payment he would suffer S.I. for 06 months more in addition to the substantive sentence. Accused Sikandar @ Babloo was acquitted.

3. The brief facts of the prosecution case as narrated by the complainant Muhammad Waqar-ul-Islam Abbasi son of Muhammad Irshad Abbasi are that Muhammad Imad ul Islam Abbasi (deceased) was his younger brother. On 28.12.2018 he was present at his house. At about 0142 hours he heard sound of fire. He saw from the window of his house which was constructed on first floor two persons one wearing helmet and other was without helmet. Both were having pistols. The person with helmet was fighting with his brother Imad while the person without helmet was standing on his bike. His brother was holding hand of the person with helmet and the person without helmet fired at his brother. In the meanwhile, he went down stairs and saw the person without helmet was making continuous firing on his brother. When he tried to follow them, they fled away on motorcycle. His elder brother Ansar-ul-Islam also arrived with other people of mohallah. They brought injured Imad to

Jinnah Hospital on motorcycle. The doctor was making treatment during which his brother expired. The police arrived and examined dead body of Imad and SIP Javed arrived and recorded his statement u/s.154 Cr. P.C. Thereafter, after post mortem they received dead body of his brother. Hence, on the basis of statement under Section 154 Cr.P.C. such FIR was lodged against two unknown accused persons.

4. After completion of investigation the challan was submitted against both the accused to which they pleaded not guilty and claimed trial.

5. The prosecution in order to prove its case examined 12 witnesses and exhibited various documents and other items. The statements of accused were recorded under Section 342 Cr.P.C in which they denied the allegations leveled against them and claimed false implication.

6. After hearing the parties and appreciating the evidence on record, the trial court convicted the appellant Waqar Ali as set out earlier and acquitted Sikandar hence Waqar Ali @ Bantoo has filed this appeal against conviction. In respect of Respondent Sikandar @ Babloo complainant has filed an appeal against his acquittal bearing No.383 of 2021 and he has also filed a Cr. Revision Application No.152 of 2021 for enhancement of sentence of Waqar Ali @ Bantoo from life imprisonment to death penalty.

7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 14.06.2021 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

08. At the very out set we note that appellant Waqar Ali @ Bantoo was also tried separately before the same trial Court in Session Case No.2015 of 2020 under FIR No.54 of 2020 u/s.23(i)A SAA 2013 of PS Brigade, Karachi and vide separate judgment dated 14.06.2021 he was convicted and sentenced to suffer 07 years imprisonment with fine of Rs.50000/- and in case of default in payment he would undergo SI for 02 months more. He was also extended the benefit of Section 382-B.

09. It is noted that there were two separate judgments in respect of each case which were inter connected as the case pistol recovered from the appellant Waqar Ali @ Bantoo in the Arms case was also used in the main

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case of murder and as such there was no reason why both these cases should not have been amalgamated and tried together in order to avoid conflicting judgments.

10. Be that as it may, learned counsel for the appellant Waqar Ali, Learned counsel for the complainant, learned counsel for the Respondent Sikandar for whom appeal against acquittal has been filed and learned Additional Prosecutor General Sindh pointed out that the evidence of 03 PWs in the main case bearing No.2327 of 2020 and inter connected case 2015 of 2020 are identical in all respects. These are PW-1 ASI Sahib Khan, PW-2 PC Arshad and PW-3 I.O. Abdul Khaliq. According to them, the evidence of all above three witnesses have been copied and pasted in both judgments and as such this has led to a defect which is not curable u/s.537 Cr.P.C. and as such the case needs to be remanded back to the trial court for a denovo trial.

11. We have considered the contentions of the parties and the relevant law. We have also compared the evidence of PW Sahib Khan, PW Arshad and PW Abdul Khaliq and we are satisfied that the depositions of the above three prosecution witnesses are identical in all respects and were copied and pasted in the two separate judgments which under the law is not permissible. In each separate case each witness has to appear in the witness box to record his evidence and cannot be copied and pasted into another case. This is a defect which is incurable as was held in the case of **Azad Khan v. The State** (2004 YLR 1076):-

> *"4. We have heard the Advocate for the appellants, State counsel and perused the record of this case very carefully. Learned Advocate for the appellants has stated that the procedure adopted by the trial Court in the trial of both the cases was against the provision of law as after recording the statement of witnesses in one case the copies of the said statements were placed on the record of another case, which is not permissible under the law as such, the appellants have been prejudiced, therefore, he has prayed that the cases may be remanded to the trial Court for retrial.*
>
> *5. Learned State counsel after going through the depositions of witnesses in both the cases has conceded the above position and has further added that the trial Court has committed illegality in placing the copies of the depositions of witnesses recorded in one case, in the file of second case and that the said illegality is not curable under section 537, Cr.P.C.*

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6. We have given due consideration to the arguments and have minutely examined the statements of three witnesses recorded in both the cases. They are P.W.1, A.S.-1. Mehar Ali, Shah, Mashir, P.W.2, S.H.O. Muhammad Aslam, complainant, and P.W.3 Line Officer Muneer Ahmed, Investigating Officer. We find that the said three witnesses are common in both the cases. Their statements were recorded on the one and same date in both the cases. The examination of the statements reveals that examination-in-chief, cross examination, paragraphs, sentences, construction and placement of each sentences and words of each sentence are same, '(except opening sentence and one word in 15th line of the deposition of P.W.2) which is not possible when the statements of same witnesses are recorded on the same date but at different times. Therefore, it is clear that after recording the statements of witnesses in one case, the copies of the depositions of the said witnesses were prepared and placed in the record of other case. The said procedure is in violation of provisions of section 353, Cr.P.C. and Articles 70 and 71 of the Qanun-e-Shahadat Order, 1984. From the said procedure, the trial Court, in fact has read the evidence of one case in other case which is not permissible under the law. The said procedure is highly objectionable and has no sanctity of law.

7. In view of the above circumstances, the submissions made by the learned advocate for the appellants have great force, as such; the mode adopted by the trial Court in conducting these cases is illegal, which has vitiated the trials.

8. In the case of Noor Muhammad v. State PLD 1981 Lahore 60, where some portion of the statements of witnesses were copied from one case and placed on the record of another case then in such situation it was held that the trials of both the cases were illegal and the said defect was not curable under section 537, Cr.P.C., therefore, the Court ordered for the retrial of both the cases.

9. In the case of Alam Sher v. State 1977 PCr.LJ 1078 in the similar situation the Court ordered for the retrial of the cases and at page 1085 observed as follows:--

> *"..... In all the above five cases, the evidence consists of the statements of Khan Mir, P.W.1 and Ch. Ahmad Ali, S.H.O. P.W.2 'and recoveries. The evidence has been recorded in a mechanical fashion. It appears that the entire evidence was recorded once and five copies were prepared and filed in different cases. The judgments have also been written in that mechanical fashion.*
>
> *In case of Muhammad Younis v. State PLD 1953 Lahore 321, it is reported that if there are common judgments and evidence is copied, the trial was said to be illegal, viz. in violation of mandatory provisions of section 353, Cr.P.C. and sections 137 and 138 of the Evidence Act. Similarly, in Nur Illahi v.' State PLD 1966 SC 708 the Supreme Court disapproved the procedure whereby the evidence of common witnesses was recorded once only and their statements were read out in the other cases. Similarly, in Abdul Waheed v. State 1968 PCr.LJ 776 where the evidence of Handwriting*

Expert, who was common in two cases, and whose original deposition was placed on the record of the other case through a carbon copy; the procedure adopted had invalidated the trial, and retrial was ordered. In case of Qalandar Khan v. State PLD 1971 Peshawar 119 the statement of common witnesses were recorded only in one case and the carbon copies thereof were placed on the record of the other cases. It was held that the procedure adopted was illegal."

10. We agree with the above proposition of law. Consequently, we set aside the convictions and sentences awarded to the appellants, without touching the merits of the case and remand both the cases for retrial from the stage of recording of the evidence. The appeals are allowed in the above terms."

12. In the light of the above, it justifies a remand of the cases back to the trial Court for a de novo trial. Accordingly we set aside the judgment passed in Criminal Appeal No.334 of 2021 and No.336 of 2021 and direct a de novo trial of the same which shall be held by the Model Criminal Trial Court / 1st Additional Sessions Judge (East) Karachi whereby the learned trial Court shall frame a common charge in respect of all the offences and thereafter carry out a denovo trial and conclude the same within 03 months of the date of this Judgment.

13. We note that appeal against acquittal has been filed against respondent Sikandar, who was acquitted in the main case. We consider that it will meet the ends of justice if Sikandar @ Babloo is granted bail after furnishing a solvent surety in the sum of Rs.50,000/- and PR bonds in the like amount to the satisfaction of the learned trial Court i.e. Model Criminal Trial Court / 1st Additional Sessions Judge (East) Karachi within 7 days of the date of this order and join the trial.

14. That having remanded both the cases back to the trial court as mentioned above for a de novo trial after framing a single charge we hereby dispose of Criminal Acquittal Appeal No.383 of 2021 and Criminal Revision Application No.152 of 2021 as infructuous. With regard to the Criminal Appeal No.335 of 2021 this appeal shall be separated from this bunch and shall be put up before a single bench of this Court for hearing as per roster on 04.10.2022.

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15. The above Criminal Appeals No.334 of 2021, No.336 of 2021, Criminal Acquittal Appeal No.383 of 2021 and Criminal Revision Application No.152 of 2021 are disposed of in the above terms.

16. A copy of this order along with R&Ps of above disposed of appeals shall be returned to Model Criminal Trial Court / 1st Additional Sessions Judge (East) Karachi for compliance.

JUDGE 19/09/22

JUDGE
19/09/2022

MAK/PS

Circumstancial and Last Seen Evidence
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IN THE HIGH COURT OF SINDH, KARACHI

CRIMINAL APPEAL NO.661 OF 2021.
CONF. CASE NO.17 OF 2021.

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,

Appellant:	Ghulam Mustafa S/o. Badi ur Rehman through Mr. Imtiaz Ali Channa, Advocate.
Respondent:	The State through Mr. Ali Haider Saleem, Additional Prosecutor General Sindh.
Date of hearing:	19.09.2022.
Date of Announcement:	22.09.2022.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant Ghulam Mustafa S/o. Badi ur Rehman has preferred the instant appeal against the judgment dated 23.11.2021 passed by VIth Additional District & Sessions Judge, Karachi West in Special Case No.44 of 2018 arising out of Crime No.296 of 2017 U/s. 376 PPC registered at P.S. Docks, Karachi whereby the appellant was convicted and sentenced to death subject to confirmation by this court along with fine of Rs.500,000/- payable to the victim in view of section 545 sub-section (a) and (b) Cr.P.C. In case of default in payment of fine he shall undergo R.I. for a further period of 06 months.

2. The brief facts of the case are that on 19.07.2017 at about 1500 hours, complainant namely Noor Muhammad son of Jabir Malook lodged FIR No.296/2017 u/s. 376 PPC at police station Docks, wherein he stated that on 12.07.2017 at about 1830 hours, he was available with his family, when his Saandu namely Ghulam Mustafa son of Badi ur Rehman resident of House situated at Muhammadi Colony, Karachi, came to his house and took his daughter namely Baby Muskan, aged about 08 years on the pretext of buying her sweets. At about 1930 hours, his daughter Muskan returned at her house crying with blood on her shalwar. He took her to the area doctor and then went at children ward, Jinnah Hospital, Karachi for her medical treatment. After some

time, he came to know that the rape has been committed with his daughter Muskan and she also disclosed that her Khalu Ghulam Mustafa has committed rape with her, hence this FIR.

3. After completion of investigation I.O. submitted charge sheet against the accused person to which he pleaded not guilty and claimed trial.

4. The prosecution in order to prove its case examined 6 witnesses and exhibited various documents and other items. The statement of accused was recorded under Section 342 Cr.P.C in which he denied all the allegations leveled against him. After appreciating the evidence on record the trial court convicted the appellant and sentenced him as stated earlier in this judgment hence, the appellant has filed this appeal against his conviction.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned counsel for the appellant has contended that the appellant is innocent and has been falsely implicated in this case at the behest of his wife PW 3 Begum Kulsom whom he had quarreled with hence the 6 day delay in lodging the FIR during which period consultation took place with the complainant, PW 3 his annoyed ex wife and PW 4 the mother of the victim all of whom were related to the victim and against him; that there was no eye witness to the murder; that there is no last seen evidence; that the evidence of the witnesses suffer from material contradictions and cannot be safely relied upon and thus for any or all of the above reasons the appellant should be acquitted of the charge by being extended the benefit of the doubt. In support of his contentions he placed reliance on the cases of **Muhammad Afzaal v. The State** (2019 MLD 1707), **Saleem and others v. The State and others** (2021 MLD 1184), **Muhammad Javed v. The State** (2019 SCMR 1920) and an unreported Judgment of this Court **Zain-ul-Aabdin v. The State** (Criminal Jail Appeal No.117 of 2021 dated 15.08.2022).

7. On the other hand learned Additional Prosecutor General Sindh appearing on behalf of the State has fully supported the impugned judgment. In particular he has contended that the delay in the FIR was not fatal to the prosecution case; that the last seen evidence connects the accused to the crime which is corroborated by the blood and semen which was found on the accused

Shalwar and the medical evidence and has preyed for the dismissal of the appeal. In support of his contentions he has placed reliance on the cases of **Irfan Ali Sher v. The State** (PLD 2020 Supreme Court 295), **Mst. Sughran Bibi v. The State** (PLD 2018 Supreme Court 595), **Zahid and another v. The State** (2020 SCMR 590), **Abdul Ghafoor v. The State** (2000 SCMR 919), **Babar v. The State** (2020 SCMR 761) and **Fayyaz Ahmad v. The State** (2017 SCMR 2026).

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

9. Before proceeding further we are acutely aware that this is a very heinous offence whereby a minor girl has been raped in a most brutal manner which crime offends the very core of society and humanity however, as Judges we have to put such aspects aside and decide the guilt or innocence of the appellant by dispassionately assessing the evidence before us and coming to a decision which is supported by the evidence on record and the governing law and not by our emotions or own personal feelings. We can only be guided by the evidence and the law and nothing else. In this respect we refer to the case of **Azeem Khan** V **Mujahid Khan** (2016 SCMR 274) which held at P.290 Para 32 as under;

> *"Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty".*

10. This position was reiterated in the later case of **Naveed Asghar** v **State** (PLD 2021 P.600) in the following terms;

> *"The ruthless and ghastly murder of five persons is a crime of heinous nature; but the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such*

nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow. It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10A of the Constitution and are to be read as an integral part of every sub-constitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person.".

11. At the outset based on our reassessment of the prosecution evidence especially the medical evidence we find that the prosecution has proved beyond a reasonable doubt that on 12.07.2017 between 1630 and 1930 hours baby Muskan (the victim) aged 8 years of age was subject to sexual assault/rape most probably in the area of medina Chowk near Saleem Machi Ka Wara Karachi.

12. The only question left before us therefore is whether it was the appellant who sexually assaulted/raped the victim at the said time, date and location?

13. After our reassessment of the evidence we find that the prosecution has **NOT** proved beyond a reasonable doubt the charge against the appellant for which he was convicted keeping in view that each criminal case is based on its own particular facts, circumstances and evidence for the following reasons and allow his appeal;

(a) The FIR was lodged 6 days after the incident which ordinarily might have been fatal to the prosecution case. However the superior courts in rape and kidnapping cases have often give the complainant in such like cases some leeway in lodging the FIR as in such cases the main concern is for the family to search for the missing person or attend to the sexually assaulted minor at hospital as has been explained in this case. In this respect reliance is placed on the cases of **Zahid** (Supra) and **Irfan Ali Sher** (Supra). We do note **however** that in this particular case the appellant was named by the victim 4 days after the incident at the time of her discharge

from hospital and yet it still took a further two days for the father to register the FIR which puts us to some caution.

(b) The best evidence namely that of the victim was not produced by the prosecution despite her being about 8 years of age and since the appellant was known to her as a relative she could easily have identified him as the person who had sexually assaulted her/raped her. Thus, there is no eye witness to the sexual assault/rape.

(c) With no eye witness to the rape as such the prosecution case is based on **circumstantial evidence** which the court must view with great **care and caution**.

In this respect reliance is placed on the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) which held as under;

> *"**In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same.** Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. **To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice."***

Likewise in the case of **Fayyaz Ahmed V State** (2017 SCMR 2026) the great care and caution in which circumstantial evidence needed to be scrutinized was emphasized especially when dealing with a capital case in the following terms;

> *"**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)

In this case it is pertinent to note that PW 3 Begum Kulsoom who is the wife of the accused seems to have reason to falsely implicate her husband who is the accused. In her own evidence she has admitted that she had quarreled with her husband and for the last two days before the incident she had been staying with her mother and that after the incident she had filed suit for divorce from her husband the accused. It is notable that her evidence is one of three separate and differing sets of evidence of how the victim returned home and significantly she was the one who handed over her husband's blood and semen stained shalwar 5 days after the incident despite her not knowing what he was wearing that day. In addition she seems to have travelled from Karachi to Mirphurkas to point out the accused at a petrol pump where he appears to have remained for about 7 hours which does not appeal to logic, common sense or reason. Was he waiting for her to come and point him out for 7 hours at Mirphurkas at a petrol station? Even otherwise her involvement in the investigation seems to be some what excessive as she is mashir in some cases and her involvement in the case appears to be even greater than the mother and father of the victim. Thus we are put on **extreme caution** regarding the circumstantial evidence especially that provided by PW 3 Begum Kalsom the wife of the accused based on the particular facts and circumstances of this case where there is a possibility of planted evidence by the wife against the accused husband.

Turning to the circumstantial evidence.

(d) The learned APG claims that there is last seen evidence to link the appellant to the victim. The test for last seen evidence has been set out in the following cases in the following terms and as can be seen even if the test is met cannot alone be used to convict a person in a capital case without corroborative evidence from an unimpeachable source as it is the weakest type of evidence;

(i) In **Fayyaz's case** (Supra) it was held as under regarding last seen evidence;

"The last seen evidence is one of such categories of evidence. In this category of cases some fundamental principles must be followed and the Prosecution is under-legal obligation to fulfill the same, some of which may be cited 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 plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused*** *and onus in this 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 of that 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 for accomplishment of the same towards a particular destination, otherwise giving company by the deceased to the accused would become a question mark.*

(v) *Additionally there must be some motive on the part of the accused to kill the deceased otherwise the Prosecution has to furnish evidence that it was during the transit that something happened abnormal or unpleasant which motivated the accused in killing the deceased.*

(vi) *The quick reporting of the matter without any undue delay is essential, otherwise the prosecution story would become doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person.*

Beside the above, circumstantial evidence of last seen must be corroborated by independent evidence, coming from unimpeachable source because uncorroborated last seen evidence is a weak type of evidence in cases involving capital punishment.

(vii) *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, which may arise if it is not done in a proper and fair manner.*

(viii) *The Court has also to seriously consider that whether the deceased was having any contributory role in the cause of his death inviting the trouble, if it was not a pre-planned and calculated murder."(Bold added)*

(ii) In the later case of **Muhammed Abid V State** (PLD 2018 SC 813) which delved further into the doctrine of "last seen together" evidence it was held as under at P.817 Para 6:

"The foundation of the "last seen together" theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused. 2. proximity of the crime scene. 3. small time gap between the sighting and crime. 4. no possibility of third person interference 5. motive 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. ***There must be something more establishing connectivity between the accused and the crime"*** *(bold added).*

(e) Returning to the case in hand.

The question is whether there was even any last seen evidence; PW 1 Noor Muhammed who is the complainant in this case states in his evidence in chief that, *"On 12.07.2017 at about 1830 hours the accused took away his daughter (the victim) on the pre text of buying her some candies. At 1930 hours when the accused brought his daughter back she was bleeding and the accused also threatened and harrased her. The accused disclosed that his daughter had suffered injury on account of falling over"* **However,** in his cross examination he states that *"when accused took Muskan with him I was not at home and he found his daughter at the Dr's clinic."* As such we find that neither did the complainant see the appellant leave with his daughter nor come back with his daughter and as such his evidence cannot qualify as last seen evidence. No other witness saw the victim leave her house with the appellant.

(f) A predominant number of witnesses state that the appellant was with the victim when he brought her home however only one witness puts the daughter at the appellant's house on the fateful day which again is the complainant who states that the owner of the appellant's house **disclosed to him** that the victim came to him for getting light. The owner however was not examined and as such this part of the complainant's evidence is **hearsay** and inadmissible especially as there was no reason for the owner not to be called as a witness in support of the prosecution case which might at least lead to there being some last seen evidence. It also does not appeal to logic, commonsense or reason that the victim who was only 8 years old would ask the owner of the appellant's house for getting light when she did not live in the house as opposed to the adult appellant who did live in the house.

As such we find that there was no last seen circumstantial evidence which at any rate is the weakest form of evidence since the only evidence on record is that the appellant brought the victim home and claims that her injury was on account of a fall. Interestingly Noor Alam who was also

living with the complainant according to the complainant called the appellant and told him that the injury was on account of a fall. Again this is only hearsay evidence as Noor Alam was not called as a witness.

(g) It also does not appeal to logic, commonsense and reason that if the appellant had so severely raped the victim to the extent that she had to undergo surgery that he would bring her home with such a lame excuse of a fall especially when no one saw her with her. He must have known that after a medical examination he ran the risk of being exposed. He might have killed her or simply left her in the street rather than running the risk of making himself a potential suspect in a capital case.

(h) As discussed above we also find the evidence of 3 out of the 6 witnesses PW 1 Noor Muhammed (father of the victim), PW 3 Begum Kulsom (wife of the accused) and PW 4 Marian (wife of PW 1, mother of the victim and sister of PW 2 Begum Kulsom) to be contradictory in how the victim returned home in an injured condition and her level of consciousness. PW 1 's evidence we have already discussed and find that he contradicted himself in his cross examination in a material way with regard to this aspect of the case. With regard to PW 3 Begum Kulsom she states in her evidence that she was at her mother's house when a young boy told her that the victim was lying in a gali near her mother's house. She and her mother came out of her house and saw the victim bleeding and in an unconscious condition so they took her to the Dr. **Significantly** her mother was not called as a witness to corroborate her story which is at odds with the evidence of PW 3 Mariam who is the mother of the victim who states in her evidence that on 12.07.2017 the victim came into the house and her condition was not fit and blood was oozing from her private parts and her blood was stained on her shalwar in the back the present accused Mustafa came in the house. In her evidence her daughter appears to be conscious. In any event with regard to this aspect of the case PW 3 Begum Kulsom and PW 4 Marian completely contradict each other in a material way which castes doubt on their credibility and reliability of their evidence as with the evidence of PW 1 the complainant with regard to this aspect of the case.

(i) With regard to the blood and semen on the Shalwar of the accused this was removed from his house by his annoyed wife PW 3 Begum Kalsom 5 days after the incident and given to the police. Interestingly no blood was found from the house of the appellant which begs the question whether the sexual assault/rape actually took place in his house. This blood and semen was sent to the chemical examiner 9 days after the incident and remained with the chemical examiner for about 11 months. Most witnesses state that the accused was with the bloodied victim from the time he brought her home to taking her to the local Dr, then to civil hospital and JPMC so it may be that the blood on his shalwar came from the victim during this period although this is not conclusive. With regard to the human sperm being found on his shalwar this is probably the strongest piece of circumstantial evidence against the

> accused **however** the shalwar was not kept in safe custody and although sperm has been found on his Shalwar there is no evidence that the sperm belonged to him. Even if the sperm did belong to him it could have been planted by his wife PW 3 Begum Kalsom who was annoyed with him, not living with him and wanted a divorce.

14. Thus, based on the sole piece of potential circumstantial evidence of semen being found on the appellant's Shalwar which was not kept in safe custody, might not have been his and might have been planted by his wife we are not persuaded to uphold the conviction of the appellant. We find that the prosecution has **not** proved the charge against the appellant beyond a reasonable doubt and by extending the benefit of the doubt to the appellant we hereby acquit him of the charge, allow his appeal and answer the confirmation reference in the negative.

15. The appeal and confirmation reference are disposed of in the above terms.