

IN THE HIGH COURT OF SINDH, KARACHI

Spl.CrI.A.T.A No. 04 of 2010

Present Before:

Mr. Justice Aftab Ahmed Gorar &
Mr. Justice Khadim Hussain Tunio

Mohsin Raza and Adnan Haider, : Mr. Abdul Razzak and Anwar Ali
Appellants, through Shah, Advocates

The State, respondent, through : Mr. Muntazir Mehdi Memon,
Deputy Prosecutor General

Spl.CrI.A.T.A No. 05 of 2010

Nazia, appellant, through : Mr. Mehmood-ul-Hassan and
Mrs. Mumtaz Chandio, Advocates

The State, respondent, through : Mr. Muntazir Mehdi Memon,
Deputy Prosecutor General

Date of Hearing : 17-04-2018

Date of Judgment : ____ .04.2018

J U D G M E N T

AFTAB AHMED GORAR---J., This judgment will dispose of both the captioned Special Criminal Anti Terrorism Appeals altogether because same are arisen out of one and the same crime. Appellants (i) Mohsin Raza @ Agha Javed son of Syed Dilshad Hussain, (ii) Adnan Hyder son of Syed Asghar Ali, (iii) Mst. Shazia wife of Mohsin Raza and (iv) Mst.Nazia daughter of Muhammad Rasheed assailed impugned judgment dated 12-01-2010 delivered by the learned court of Judge Anti Terrorism Court No.I, Karachi Division in Special Case No. 101 of 2008, Police Station Gulbahar Karachi, registered under Section 365-A, 302 and 34 Pakistan Penal Code read with Section 7(a)(e) of Anti Terrorism Act, 1997 thereby accused Mohsin Raza, Adnan Hyder, Mst.Shazia and Nazia so far as Section 34 Pakistan Penal Code is concerned, all the accuse dare liable to conviction for kidnapping for ransom, accordingly convicted them for an offence

punishable under Section 7(e) ATA, 1997 read with Section 365-A Pakistan Penal Code and sentenced to each of accused for imprisonment for life and forfeiture of their property to the extent of Rs.200,000/= each, in default thereof, accused shall further undergo rigorous imprisonment for one year more. Benefit of Section 382-B Cr.P.C was also extended in favour of the accused. Accused Mohsin Raza was found guilty of committing murder of deceased Sohrab Khan whereby Mohsin Raza was awarded death sentence under Section 7(a) Anti Terrorism Act, 1997, read with Section 302 Pakistan Penal Code, accused should be hanged by neck till he is death. The death sentence is subject to the confirmation of High Court of Sindh, Karachi. Accused Mohsin Raza was also sentenced to pay fine of Rs.500,000/=, out of fine amount compensation of Rs.2,50,000/= to be paid to the legal heirs of deceased Sohrab Khan as is contemplated under Section 544-A Cr.P.C, in case of non payment accused shall suffer rigorous imprisonment for the period of two years more; both the sentenced ordered to be run concurrently. The proceedings against appellant Mst.Shazia were stand abated by this Court vide order dated 02-12-2016 as per death certificate produced by the Senior Superintendent Central Prison for Women Sindh.

2. Briefly the sum and substance of the prosecution story as is envisaged in the FIR are that, complainant Abdul Ghaffar Khan recorded his statement under Section 154 Cr.P.C, same was incorporated into FIR alleging therein that he received telephone call on 22.06.2008 at 12.10 a.m., from partner of Sohrab Khan namely Muhammad Ali that he should reach at Muka Chow for an urgent work and he was also asked to bring Javed Hashmi, complainant together with Javed Hashmi went there, where Muhammad Ali informed complainant that Sohrab Khan had telephoned him that he was in urgent need of Rs.70 to 80,000/= as he was in urgent difficulty, he had also asked him to make the arrangement of the

said money in any way and he further directed one phone to reach with the money at Meena Bazaar Karimabad. Muhammad Ali further disclosed to the complainant that he had taken the money to the place which was informed to him by Sohrab Khan and again he was asked by deceased Sohrab Khan on telephone to bring the money at Karimabad Bridge, when he reached at the bridge, one person came there on motorcycle and enquired from the P.W Muhammad Ali about the money which he had brought, Muhammad Ali refused him to handover the money, but on seeing the mobile phone of Sohrab Khan in hand of the culprit, he handed over the money to that person; complainant alongwith Muhamamd Ali and others reached at Police Station Azizabad and made such entry in the police roznamcha. Thereafter complainant Javed Malik and brother of deceased went to Police Station Airport at about 3:30 a.m., and lodged report regarding missing of his brother and they returned to home. In the morning Station House Officer Police Station Gulbahar informed the complainant that dead body of his brother Sohrab Khan had been recovered from the "Diggi" of his car and it had been taken to Abbassi Shaheed Hospital. On this information complainant alongwith his relatives rushed to hospital and found dead body of his brother in the mortuary; complainant disclosed that his brother was kidnapped for ransom by some accused and after getting the ransom amount he was murdered.

3. Investigation was entrusted to AVCC and Investigation Officer seized the record of Cellular # (0321) 8934 429 and # (0302) 2009 548 respectively, it had transpired that conversation had taken place via both the above mobile numbers; on 22-07-2008 on the basis of record of above mobile telephone numbers, Investigation Officer raided House # B/2/48, Talib Colony, Liaquatabad together with police party and lady constable whereby arrested accused Mst.Nazia and on her pointation Investigation Officer arrested accused Mohsin Raza and Mst. Shazia and on their pointation Investigation Officer arrested their fourth

accomplice Adnan Hyder from the street in front of House # 2281, Hussinabad, Jafferia, Golimar and recovered one T.T.Pistol from his possession. On 29-07-2008 Investigation Officer produced accused Mohsin Raza before Judicial Magistrate for identification parade where he was correctly identified by PW-Muhammad Ali. Thereafter on 01-08-2008 Investigation Officer produced accused Mst.Nazia before learned Judicial Magistrate, where her confessionals statement was recorded, wherein she narrated the entire facts and disclosed that she alongwith other co-accused Mohsin Raza, Mst.Shazia and Adnan Hyder had kidnapped deceased Sohrab Khan and kept him in captivity in House # B/2/48, Talib Colony, Liaquatabad where accused Adnan Hyder alongwith accused Mohsin Raza on the force of pistol tied him. Since the deceased Sohrab Khan was brought deceitfully by her (accused Mst.Nazia) at the above house where accused Mohsin Raza and Shazia were residing and accused Mohsin Raza had brought the ransom amount and after some quarrel with the deceased Sohrab Khan, accused Mohsin Raza murdered him with licenced pistol of accused Adnan Hyder and thereafter they all put the dead body of deceased in the "Diggi" of Car of deceased and left it near interior road, Firdous Colony, near Salman Heights and after completing the investigation, Investigation Officer submitted the charge sheet before Hon'ble Administrative Judge Anti-Terrorism Courts, High Court of Sindh, Karachi, on 11.08.2008, from where from it was transferred to the court of Judge Anti Terrorism No. 1 Karachi Division.

4. After taking oath by the learned Judge, Anti-Terrorism Court No.I [Karachi] as provided under Section 16 of the Anti-Terrorism Act, 1997 at Ex.6, a formal charge at Ex.7 was framed against the appellants to which appellants pleaded not guilty and claimed to be tried vide their plea at Ex.7/A to 7/D respectively.

5. Prosecution examined PW-1 Abdul Ghaffar [Complainant] at Ex.8, PW-2 Mr.Abdul Sattar, Civil Judge & Judicial Magistrate VIII [Central] Karachi]at Ex.9, PW-3 Muhammad Ali at Ex.10, PW-4 Ms.Sarah Junejo Civil Judge & Judicial Magistrate [Central] Karachi at Ex.11, PW-5 Hazoor Bux Patrolling Officer Motorway Police at Ex.12, PW-6 ASI Ali Sher Zaidi at Ex.13, PW-7 Muhammad Tariq at Ex.15, PW-8 HC Suhail Ghani at Ex.16, PW-9 Dr.Muhammad Saleem Arain at Ex.17, PW-10 Inspector Mehmood Khan at Ex.18, CW-1 ASI Syed Ali Sher at Ex.19, CW-2 Investigation Officer Mr. Mehmood Khan Rajput at Ex.22.

6. Statement of accused as provided under Section 342 Cr.P.C has been recorded wherein accused denied the allegations and claimed themselves to be innocent. Accused did not choice to examined themselves as is contemplated under Section 340(2) Cr.P.C neither intend to adduce any defence evidence in disprove of the charge as provided under Section 340(2) Cr.P.C.

7. **M/s Abdul Razzak, Syed Anwar Ali Shah, Syed Mehmood-ul-Hassan and Ms.Mumtaz Chandio** advocates representing the appellants in both the Special Anti Terrorism Appeals contended that learned trial Court had misread the entire evidence available on record and mis-appreciated the law as well as facts by delivering impugned judgment which is not maintainable and requires interference by this Court to be set aside; per learned counsel the evidence requires reappraisal by this Court; per learned counsel the entire evidence as is produced by the prosecution is not only inconsistent, conflicting and contradictory but also untrustworthy, dishonest and false one; per learned counsel prosecution has miserably failed to establish the guilt of the appellants; per learned counsel the conviction and sentence as is awarded to the appellants is bad in law and facts;

per learned counsel learned trial Court had failed to consider the material facts; alleged confessional statement is general in nature, there is sufficient delay and is due to ignorance of legal requirement of law as is prescribed, same is the exculpatory, unsustainable, nullity in the eyes of law, having no legal sanctity in law; per learned counsel there is no independent witness of the alleged incident, regarding missing of deceased and his abduction, demand of ransom; all these aspects have not been considered in the manner which it requires as per legal approach; per learned counsel after confessional statement of appellant Nazia, her custody was again handed over to the Investigation Officer rather appellant was sent to the Judicial Custody; this lacuna has never been cured by any Law or has been explained plausibly; per learned counsel learned trial Court Judge was pleased to award death sentence to appellant No.1 on the basis of confessional statement of appellant Nazia; per learned counsel it is well settled principle of law that retracted confession need independent corroboration on material points but there is nothing in this case therefore confession is not sufficient basis for awarding any conviction / sentence to the appellants; per learned counsel the identification parade was not conducted as is provided under the Law by approaching Specific provision of identification parade; such identification parade has no value in the eyes of law; per learned counsel the prosecution has failed to produce entries made by the complainant in the presence of PW-3 Muhammad Ali at Police Station Azizabad as well as Airport in respect of missing of deceased; per learned counsel an application under Section 540 Cr.PC was moved to require the alleged entries but such an application of the appellants was dismissed rather to require the alleged entries for its genuineness and truthfulness; per learned counsel the alleged recovery of empty bullet is also dubious because it had not find place in the First Information Report and fabricated Forensic Laboratory Report has been obtained with a unexplained delay which has no nexus under the

Law; per learned counsel the impugned judgment is unwarranted under the Law as such same is against the norms, spirit and natural justice; per learned counsel there are series of contradictions and improvements in the statement of PW-Muhammad Ali who posed to be “eye-witness of the scenario”; per learned counsel it is also well settled principle of law that prosecution has to stand on its own legs and a conviction is certainly not to be based on weakness of the defence, the observations made by the learned trial Court cannot stamp testimony unnecessarily with truth as such the observations having no sanctity in the eyes of law; per learned counsel the entire prosecution witnesses are untrustworthy, unreliable as such there is no record of alleged abduction of the deceased and demand of ransom except tangible and cogent evidence; per learned counsel the impugned judgment is the result of misreading, miscarriage of justice and is liable to be set aside; per learned counsel the conviction / sentenced awarded to the appellants may also be set aside and the appellants may be acquitted of the charged offence.

Learned counsel have relied upon the case law reported in 2007 SCMR 670, 2015 SCMR 423, 2017 SCMR 898, 2010 SCMR 1009, 2011 SCMR 629, 1971 (3) SC Cases 208, 2016 SCMR 274, 2011 SCMR 769, 2010 SCMR 1706, 2008 SCMR 1572 and 2008 SCMR 707, 1969 SCMR 390, 2000 SCMR 1038, 2004 SCMR 1185, 1995 SCMR 127, PLD 1996 SC 01, 1995 P Cr.LJ 159, 1985 P Cr.LJ 1118, 2007 Cr.L.J 1792, NLR 1996 Cr.L.J 1230, 2013 P.Cr.L.J 1300, 2000 P.Cr.L.J 264, 2002 P.Cr.L.J 34, 2002 P.Cr.L.J 34, 2003 MLD 685, 2011 SCMR 1127, 2013 P.Cr.L.J 1847, 2011 S.C.M.R 323, 2013 MLD 1573, 2013 MLD 1675 FSC relevant page 1684[D], 2003 P.Cr.L.J 1847, 2003 P.Cr.L.J 1847 and 2003 P.Cr.L.J 1847.

8. **Mr. Muntazir Mehdi Memon**, Deputy Prosecutor General Sindh, contended that the learned trial Court has rightly convicted the appellants after appraising entire evidences available on record; per learned DPG there are sufficient material available on record which ultimately connect the appellants with the commission of offence; per learned DPG all the prosecution witnesses have fully implicated the appellants with the commission of alleged offence viz. Abduction, Demand of Ransom, whereby causing unnatural death of deceased; per learned DPG both the appeals moved by the appellants may be dismissed; per learned DPG the conviction and sentence awarded to the appellants may be upheld.

Learned Deputy Prosecutor General relied upon 1991 MLD 752, 1999 MLD 1460, 1999 MLD 1513 and 1999 SCMR 2841.

9. Heard and perused.

10. We have scanned the entire evidences available on record. It is now by settled provisions of criminal law that this Court has to reappraise the entire evidence for safe administration of justice. We would like to introduce PW-4 Muhammad Ali eyewitness of the scenario [alleged business partner of deceased Sohrab Khan] who deposed in the Examination-in-Chief as follows:-

“After few moments I received telephone call from the mobile phone of deceased Sohrab Khan of a person and he enquired me about my whereabouts and I informed him that I am standing at Karimabad he enquired about dress and I disclosed him that I am wearing pant and shirt on that he directed me to come on the overhead bridge of Karimabad, I was walking on the bridge and when reached on overhead bridge and at the place where under bridge and overhead bridge were meeting I saw one person came and enquired from me that I am man of Sohrab Khan, I replied him in

affirmative and he demanded money from me I asked him that he should connect me with telephone with Sohrab Khan but that person asked me that not to further talk and handover the amount immediately. I again asked him that I have money with me and I am giving it to him but I may be allowed to talk deceased Sohrab Khan, the person showed me the mobile of deceased Sohrab Khan and on seeing that I handed over Rs.80,000/= to him. The person whom I delivered Rs.80 thousand is present in the Court is same. We informed about the incident to P.S Azizabad that our friend Sohrab Khan has been kdinapped while coming from Airport to his house but at that time I was on back of my friend”

In the cross examination admitted as follows:-

“My statement was not readover to me by police but it was written on my dictation. It is correct that I talked only with Sohrab Khan on the mobile phone and nobody else talked with me on the telephone of Sohrab Khan. It is correct that I have not stated in my statement about the make, company, colour of the mobile phone showed me by the accused. It is correct that it is not mentioned in my 161 Cr.P.C statement that deceased Sohrab Khan informed me that he is in problem. I did not ask the brother of deceased that whether they can identify the accused. It is correct to suggest that Magistrate and staff were known to me personally. It is correct that in the identification there were different persons and I cannot say that they were clean shaved, beard persons or with mustaches but I identified correctly the accused.

11. This witness is interested witness and posing himself to be eyewitness of the incident, after receiving of telephone call from deceased Sohrab Khan; and had paid the ransom amount to the accused; PW-Muhammad Ali did not bother to communicate such fact either to the area Police or brother of the deceased viz. Complainant; apart from above, nowhere this witness in his statement recorded

under Section 161 Cr.P.C provided the “**hulia**” height, feature and description of appellant Mohsin Raza who alleged to have received ransom amount of Rs.80,000/= from him at overhead bridge Karimabad; although this witness admitted that he talked to deceased prior to the alleged incident but deceased didn't disclose to him what's happening. This witness also failed to produce any such entry as is kept with Police Station Azizabad regarding missing of deceased Sohrab Khan and the demand of ransom as alleged. This witness has only identified appellant Mohsin Raza via news when it was displayed; prior to this, this witness has met with Mohsin Raza but he could not communicate any details of the cellular of deceased Sohrab Khan being close friend and alleged business partner of the deceased. The testimony of this witness is not trustworthy, not inspiring confidence because once he had seen appellant Mohsin Raza holding cellular of deceased Sohrab Khan and handed over the alleged ransom amount to appellant Mohsin Raza on the other hand did not choose to act as a complainant because this witness was business partner and made arrangement of ransom amount, on the contrary this witness failed to give features and description of Moshin Raza when he made entries regarding missing of deceased at Police Station Azizabad. This witness also failed to produce any D.D entry of Police Station Azizabad regarding missing of deceased Sohrab Khan; all these aspect of the case ultimately casts reasonable doubt while applying judicious mind in the testimony of this witness.

12. We are therefore constrained to provide legal legislation and guideline as is held in 2016 SCMR 274 in the case of Azeem Khan and another v. Mujahid Khan and others it has been held as follows:-

“---Ss.365-A & 302(b)---Anti-Terrorism Act (XXVII of 1997), S.7(e)---Kidnapping for ransom, qatl-i-amd---Reappraisal of evidence---Benefit of doubt---Un-witnessed”

crime---Lack of corroborative evidence---
Voice data of phone calls not presented---
Recovery memo witnesses 'interested
witnesses'---Crime in question was an un-
witnessed incident and based only on
circumstantial evidence and recovery of
incriminating articles---Important links in
the chain of story set up by the prosecution
were missing due to lack of corroborative
evidence---No voice record transcript of
calls had been brought on record to prove
the ransom demand---Area from which the
call for proof that the cell phone from
which ransom demand was made was
missing---Attesting witnesses of recovery
memo were related to the deceased and
thus were highly interested witnesses---
Number of bones, allegedly belonging to
deceased, which were recovered on
pointation of accused persons did not
match with the number of bones sent for
analysis to the Forensic Science
Laboratory---Trial Court had relied on
highly cryptic and infirm evidence to award
death sentence to accused persons---
Supreme Court set aside convictions and
death sentences awarded to accused
persons and acquitted them of the charge.

[The underline is ours]

13. PW-1 Abdul Ghaffar Khan at Ex.8 deposed in the examination-in-chief as follows:-

"I alongwith Jawed Hashmi proceeded to Muka Chowk and reached there at about 1.00 PM. Where my brothers friend namely Tariq Khan and partner of the brother Ali Muhammad were already present and that disclosed to me that Muhammad Ali has received telephonic call of my brother in some serious condition that he requires Rs.70-80 thousand for some urgent work. Muhammad Ali disclosed that he alongwith the said amount reached at the place which was informed by the Sohrab at Karimabad near Meena Bazaar and there is received telephone call from the mobile phone number of Sohrab Khan to reach at bridge of Karimabad and Muhammad Ali disclosed that he was going on the Karimabad bridge on a motorcycle rider came there and required from him that he is belonging to Sohrab Khan and

Muhammad Ali informed him that he is belonging to Sohrab Khan and Muhammad Ali asked him to allow him to talk Sohrab Khan for which he refused and show the mobile phone of the Sohrab Khan to Muhammad Ali and on seen the mobile phone of Sohrab Khan & Muhammad Ali handed over the money to that person. After hearing these facts I proceeded to PS Azizabad and we made entry of CPLC about missing of my brother Sohrab Khan and his Car No.ANV-650, from there we proceeded to PS Airport as my brother was doing job in Jurisdiction of Airport as clearing and forwarding”

In the cross examination, this witness admitted as follows:-

“It is correct that it is not mention in my 154 Cr.P.C statement that I received call from Muhammad Ali but I stated that I received telephone from Muhammad Ali. It is correct that police did not collect any Data of my mobile phone. It is correct that I had not given my mobile telephone number in my 161 Cr.P.C and 154 Cr.P.C statements”

14. Thus the evidence of this witness is not direct neither cogent nor reliable or trustworthy because the alleged incident as alleged had taken place in between 21/22-06-2008 and FIR was lodged on 22-06-2008 at 0845 hours, there is delay of eight hours in lodgment of the FIR which is not plausibly explained by the prosecution as well as PW-Muhammad Ali. Thus this witness heard story through PW-Muhammad Ali, who being brother of deceased Sohrab Khan, is not star / eyewitness of the scenario but has given visual account heard by him through PW-Muhammad Ali, therefore his evidence is said to have been hearsay, it could not appeal to the prudent mind while adjudicating the Section 302 Pakistan Penal Code provided for capital charge.

15. We therefore offer case law reported in 1995 SCMR 127 in the case of Mehmood Ahmad and 3 others vs. The State and another, it has been held as follows:-

“---Ss.302/34 & 323---Appreciation of evidence---Delay of two hours in lodging the F.I.R in the particular circumstances of the case had assumed great significance as the same could be attributed to consultation, taking great significance as the same could be attributed to consultation, taking instructions and calculatedly preparing the report keeping the names of the accused open for roping in such persons whom ultimately the prosecution might wish to implicate---Non-explanation of the delay in making the report to might wish to implicate---Non-explanation of the delay in making the report to the police coupled with the improvements and contradictions made by the eye-witnesses in their statements had rendered their testimony doubtful and unreliable which did not inspire confidence---Medical evidence by itself was unable to establish the identity of the accused---Non-association of any independent respectable witness from the locality with the recovery proceedings, in the absence of any explanation in this behalf by the prosecution, had made the recovery of the carbine and the empties unreliable and consequently the Ballistic report was of no importance---Picking up of the accused in the identification parade without describing the roles played by them in the crime was illegal rendering the proceedings unreliable having no evidentiary value---Accused were acquitted in circumstances”

[The underline is ours]

16. It has also been held in the case of Muhammad Iqbal vs. The State, reported in P L D 1996 Lahore 402 as follows:-

(c) Qanun-e-Shahadat (10of 1984)---

“---Art. 71---Direct evidence---Law insists for a direct evidence of the primary source

and it would be inadmissible if it comes from an indirect source.

17. While intercepting the confessional statement of appellant Nazia as was recorded under Section 164, Cr.P.C. All the accused persons were arrested altogether on 22-07-2008 and accused Mohsin Raza was produced before the Judicial Magistrate for identification parade on 31-07-2008 after identification appellant Mohsin Raza and late Shazia were produced for recording their confessional statement but they refused to confess their guilt before the Judicial Magistrate and were remanded to judicial custody. Be that as it may, the Investigation Officer with malafide intention produced appellant Nazia before the Judicial Magistrate for recording of her confessional statement on 01-08-2008; learned Judicial Magistrate and Investigation Officer of the case admitted that after recording confessional statement, custody of appellant Nazia was time and again handed over to same Investigation Officer with the pretext that Investigation Officer would have to obtain remand from Administrative Judge of the ATC; which is against the norms of legal requirement of Law as such this week type of periodical judicial proceedings have no nexus while administering Criminal Justice System. Once accused confessed her guilt there would be question for further remand from hi ups. It has been surfaced on record that FIR was lodged on 22.06.2008, appellant Nazia was arrested on 22-07-2008 and her confessional statement was recorded on 01-08-2008, much after eight days after her arrest; whereby after her confessional statement her custody was again handed over to the Investigation Officer for investigation purposes which is also nullity under the Law. The statement of co-accused is inadmissible as provided under Article 38 and 39 of Qanun-e-Shahadat Order, 1984. To this aspect of the case we

have taken guideline from the case law reported in PLD 2000 Karachi 128 in the case of Muhammad Ibrahim vs. The State, it has been held as follows:-

“---S.302---Appreciation of evidence---Evidence of one of the prosecution witnesses read with F.I.R. and medical evidence had demonstrated a very uncertain situation---Complainant in his evidence recorded at the trial had altered complexion of prosecution story as given in F.I.R, by making a number of improvements and version given by other prosecution witness did not deserve any credit---Medical evidence did not support case of prosecution---No material corroboration was rendered to evidence of eye-witnesses whose testimonies even otherwise lacked credence---Magistrate who recorded confessional statement of accused, had admitted that after recording confession he sent the accused to judicial custody through same police official who had brought accused to him for confession---Act of Judicial confession as voluntariness of judicial confession which was essential prerequisite had become doubtful---Seizure memo, of hatchet allegedly used in occurrence did not mention that same was stained with blood which was necessary when medical evidence had come in conflict with ocular evidence as to the nature of weapon used while causing injury---Prosecution had, thus, failed to prove motive---Accused was acquitted of the charge giving him benefit of doubt as prosecution failed to prove the case against him”

[The underline is our]

The guideline has also been taken from case law reported in 2007 P Cr. L J 1792 Mst.Roshan Bibi and another vs. The State which reads as follows:-

“---S. 164---Confession of co-accused---Evidentiary value---Confession of co-accused under S. 164, Cr.P.C., was no evidence, moreso when it was retracted---In every case of judicial confession under Section 164, Cr.P.”C., it was to be seen, if it was made by an accused person voluntarily and free from any pressure or fear and that all the requirements of law had been complied with by the Magistrate---In case of doubt or non-compliance of legal requirements or where evidence on record was found to be contrary or not in line with

the admission of guilt, far greater care had to be taken by the court---All formalities under S. 164, Cr.P.C., if not complied with by the Magistrate, Judicial confession would lose its credibility.

In 1985 P.Cr.L.J 1118 in the case of Akhtar Muhammad vs. The State, it has been held as follows:-

---S. 364---Penal Code (XLV of 1860), S. 302---Confession---Delay of seven days in recording of confession---Magistrate recording confession after satisfying himself that accused was giving voluntary confession---Confession read over to accused who was illiterate person and after his admission that it was correct, Magistrate taking his signature---Magistrate appending certificate s required under 364, Cr.P.C.---Accused remanded to judicial custody after confession was recorded---Recording of confession after 7 days, held, immaterial in circumstances---Every confession to be considered on its own merits in light of surrounding facts and circumstances.---[Confession]---Delay]

In 1995 P.Cr.L.J 159 [Federal Shariat Court] it has been held as follows:-

(j) it is mandatory that the Court should record a statement of the accused under section 342 Cr.P.C wherein he may be asked the question whether he had made confession voluntarily or whether he had made the same under coercion or duress.

18. Coming to the Forensic Laboratory Report, it has transpired the crime weapon i.e. .30 bore pistol together with live bullets as alleged was recovered from appellants on 22-07-2008, it has been sent to the Forensic Science Laboratory, Criminalistic Division Sindh Karachi on 11-08-2008; alleged recovered pistol was sent after the delay of twenty days; it had casts serious doubts in a judicious mind, therefore, we have been fortified with the case law reported in 2008 S.C.M.R 707 in the case of Ali Sher and others vs. The State reads as follows:-

***“---S.302---Reappraisal of evidence---
Sending of crime—empties---Delay---
Crime empties allegedly found at the place
of occurrence were retained in police
station and were sent to Forensic Science
Laboratory along with the crime weapons,
12 days after the recovery of alleged
weapons---Effect---Delay had destroyed the
evidential value of such piece of evidence
and the recoveries could not offer any
corroboration to the ocular testimony”***

19. Glaring and cautious view had also been awarded to the medical evidence, thus it is now well settled that the medical evidence can furnish corroboration but itself will not establish the identity of the assailant or to connect the appellant with crime. Guideline has been taken in the case of Mehmood Ahmad and 3 others v. The State reported in 1995 S C M R 127, it has been held as follows:-

***“---Ss.302/34 & 323---Appreciation of
evidence---Delay of two hours in lodging
the F.I.R, in the particular circumstances
of the case had assumed great significance
as the same could be attributed to
consultation, taking instructions and
calculatedly preparing the report keeping
the names of the accused open for roping
in such persons whom ultimately the
prosecution might wish to implicate---Non-
explanation of the delay in making the
report to the police coupled with the
improvements and contradictions made by
the eye-witnesses in their statements had
rendered their testimony doubtful and
unreliable which did not inspire
confidence---Medical evidence by itself was
unable to establish the identity of the
accused---Non-association of any unable
independent respectable witness from the
locality with the recovery proceedings, in
the absence of any explanation in this
behalf by the prosecution, had made the
recovery of the carbine and the empties
unreliable and consequently the Ballistic
report was of no importance---Picking up
of the accused in the identification parade
without describing the roles played by them
in the crime was illegal rendering the
proceedings unreliable having no***

evidentiary value---Accused were acquitted to circumstances. Reliance has also been placed in the case of Muhammad Iqbal v. Abdul Hussain reported in 1994 S C M R 1928.

[The underline is ours]

20. The Investigation Officer has sent the blood stained cloths as alleged recovered; same were sent to the Forensic Science Laboratory; report received reflects that same were stained with human blood; the question would be arises that whether it was of the same group which was available on the cloths of the victim and the blood-stained earth. In this context we have been fortified with the case law reported in the case of Muhammad Asif v. The State reported in 2017 SCMR 486, reads as follows:-

*----S.302(b)---Qatl-i-amd---Articles sent to Chemical Examiner and serologist for examination---Practice to be followed by police--- Mere sending of blood stained crime weapons to the Chemical Examiner and Serologist would not serve the purpose of the prosecution nor would it provide any evidence to inter link different articles---Unless the blood-stained earth or cotton and blood-stained clothes of the victim were sent with the crime weapon for opinion of Serologist it could not be conclusively opined that it was human blood on the crime weapon, and that it was of the same group which was available on the cloths of the victim and the blood-stained earth/cotton---Failure to follow such practice would make the opinion of Chemical Examiner inconclusive, which could not be used as piece of corroboratory evidence.
[The underline is mine]*

21. The prime case property viz. Car bearing No. ANV-650 pertains to deceased Sohrab Khan wherefrom dead body of deceased as alleged was recovered from “Diggi” of the Car; as to the above, no such mashirnama of recovery of such a Car has been prepared by the Investigation Officer nor it has find place to be produced before the learned trial Court to ascertain the veracity of

case property; it had also creates reasonable doubt in the prudent mind because mashirnama is the legal requirement as per spirit of law which too needs independent corroboration by attestation of private witnesses therefore in failure of legal requirement of Law nothing explanation has been offered by the Investigation Officer for non-preparation and non-production of such mashirnama. Be that as it may, upon an application moved by the learned counsel for production of alleged car being case property, same was also covered with the certain objection of offered by learned defence counsel thereafter been produced before the Court like **“camel step into shoes of a man”** instead preparation of proper mashirnama of recovery of Car being legal requirement of Law, thus non preparation of mashirnama and its nonproduction also vitiates the case of prosecution being weakest type of evidence.

22. The place of arrest of the appellants is situated in a thickly populated area being dwelling house but Investigation Officer did not bother to associate an independent source to strengthen prosecution case by collecting an independent evidence. It would be appropriate to reproduce herein below the requisite and legal requirement of mandatory provisions of Section 103, Cr.P.C which have been flatly violated in present case.

The pre requisite of mandatory provisions of Section 103 Cr.P.C entails as follows:-

103. Search to be made in presence of witness. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search and may issue an order in writing to them or any of them so to do.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such office or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to

attend the Court as a witness of the search unless specially summoned by it.

(3) **Occupant of place searched may attend.** The occupant of the place searched, or some person in his behalf, shall, in every instance be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witness, shall be delivered to such occupant or person at his request.

(4) When any person is searched under section 102, subsection (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Pakistan Penal Code.

It has been held in 2000 S C M R 683 in the case of Tayyab Hussain Shah v. The State, as follows:-

----S.103---Penal Code (XLV of 1860), S. 302/34---Search in presence of witnesses---Mandatory, requirement---Requirement of making two members of the public of the locality as Mashirs to the recovery is mandatory unless was shown by the prosecution that was not possible in the circumstances of the case to have two Mashirs from the public.

In a case reported in 2010 P Cr. L J 461, Re. Ghulam Murtaza v. The State, it has been held as follows:-

“(b) Penal Code (XLV of 1860)----

---Ss.302(b)/34 & 324/34---Qatl-i-amd---Appreciation of evidence---Benefit of doubt---Single circumstance of doubt sufficient to make the case doubtful---Principle---Many circumstances creating doubt are not required for giving benefit of doubt to accused---Single circumstance creating reasonable doubt in a prudent mind about the guilt of accused would make him entitled to benefit of doubt, not

as a matter of grace and concession, but as a matter of right”

C) Muhammadan Sharia Law---The law developed in our country is based on maxim that it is better that ten guilty persons be acquitted rather one innocent person be convicted.

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D) Muhammadan Sharia Law--- Principle of Administration of Criminal Justice---It is also an established principle of administration of criminal justice coupled with Muhammadan Sharia law that conviction cannot be based on any other type of evidence unless direct or substantive evidence is available and the guilt of accused cannot be based on high probabilities that may be inferred from evidence in a particular case---Held; sufficient discrepancies are appearing in the statements of prosecution witnesses and the memo of place of occurrence and recovery, prepared during investigation, appear to be suspected.

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23. The remaining prosecution witnesses are police official whom had carried out usual investigation as such there is no need to re-praise the evidence of remaining prosecution witnesses because the star and eye witness of the scenario, Forensic Laboratory Report and Medical evidence has been thrashed out. Be that as it may, there are series of contradictions even depict from the statements recorded under Section 161 Cr.P.C, and the evidences recorded before the learned court below; the prosecution story is not set to be free of any reasonable doubt. If a single doubt creates reasonable doubt in the prudent mind therefore its benefit also goes in favour of the accused because accused is favorite child of the Court. I am fortified with the case law reported in 1995 S C M R 1345 Tariq Pervez v. The State, it has been held as follows:-

“---Art. 4---Benefit of doubt, grant of---For giving benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubts---If a simple circumstance creates reasonable doubt in a prudent mind about the guilt of accused, then he will be entitled to such benefit not as a matter of grace and concession but as a matter of right”

24. Keeping in view that the occurrence had taken place at an isolated place, no source of independent corroboration, possibility, dead body of deceased was recovered from barren place being unseen occurrence cannot be ruled out. So convicting the appellants only on the basis of statement of complainant PW- Abdul Ghaffar Khan and PW-4 Muhammad Ali whom are interested, related in terse and unnatural witnesses however both of them have brought on record noting plausible reasons and explanation of their presence at the time and place of occurrence is not sustainable.

25. In the light of what has been discussed above, the prosecution has failed to prove its case against the appellants beyond any reasonable doubt. Therefore, the conviction and sentence awarded to the appellants under the impugned judgment is set aside. Appellants are acquitted of the charge. They shall be released forthwith if not required in any other case. Resultantly, the appeal is allowed. As regards to the confirmation case / reference bearing No.02 of 2010, the question thereof is answered in negative.

J u d g e

J u d g e

BrohiPS