IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.93/2018

Appellant : Muhammad Noman,

Respondent : The State,

CR. JAIL APPEAL NO.157/2018

Appellant : Muhammad Urs,

Respondent : The State,

Date of hearing : 12th, 18th February, 7th, 14th March and 5th April, 2019.

Date of announcement: 23.05.2019.

Appearance:

M/s. Irfan Ahmed Usmani and Saira Erum Khan advocates for appellant in Appeal No.93/2018.

M/s. Abbas Haider Gaad and Agha Mustafa Durrani advocates for appellant in Appeal No.157/2018.

Mr. Siraj Ali Chandio, Additional Prosecutor General Sindh.

J U D G M E N T

SALAHUDDIN PANHWAR, J. Appellants, through their respective appeals, have impugned the judgment dated 30.01.2018 passed by Additional District and Sessions Judge concerned in S.C. No.378/2006, arising out of FIR No.213/2006, u/s 302, 396, 34 PPC, P.S. Darakshan, Karachi, whereby both above named accused were convicted and sentenced u/s 302(b) PPC for imprisonment for life as *Ta'zir* and further sentenced to rigorous imprisonment for 3 years u/s 404 PPC, with order that both sentenced to run concurrently and with benefit of section 382-B Cr.P.C.

2. Brief facts of prosecution's case are that on 09.05.2006 complainant Muhammad Yousif registered FIR stating that his elder brother Muhammad Ismail who dealt in real estate left home on 08.05.2006 at about 1745 hours while informing that he would come back within an hour but did not return until 2100/2200 hours hence they got worried and dialed his mobile number 0333-2159747 but his phone was stitched off. On next day viz. 09.05.2006 at 1045 hours, he reported missing of his brother at PS PIB Colony. Same day at about 2100 hours, police of PS Darkshan called him at Jinnah Hospital. When complainant with his relatives reached at the hospital, found dead body of his brother Muhammad Ismail. Police informed the complainant that they had recovered dead body of his brother from area of DHA, Phase-VIII therefore he lodged the FIR against unknown offenders.

3. During investigation, Investigation Officer Inspector Tahir Aziz Abbasi visited place of incident viz. Lane No.3, Zulfiqar Street, Khayaban-e-Shaheen on 09.05.2006 in presence of complainant Muhammad Yousuf and ASI Pervaiz and collected blood stained earth; on 10.05.2006 Vigo vehicle of deceased Muhammad Ismail was recovered by police of PS Gizri and the I/O seized it, he obtained sealed parcel containing four empties of pistol bullets recovered from vehicle by duty officer; on 18.05.2006 I/O arrested suspects Waseem Warsi and Zaheer-ul-Haq on pointation of complainant and also arrested suspect Malik Imran on complainant's pointation and obtained police custody remand of suspects but did not find any incriminating material against them hence released them u/s 497(2) of Cr.P.C; on 23.05.2006 complainant informed the I/O that one Muhammad Ali had killed his brother, on such information I/O arrested accused Muhammad

Ali as suspect. During interrogation, accused Muhammad Ali confessed to have killed Muhammad Ismail in his Vigo vehicle alongwith accused Noman and Muhammad Urs and abandoning the dead body and vehicle; he further disclosed that pistol used in crime was kept at the residence of his father-in-law. Investigating officer formally arrested accused Muhammad Ali on 25.05.2006 at 0300 hours and on same day at about 1035 hours, he recovered one 9-mm pistol bearing No.534118 having four live bullets along with its license from the house of father-in-law of Muhammad Ali. I/O arrested co-accused Noman and recovered mobile phone of deceased Muhammad Ismail from his possession. Investigating officer then recorded police statements of witnesses and forwarded blood stained earth for chemical examination. Meanwhile, on 25.05.2006 investigation was transferred from said I/O to SIP Ghulam Hussain of PS Aziz Bhatti who obtained remand of both arrested accused and interrogated them during which accused volunteered to point out place where they had thrown away dead body of Muhammad Ismail and his vehicle and later he on same day prepared two different memos of wardat. On 29.05.2006, accused Muhammad Noman volunteered to record his confession hence investigating officer produced him before learned 12th Judicial Magistrate, Karachi South, where confession of accused was recorded on the same day. Investigating officer forwarded recovered pistol and crime empties to Forensic Laboratory and also wrote a letter for getting CDR of mobile numbers under the use of deceased and also collected CRO of accused. On same day accused Muhammad Ali volunteered to produce robbed money, blood stained clothes of all accused and shoes of deceased hence on same day, he recovered pair of shoes of deceased Ismail and cash of

Rs.200,000/- so also blood stained clothes from the house of accused Muhammad Ali on his pointation. On 31.05.2006 investigating officer arrested accused Urs on pointation of co-accused Muhammad Ali, from his house in Thatta and recovered M-90 Nokia mobile phone of black and silver colour of deceased Muhammad Ismail and cash of Rs.50,000/- being part of stolen money of deceased from possession of accused Urs. On 02.06.2006 accused Urs pointed out place of wardat. Investigating officer submitted interim report before the Court and after collecting reports of Forensic laboratory and Chemical Examiner submitted charge sheet.

4. Formal charge was framed upon all three accused persons (exhibit-6) who pleaded not guilty vide their respective pleas (exhibits 6/A to 6/C). Accused Muhammad Ali then was called absent and warrant of arrest issued against him returned with the report that he was no more alive; hence proceeding of the case against him was abated.

5. Prosecution examined (1) PW-1 Muhammad Khan at exhibit 8 who produced roznamcha entry No.12 at exhibit 8/A, memo of pointation of place of abandonment of dead body at exhibit 8/B, memo of pointation of place of abandoning the Vigo vehicle at exhibit 8/C, memo of recovery of shoes at exhibit 8/D, memo of recovery of stolen money and blood stained clothes of all accused at exhibit 8/E, memo of arrest of accused Muhammad Urs at exhibit 8/F, memo of pointation of *wardat* by accused Urs at exhibit 8/G, memo of pointation of place of abandonment of crime vehicle at exhibit 8/H; (2) PW-2 HC Altaf Hussain at exhibit 9 who produced memo of arrest of accused Muhammad Ali at Ex-10 and memo of formal arrest of same accused at exhibit 11; (3) PW-3 PC Nazeer Ahmed at exhibit 12 who produced memo of inspection of dead body at Ex-13 and inquest

report at exhibit 14; (4) PW-4 ASI Muhammad Saleh Abro at exhibit 15 who produced memo of recovery of crime weapon at exhibit 16; (5) PW-5 the then 12th Judicial Magistrate, Karachi South Mr. Zeeshan Akhter at exhibit 17 who produced application submitted to him by I/O for confession at exhibit 18, original confessional statement of accused Noman at exhibit 19; (6) PW-6 complainant Muhammad Yousif at exhibit 20 who produced his statement u/s 154 of Cr.P.C at exhibit 21, receipt of dead body at exhibit 22, memo of site inspection at exhibit 23, memo of arrest of suspects at exhibit 24, memo of arrest of suspect Malik Imran at exhibit 25, memo of arrest of accused Noman at exhibit 26; (7) PW-7 SIP Muhammad Pervaiz at exhibit 29 who produced application submitted by him to MLO at exhibit 29/1, death certificate of deceased at exhibit 29/2 and FIR at exhibit 29/3; (8) PW-8 PC Wasim Ahmed at exhibit 30 who produced memo of seizure of crime vehicle at exhibit 30/1, (9) PW-9 Senior Medical Officer at exhibit 31 who produced postmortem report of deceased Muhammad Ismail at exhibit 31/A; (10) PW-10 Inspector Tahir Aziz Abbasi at exhibit 32 who produced sketch of *wardat* at exhibit 32/A, roznamcha entry No.27 at exhibit 32/B, report submitted by him to SSP for releasing of suspects at exhibit 32/C, roznamcha entry No.19 at exhibit 32/D, roznamcha entry No.21 at exhibit 32/E, his letter to high-ups for permission for chemical examination at exhibit 32/F; (11) PW-11 SIP Ghulam Hussain at exhibit 33 who produced memo of roznamcha entry No.32 at exhibit 33/A, roznamcha entry No.12 at exhibit 33/B, five photographs of recovery proceedings at exhibit 33/C to exhibit 333/H, roznamcha entry No.10 at exhibit 33/I, letter for permission at exhibit 33/J, his letter for permission bearing No.481 at exhibit 33/K, letter for permission at exhibit 33/33/L, forensic examination report No.50/60

at exhibit 33//M, report of chemical examiner at exhibit 33/N, order of transfer of investigation at exhibit 33/O; prosecution closed the prosecution evidence vide statement at exhibit 34.

6. By order dated 14.12.2017 (exhibit 35), charge upon accused was altered from offenses punishable u/s 396 PPC and article 17(4) of the Offence Against Property (Enforcement of Hudood) Ordinance 1979 to offenses punishable u/s 302 and 404 of PPC. Altered charge was framed upon accused vide exhibit 36 but both of them pleaded not guilty vide their respective pleas (exhibit 6/A to Ex-36/B). Learned counsel for the both accused then filed joint statement (exhibit 37) stating that on alteration of charge, they did not want any time for proceeding with the case and relied upon evidence available on record. Prosecution also filed similar statement (exhibit 38).

7. The statements of accused Urs and Noman were recorded (exhibits 39 and 40 respectively) wherein they stated that police had involved them in this case falsely at the instigation of complainant and no recovery of any incriminating material was effected from them. Accused Noman further pleaded that he had recorded judicial confession under coercion by police who had tortured him for three days and produced him learned Judicial Magistrate who obtained his signature on a paper without attending to his complaint of maltreatment. Both the accused neither examined themselves on oath nor produce any witness in their defence.

8. Learned trial Court framed and answered the points for determination as under:-

POINT NO.1 Whether deceased Muhammad Ismail died an unnatural death?	In affirmative
POINT NO.2 Whether between 1745 hours	Proved

on 08.05.2006 to 1900 hours on 09.05.2006 while travelling in Toyota Hi-lux Vigo vehicle having registration No.KN-4058, at Sea View area Karachi accused Muhammad Noman and Muhammad Urs along with deceased co-accused Muhammad Ali in prosecution of their common intention committed qatl-i-amd of Muhammad Ismail s/o Muhammad Ibrahim by causing him firearm injuries and further stolen cash of Rs.850,000/- from his vehicle and then threw away his dead body in lane No.3 of Zulfiqar Street, DHA Phase-8, Karachi and abandoned his vehicle in Gizri?	
POINT NO.3 What offence, if any, accused have committed and what should the order be?	Accused are convicted for qatl-e-amd and are sentenced to life imprisonment.

9. I have heard learned counsel for appellants as well learned Additional Prosecutor General Sindh, perused the record.

10. Learned counsel for appellant Muhammad Noman has argued that the incident is unwitnessed one, accused are not nominated in FIR; that during investigation though main accused Muhammad Ali was arrested but police failed to record his judicial confession; that case papers were handed over to second investigating officer before formal order that is in violation of the law; that accused Muhammad Ali has got recovered incriminating articles at four different occasions which is not appealable to a prudent mind; complainant in his FIR has failed to disclose details of stolen articles however surprisingly on their alleged recovery he has identified those as belongings of his deceased brother; that confession allegedly recorded by appellant/accused Noman was obtained under coercion by police which is also delayed by four days of his arrest and its each page had not been signed by learned Judicial Magistrate and it has been denied by maker and after recording of confession investigating officer kept custody of accused for overnight hence owing to such

defects, the confession was not voluntarily recorded hence cannot be considered; .that during trial prosecution has failed to produce Vigo vehicle despite serious efforts taken by the trial Court; further it has failed to produce related articles of vehicle and moreover it was unbelievable that although deceased is alleged to have been killed inside his vehicle yet no corresponding damage inside of vehicle was detected; that complainant has disclosed one colour of the clothes lastly worn by deceased but during trial those clothes were found to have different colour. It is further contended that prosecution has failed to prove any motive against accused for his committing murder of deceased and even it has failed to establish any connection between him and accused; that recoveries allegedly effected during investigation were made after sufficient delay although accused Muhammad Ali was arrested on 23.05.2006 and mashirs of those recoveries are related to deceased hence they are interested and those recoveries are doubtful; that prosecution's case against accused was highly doubtful and they are entitled for acquittal. Learned counsel has relied upon 2008 PCrLJ 1059, 2013 PCrLJ 267, 2003 PCRLJ 1608, 2016 PCRLJ 1608, 2014 PCRLJ 323, 2003 SCMR 1385, 2007 SCMT 670, PLD 1982 Karachi 1000, PLD 1960 W.P-Karachi 797, 2008 PCRLJ 87, 1990 PCRLJ 677, 1983 SCMR 1292, PLD 2000 Karachi 128, 1995 SCMR 1345, PLD 1990 SC 484, 2017 PCRLJ 327 and 2018 YLR 1629.

11. Learned counsel for appellant Muhammad Urs, in line with the above arguments, has further submitted that present appellant was disclosed by co accused in his statement under section 164 CrPC; that prosecution's case was of no evidence against accused Muhammad Urs and small amount from allegedly stolen money has been foisted on him to make a case; that prosecution has

failed to prove on record that accused Muhammad Urs was known to the deceased and that he had any motive for killing him; that appellant is a poor person who was serving as a private driver with the brother of main accused Muhammad Ali as such he has been booked for that reason in present case. He placed reliance on 2004 YLR 206, 1983 SCMR 573, 2003 SCMR 1419 and 1992 SCMR 1983.

12. Learned Addl. P.G. has argued that prosecution has proved the case beyond shadow of reasonable doubt by establishing complete chain of circumstantial evidence; that present appellants were arrested on pointation of deceased who was principal accused, from whom pistol used in the crime and partial robbed money of Rs.2,00,000/- were recovered and during investigation, accused Muhammad Noman has recorded judicial confession wherein he has implicated himself and two co-accused while disclosing facts of incident and pistol recovered from accused Muhammad Ali matched with the crime empties recovered from crime vehicle; that defence has not alleged any malafide on the part of complainant and initially, several persons were interrogated in the case but no incriminating material was found against them hence were released which shows fairness on the part of complainant; that although first investigating officer Tahir Aziz Abbasi has made some admissions in his cross-examination but his such admitted acts were neither unlawful nor fatal to prosecution case because defence has not suggested to investigating officer that he was not competent to conduct investigations; that defense has failed to adopt proper legal procedure for retracting from judicial confession of accused Muhammad Noman as detailed in section 342 of Cr.P.C and while replying to formal charge accused have failed to take such plea of coercion hence this contention had no weight. That accused have further neither

examined themselves on oath nor have they produced any witness in their defence as such presumption shall be drawn that they had admitted the prosecution's case and had no defence to offer; that there is motive for commission of the offence with accused that was to commit robbery. He has relied upon 2010 SCMR 55, 1999 SCMR 1744, 1995 SCMR 1615, 1992 SCMR 1983 and PLD 1972 SC 363.

13. The instant case was always **'un-witnessed one'** so was rightly viewed by the learned trial Court judge while discussing the point No.2 as:-

> "28. The perusal of above prosecution evidence shall reveal that alleged offence has gone unseen as such prosecution case rests on following circumstantial evidence;
>
> a- corroborative evidence of witnesses and recovery f dead body and crime vehicle;
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> b- Pointing out of two places of wardat by accused on their arrest;
>
> c- Recovery of crime empties, crime weapon and their matching during forensic analysis;
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> d- Recovery of bloodstained clothes of accused and victim and positive report of Chemical Examiner;
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> e- The judicial confession of accused Muhammad Noman during investigation;
>
> f- The motive of accused for commission of offence"

However, what the learned trial Court judge seems to have missed is the *criterion* for appreciation of evidences in such like cases, completely and entirely, depending upon circumstantial evidences including confession. I may add that in cases of *unseen* offences the duty of the prosecution becomes double because *corroborative* pieces of evidence are easy to be arranged / managed. This has been the

reason that in recent case of *Fayyaz Ahmed v. State* (2017 SCMR 2026) the criterion for such like cases has been reaffirmed with a caution favouring to accused as:-

> 5. 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 other the neck of the deceased**. 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 persons and the required chain is made out without any missing link, otherwise at random reliance on such evidence **would result in failure of justice**.

Thus, it was legally reaffirmed that the Courts are not supposed to depart from its duty to make *deep* scrutiny and examination of every aspect of the case and evidences, so collected and claimed by prosecution in such like cases, and if during such scrutiny one or more indications appear, showing design of the prosecution of manufacturing and preparation of a case, then it is better to discard the same. In the said case, the Courts have further been advised not to be influenced from *appearance* of investigation material in such like cases but to strongly stick with their obligations while appreciating evidences in such like cases. The relevant portion reads as:-

> 6. 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**.

14. The learned trial court judge while referring to evidences of the PW-1 Muhammad Khan and PW-6 complainant Muhammad Yousif gave much weight to not directly naming the present appellants and dead accused Muhammad Ali while concluding the para-31 of *impugned* judgment as:-

> "It may be noted from above gist of evidence that complainant Muhammad Yousif had on first hand information about business matters of his deceased brother and for this reason he had not nominated any body in the FIR including present accused and deceased accused Ali Muhammad (Muhammad Ali) but later on when he learnt about business matters of his brothers he got three suspects arrested who were released during investigation and this fact suggest that complainant Muhammad Yousif and mashir brother Muhammad Khan both had been acting fairly in the case and they had no grudge or motive against anyone to falsely involve them in the murder of their brother".

I am surprised why absence of a grudge could be sufficient to *blindly* ignore the abnormal conduct and attitude of these witnesses which, otherwise, were indications showing design on part of the complainant party. How the complainant led the investigation was quite obvious from admissions, made by PW-10 Inspector Tahir Aziz Abbasi in his examination-in-chief as:-

> ....On 18.05.2006, I was available at my duty at P.S Darakshan, when the complainant through mobile phone, contacted me and asked me to come at his residence. On such request, I reached at his residence situated PIB Colony, House No.404 and met with the complainant and he brought me inside the house, in drawing room. The complainant got me met with two persons already available in the drawing room and informed me that he has suspicion of murder of his brother upon them. On enquiry, they disclosed their names as Waseem Warsi and Zheerul Haq. I affected their arrest in the case and prepared such memo at about 0045 hours, on 18.05.2006 which was signed by complainant M. Yousuf and HC Amanullah. I see such memo at Exh.24, and say that it is same, correct and bears my signature. Thereafter, we shifted

> the said arrested accused alongwith the complainant at P.S. In the meanwhile the complainant also informed us about another suspect Malik Imran. Therefore, we alongwith the complainant went at flat of said Malik Imran, situated at Zamzama adjacent to Pizza Hut, Block-19-C, 3rd Flor and I do not remember name of the building. ..... on the pointing of the complainant I arrested him, who was coming to his residence.... Thereafter, I got police remand of the said accused from the concerned Magistrate and remained in interrogation the accused but no clue was found. ...Thereafter, the complainant came at P.S and submitted in writing that the accused arrested as yet not are real culprits involved in murder of his brother. Therefore, I let off the said accused u/s 497-II Cr.P.C. after getting approval from my high ups. I made such entry for letting off the accused. I produce my such report submitted to the SSP having approval at Exh.32/C and xay that it is same, correct and bears my signature having endorsement of the SSP. I also produce such entry at Exh.32/D, and say that it is same and correct. **On 23.05.2006 I was available at P.S when complainant M Yousuf alongwith Muhammad Ali came there and informed me that Muhammad Ali murdered his brother. Therefore, I affected arrest of said Muhammad Ali..**."

There can be no denial to fact that a *clue* even suspicion may expose all truths. The complainant party may have a right to disclose their *suspicion* but cannot dictate arrest and release of the suspects which *legally* must always be dependant upon evidence or absence thereof. However, the manner in which the complainant and his brother remained behaving was never worth appreciable.

15. Be that as it may be, the learned trial court judge also never appreciated that complainant and his brother never disclosed about factum of ***cash*** with deceased till they introduced deceased accused Muhammad Ali as suspect. The missing report and FIR nowhere indicate about such **cash** amount with deceased. PW-6 complainant in his evidence stated as:-

> Page-335 of paper book.
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> > ...after the Soyam I had disclosed to him on his asking that Waseem Warsi, and Zaheerul Haque and Malik Imran had met our brother on the day of incident, investigation may be made from them..

He admitted in his cross examination as:-

> Page-339 of paper book
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> ...It is a fact that in my 154 Cr.P.C and FIR so also in the missing report of my brother, it is not mentioned that our deceased brother had also taken Rs.8 or 9 lacs from our house. Vol. say that this fact came to our knowledge subsequently through his wife. ...**It is a fact that right from 09.05.2006 to 23.05.2006 we did not suspect present accused persons.**

The admission of ignorance of such *vital* fact by those who, being blood-relations, going in search of their own blood or for murderer of their own blood, was always not believable. However, it is also a matter of record that no words in support of such cash amount (*alleged motive)* ever came on surface with name of widow of deceased hence in absence thereof it was never safe to give any credit to complainant party for not naming present appellants or others in FIR, as wrongly viewed by learned trial court judge.

16. Now, I would refer other piece of circumstantial evidence which the learned trial court judge observed as:-

> "32. In the second place, there is corroboratory evidence of pointing out of two places of *wardat* by accused Muhammad Ali, Noman and Urs. It is to be noted that since dead body of Ismail and his Vigo vehicle were recovered before arrest of accused hence it was already in the knowledge of investigating officer that after the incident dead body of Ismail had been abandoned in Lane No.3 of Zulfiqar Estate in DHA Phase-8 and his Vigo vehicle had been abandoned in area of Gizri hence such pointing out of two places by accused had not qualified to become discoveries as stipulated in Article 40 of Qanun-e-Shahadat Order 1984 **yet those acts of pointing out of *wardat* places by accused had confirmed the fact of recovery of dead body and crime vehicle from those places."**

I am unable to appreciate that when the learned trial court judge himself *rightly* found such pointing out of places as not qualifying *discoveries* within meaning of Article 40 of Qanun-e-Shahadat Order, 1984 then how he *(learned trial court judge)* himself can use such evidence against the appellants. Here, I would like to refer the relevant portion of the case of *Hayatullah v. State* 2018 SCMR 2092 wherein it is held as:-

> "4. ..... In order to give a cover of Article 40 of Qanun-e-Shahadat Order, 1984, the investigating officer recovered a pistol on the same day and all the witnesses claimed that thereafter the appellant pointed out the place of occurrence and the place from where the dead-body was earlier recovered. We are conscious of the fact that after making such disclosure before the police no new fact was discovered because it is already in the knowledge of the police on 11.02.2006 that the deceased had received a bullet injury and from the place of occurrence an empty of 30 bore pistol was also recovered. So the recovery of pistol after the said disclosure was not a new fact or not a fact which was not in the knowledge of police. Likewise, the place of occurrence and the place here dead-body was thrown while dragging it from said place, was already in the knowledge of the police and such pointing out of the place after said disclosure is worthless, irrelevant and inadmissible as the said place was already in the knowledge of the police and a site plan of the same place had already been prepared on 11.02.2006. **Likewise , the memo of pointing out of the place from where the motorcycle was recovered is also irrelevant** as the motorcycle was recovered much prior to the disclosure and pointing out of the said place which was already in the knowledge of the police"

These memos legally were of no significance. However, learned trial court judge never gone deep into evidence of the investigating officer (PW-11) SI Ghulam Hussain who, otherwise, made following admissions in his cross-examination i.e:-

> Page-485 of paper book
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> *...It is fact that when I received police papers copy of roznamcha entry No.34 dated 09.05.2006 was its part and as per that report information regarding availability of deadbody was at bungalow No.27/1, Zulfiqar Avenue, Phase-8 of DHA. It is incorrect to suggest that as per memo of site inspection dated 09.05.2006 prepared by ASI Muhammad Pervaiz the deadbody was found in Zulfiqar street no.3 which are falls within the territorial limits of PS Gizri and not PS Darakhshah. It is fact that inquest report at Ex.14 shows that deadbody was found in Zulfiqar Avenue and not in Zulfiqar 3 and both the places are different roads.*
>
> Page 487 paper book
>
> *..It is fact that phone caller Saleem Adil who informed police on 09.05.2006 vide entry no.34 about availability of deadbody at Bunglow No.27/1 of Zulfiqar Avenue has not been examined in investigation and joined as witness sin this case.*

In existence of such admissions, the learned trial Court judge seriously erred while giving any weight to such *irrelevant* memo of

place of incident and recovery when above referred admissions, *prima facie,* speak differently.

17. The learned trial court, while attending other claimed incriminating material, observed as:-

> 33. So far recoveries of bloodstained clothes of three deceased, crime weapon viz licensed pistol NO.F-534118 with license no.L-449, pair of shoes of deceased Muhammad Ismail and recovery of part of stolen money of deceased Muhammad Ismail from accused persons so also his two mobile phones are concerned those facts were not in the knowledge of investigating police before arrest of accused and came into their knowledge only after those recoveries hence such recoveries will qualify as discovery under Article 40 of Qanun-e-Shahdat Order thus those have been rightly proved against accused as corroboratory evidence. Such recoveries have been supported by attesting witnesses of recovery Muhammad Khan, Ghulam Akber and HC Amanullah and ASI Muhammad Saleh.

The learned trial Court, though, rightly interpreted the Article 40 of Qanun-e-Shahadat Order, 1984 but it is worth adding that since death of deceased in result of 9mm pistol was already known to police hence recovery of such pistol was also not falling within meaning of Article 40 of Qanun-e-Shahadat Order, 1984, as was so held in the case of *Hayatullah v. State* supra. Even otherwise, I am compelled to add that mere fact of some discovery of evidence by or on pointation of accused is not sufficient to *blindly* accept same unless same *(discovered evidence)* is proved as required by law. From earlier discussion, it already become doubtful that cash of Rs.850,000/- was, in fact, was with the deceased or otherwise?, therefore, claim of recoveries of such amount *alone* was never sufficient for acceptance rather was always required to be examined with more care. The learned trial court judge never appreciated that very root, upon which whole structure against present appellants was raised, was doubtful. The manner of arrest of deceased accused Muhammad Ali was always doubtful because per I.O it was

complainant who had brought the deceased accused Muhammad Ali at police station while per complainant he had called the I.O to reach at flat of accused Muhammad Ali wherefrom he was arrested. The comparative position is as under:-

Per complainant.	***Per I.O (PW-10)***
..On 23.05.2006 I asked the IO to reach at the flat of accused Muhammad Ali situated at Data Garden , fourth floor, Goru Mandar. I met with IO at Goru Mandar and we collectively went at the flat. Accused Muhammad Ali was arrested by the IO who was brought at P.S.	**On 23.05.2006 I was available at P.S when complainant M Yousuf alongwith Muhammad Ali came thereand informed me that Muhammad Ali murdered his brother. Therefore, I affected arrest of said Muhammad Ali**

Not only this, but the PW-11 admitted in his cross examination as:-

> "I see memo of arrest of accused Muhammad Ali at Ex.10 and say that it does not show from where he was arrested and how he was brought in the interrogation room. It is fact that in same document at Ex.10 name of mashir Muhammad Yousuf at serial no.3 is interpolated with different ink"

The above glaring conflict as well admitted interpolation were always sufficient to indicate some engineering *least* doubts but were neither properly examined nor appreciated by learned trial Court. Reference, if any, may be made to case of *Sughran Begum v. Qaiser Pervez* (2015 SCMR 1142) wherein it is held as:-

> "25. This Court has taken serious notice of such overwriting or interpolation in the police documents of important nature, particularly, in murder cases and on this count has rejected the prosecution case . One of the leading judgments in this regard is given in the case of *Muhammad Sharif v. State* 1980 SCMR 231). Keeping in view the police traditional chicanery pressed into service in procuring and planting false corroborative pieces of evidence, the entire case of the prosecution has become highly doubtful and the evidence cannot be safely relied up-on.

As regard the recovery of blood stained clothes of accused persons, mobile phone etc, the learned trial Court judge again erred while not

appreciating the fact that it is never acceptable to a prudent mind that accused persons, having committed murder, not only went to market through Taxi; purchased fresh clothes; changed them and then handed all clothes to deceased accused Muhammad Ali to keep them preserved (this is what appears from alleged confession of appellant Nouman as well what prosecution intended the court to believe). During period of **09-5-2006 to 23.5.2006** the accused persons had every chance to destroy such articles yet they, *surprisingly,* did not choose so. Was such story ever believable for a prudent mind? The answer could be nothing but a big "No." This, however, was never properly appreciated by the learned trial Court Judge. Reference may be made to the case of *Muhammad Asif v. State* (2017 SCMR 486) wherein it is held as:-

> 17. It is , normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future, thus , human faculty of prudence would not accept the present story rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no circumstances would have chosen to preserve it in his own shop if believed so because that was susceptible to recovery by the police.

The mobile phone of the accused was also claimed to be recovered from possession of the appellant Nouman but there also came admission as:-

> PW-6 complainant:
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> It is a fact that in my statement under section 154 Cr.P.C it is not mentioned that deceased brother had two mobile phones. Vol says that it is mentioned that we contacted our brother on his mobile phone bearing No.0333-2159747 **but its made and model is not mentioned**."
>
> It a fact that similar mobile phone are also easily available in the market and present mobile has no particular marks to show that same is belonging to my deceased brother"

Further, it was never worth accepting that appellants, having committed the murder, started using the mobile phones of the deceased particularly when they even remained in contact with complainant party prior to their arrest even, as was claimed by complainant in his examination-in-chief as:-

> "...We also enquired from his friend, Muhammad Ali, Nouman and Urs who used to deal in business with him, ...

These aspects were never properly appreciated by the learned trial Court judge while accepting such recovery as ***proved.***

Further, as regard recovery of *licensed* pistol of the deceased Muhammad Ali from house of his in-laws was since in complete negation to section 103 Cr.PC although there was no urgency and place was a **flat.** There came no explanation for not associating persons of the locality (neighbourhood) and making the complainant and his brother as witnesses/mashirs. The departure from mandatory requirement of section 103 Cr.PC was again causing a dent towards credibility of such recovery. Reference may be made to case of *Muhammad Ismail v. State* 2017 SCMR 898 wherein it is held as:-

> "4. ...it was also alleged by the persecution that some robbed cash had been recovered from the custody of the appellants. It is not disputed that cash allegedly recovered did not stand connected with the robbed amount. **For the above mentioned recovery of weapons the prosecution has failed to associate any independent witness of the locality and, thus, the mandatory provision provisions of section 103 Cr.P.C**...

18. The learned trial Court judge also gave weight to ***forensic evidences*** but entirely failed in appreciating that no such **'material'** was ever confronted to appellants during their examination under section 342 Cr.P.C hence it was never within

competence of the learned trial court judge to include into consideration what it (Court) itself not brought into notice of the accused (342 Cr.PC statement). The position, being legally settled, needs no reference however, if any, needed may well be given to case of *Qaddan & Ors v. State* 2017 SCMR 148.

19. Without prejudice to such legal position, such recovery was also never safe to be relied because the crime empties were recovered on **10.5.2006** while pistol was on **25.5.2006** ; the prosecution never safely proved *safe* custody of such *empties* till their receipt in office of Chemical Examiner. For such like report, in the case of *Javed Khan v. State* 2017 SCMR 524, it was observed to be not ***free from doubt.*** The relevant portion of the judgment is reproduced hereunder:-

> "10. As regard the manner of matching the bullet casing with the pistol, it is not free from doubt. The Police allegedly recovered the pistol, stated to have been used in the crime in another case (FIR No.237 dated 29.6.2001) however, the pistol was sent to the Forensic Science Laboratory on 7.1.2002, whereas the investigating officer stated that Raees Khan disclosed using the same weapon in this crime on 14.10.2001, the delay in sending the pistol was not explained. Neither the Forensic Science Laboratory nor any of the policemen, who had received the bullet and its casing and had kept them in custody and then delivered them to the Laboratory, mention the marks affixed on the seals affixed on the parcels in which the said items were delivered to and received by the Laboratory. Under such circumstances it would not be safe to uphold the conviction of the appellants merely on the basis of the firearm expert's report because of the legitimate concerns about when and how the bullet casing and pistol were delivered to the Forensic Science Laboratory.

Lastly, there remains the **'judicial confession'** of the appellant Nouman which was also given much weight. At the very outset, I would be safe in saying that a retracted confession alone in absence of independent corroboration is never safe to uphold conviction. For such view reliance is, *respectfully,* placed on the case of *Muhammad Ismail v. State* 2017 SCMR 898 wherein it is held as:-

> "4. ...it was also alleged by the persecution that some robbed cash had been recovered from the custody of the appellants. It is not disputed that cash allegedly recovered did not stand connected with the robbed amount. For the above mentioned recovery of weapons the prosecution has failed to associate any independent witness of the locality and, thus, the mandatory provision provisions of section 103 Cr.P.C. The prosecution had also maintained that some of the appellants had made an extra judicial confession but the high court itself discarded the evidence relating to the extra-judicial confession as the same was not only unnatural but was also inadmissible in evidence .....The only other piece of evidence remaining in the field was a judicial confession allegedly made by Muhammad Iqrar, Khaid Hussain and Shakir Ali appellants before a Magistrate under section 164 Cr.PC but admittedly the said judicial confession had been retracted by the appellants before the trial court and in the absence of any independent corroboration **such retracted judicial confession could not suffice by all itself for recording or upholding the appellants' convictions**. ....The proceedings of recording of the judicial confession deposed about by the relevant Magistrate show that it had never been mentioned in those proceedings that before recording the confessions the handcuffs of the appellants had been removed. The statement made by the concerned Magistrate before the trial court shows that some police constables did remain in the courtroom at the time of recording of the confession."

At this very point, it is also relevant to add here that **'judicial confession'** alone is never sufficient to be taken as ***gospel truth*** for awarding conviction unless it fits in undeniable facts of the case.

Legally, after recording the confession the accused is not to be handed over to the same police so was claimed by PW-5, the learned Magistrate in his evidence as:-

> *"...I also disclosed to the accused that if any confession is made it will be used against him during trial and also told him that he is not bond (bound) to record such statement and on his refusal he will be sent to jail and his custody would not be handed over his custody to police"*

but here the I.O (PW-11 SI Ghulam Hussain) admitted as:-

> Page-485 of paper book
>
> *"It is fact that accused Muhammad Noman was remanded to police custody till 30.05.2006 but I produced him for confession on 29.05.2006 and again retained his custody with me until his handing over to jail on 30.5.2006 vide entry no.754 at 1440 hours of jail."*

The learned Magistrate even admitted in his cross examination that :

> *'I did not give him opportunity after reflection again. It is correct to suggest that it is not mentioned in the confession statement that after recording confession of accused, to whom his custody was handed over. It is a fact that I recorded confession statement of accused on 29.05.2006 and did not sent (send) the accused to jail custody for one day prior recording his confessional statement. The IO had filed the application at about 11.00 or 11.15 a.m. It is a fat that in my order, it is not mentioned as to what time, accused should be produced again before me"***.**

The above admissions, *prima facie,* show that appellant was not given proper reflection time; nor he was kept away from police rather he (appellant) was allowed to remain with police during reflection time *even.* Such conduct, being in grave violation of the mandatory requirement for recording confessional statement, hence renders such confession not safe to be relied upon, particularly for capital punishment.

20. Be that as it may, the perusal of the judicial confession would show that it was attempted to be couched in a manner to portray the same (*confession)* as exculpatory and even shows complete ignorance of the intentions of other two persons unless, per confession, the co-appellant Urs killed the deceased by making fire. He (confessor) claims to have pressed the trigger under force when the deceased had already died. This piece does not find corroboration from post-mortem report whereby all the injuries, on person of the deceased, were declared as **"*antemortem".***

21. Further, per the confession the appellants, including deceased accused, having killed the deceased left the vehicle and then **hired a taxi to reach Bahadurabad from where took vehicle of Muhammad Ali and went Tariq Road from where Muhammad Ali purchased one T-Shirt for himself and one for me (confessor)**

while shalwar-qameez for his driver (appellant Urs); changed clothes in way and kept all blood-stained clothes with him in a shopping bag".

22. No prudent mind shall believe that though the clothes of all three were stained with blood yet they preferred to leave the vehicle and took a **taxi;** took their own vehicle and went to a thorough busy market (Tariq road) for purchasing while wearing blood-stained clothes. This was never worth believing hence was always making the confession as not *natural.*

23. There is another important aspect which entirely lost sight by learned trial court judge that though the vehicle was specifically claimed as **'crime scene '** but same was never made as ***case property*** nor ever produced in the court. This position stands evident from the admission of the I.O (PW-10) i.e:

Page-445 of paper book

> *'It is fact that those seat covers and floor mats of crime vehicle are not part of case property available before this Court nor those are secured as mentioned in column No.5 of charge sheet. I do not remember where I noted blood stains in crime vehicle when I drove it to my police station."*

Therefore, such confessional statement even was never sufficient to hold conviction because it neither finds strength from other facts nor fits into reason hence the learned trial court judge was also not legally justified while ignoring all these aspects.

24. In view of above discussion, I am of the clear view that prosecution never succeeded in establishing the charge against the appellants on the criterion, set for proving case completely based on *circumstantial evidence,* hence it is not safe to uphold the conviction, so recorded by the learned trial Court judge. Accordingly, impugned judgment of conviction is set aside; the appellants are acquitted of

the charge. They shall be released forthwith if not required in any other custody case.

J U D G E

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