SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Manzoor Ahmad Malik
Mr. Justice Mazhar Alam Khan Miankhel
Mr. Justice Syed Mansoor Ali Shah

Jail Petition No. 147 of 2016
(Against the judgment of the Lahore High Court, Rawalpindi Bench, Rawalpindi dated 12.02.2016 passed in Crl. Appeal No. 16-J of 2011, Crl. Revision No. 31 of 2011 and M.R. No. 25 of 2011)

Naveed Asghar and two others **Petitioner(s)**

Versus

The State **Respondent(s)**

For the Petitioner(s): Syed Rifaqat Hussain Shah, AOR

For the Complainant: Nemo

For the State: Mirza Abid Majeed, DPG, Punjab

Date of Hearing: 07.12.2020

JUDGMENT

Syed Mansoor Ali Shah, J.- On January 21, 2010 Parvez Akhtar, a retired WAPDA employee, his wife Firdous Kausar, his daughters Ghazala and Bushra and his granddaughter Zarmina were mercilessly murdered in their house, their throats slit open by a sharp edged weapon. One Mirza Muhammad Umar told the complainant, Mobeen Akhtar, the bother of the deceased Pervaiz Akhtar, that a night before at about 08:30 p.m. he had seen three persons with a motorcycle outside the house of Pervaiz Akhtar. Mobeen Akhtar reported these facts to the Police and that apparently his deceased brother had no enmity with anyone. First information report (FIR)[1] of the tragic incident was recorded with these brief facts. Mirza Muhammad Umar, in his statement to the Police, narrated that he could not recognize those three persons as there was darkness in the street at that time. During investigation, the investigating officer suspected it to be a robbery that ended with five brutal murders.

[1] FIR No. 11, P.S. Mangla Cannt., district Jehlum, offence u/s 302/34, PPC.

2. On January 24, 2010 one Fazal Karim[2] told the Police that in the evening of January 20, 2010 he had seen Qadeer Ahmad, the son-in-law of the deceased Pervaiz Akhtar, along-with two other boys going towards *Dhok Tama* (the locality where the house of the deceased Pervaiz Akhtar was situate) on a motorcycle. The Police arrested Qadeer Ahmad, Khurram Shahzad and Naveed Asghar ("petitioners") on January 31, 2010 and recovered two bloodstained knives (the alleged weapons of offence), a motorcycle (allegedly used by the accused persons for coming to the place of occurrence), mobile phones, a laptop, three cameras, an amount of cash amount, gold ornaments and some Defence Saving Certificates (the alleged looted property). An application was made for recording confessional statement of the accused, Naveed Asghar, but it was turned down by the Magistrate with the observation that the accused appeared to be under pressure of the Police.

3. With the said incriminating material, the petitioners were sent up for trial. The learned trial court convicted them, vide its judgment dated 22.01.2011, for the offences of house trespass, robbery and murder, and sentenced each of them to three years rigorous imprisonment with fine of Rs.10,000/- under section 452, of the Pakistan Penal Code, 1860 ("PPC"); five years rigorous imprisonment with fine of Rs.10,000/- under section 392, PPC; and death on five counts under section 302(b), PPC read with section 34, PPC. Each of them was also directed to pay compensation of Rs.100,000/- to the legal heirs of the deceased persons, under section 544-A,CrPC. The High Court dismissed the jail-appeal filed by the petitioners and confirmed the death sentence, vide its judgment dated 12.02.2016. Hence, this jail petition is filed by the petitioners for leave to appeal.

4. The main contentions of the learned counsel for the petitioners are that: the occurrence was unseen and the petitioners has falsely been involved in the case; the circumstantial evidence produced by the prosecution is totally insufficient to connect the petitioners with the commission of offences; the learned courts below have wrongly relied upon the incredible testimony of

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[2] This person died during trial of the case, and could not be examined by the prosecution as its witness.

Muhammad Umar (PW-13) and fake recoveries of alleged weapons of offence and looted property; and, the High Court has not appreciated the prosecution-evidence in depth and has referred to the prosecution-evidence in a cursory and casual manner for confirmation of death sentence. Learned counsel for the State, on the other hand, has supported the judgments of the courts below, which according to him are well-reasoned and therefore do not merit interference.

5. Submissions of the counsel for the parties and examination of the record of the case with their able assistance give rise to the following points of law for our consideration: what is the nature, scope and extent of reappraisal of evidence by the High Court while hearing an *appeal* and a *reference* sent by the trial court for confirmation of the death sentence; whether it was necessary to complete the chain of the circumstantial evidence in order to connect the accused with the commission of the offence; whether reliance could be placed on a testimony of a witness who made improvements in his statement; whether recovery of the alleged stolen property without their prior identification or in absence of any proof that they were owned by the deceased persons could connect the accused with the commission of offence; whether recovery of the alleged weapons of offence, viz, blood-stained knives, without a positive forensic report as to matching the bloodstains found thereon with the blood of any of the deceased persons could connect the accused with the commission of offence; and, whether medical evidence, viz, postmortem reports etc., could corroborate the other prosecution evidence against the petitioners.

Reappraisal of evidence by the High Court in deciding the appeal and the reference for confirmation of death sentence

6. Normally, the High Courts hear and decide the appeal filed by the convicted person and the reference sent by the trial court for confirmation of the death sentence, together. It has been noticed that while doing so the learned Judges of the High Courts sometimes, as it appears to have done in the present case, remain content with examining and deciding only the arguments and contentions advanced in appeal, and do not by themselves scrutinize the whole material available on record of the case. Apart from deciding those arguments and contentions, it is incumbent

upon the High Courts, in discharge of their statutory duty under sections 375 and 376 of the Code of Criminal Procedure, 1898 ("CrPC"), to read and appraise each and every piece of evidence, and to examine also whether any evidence has been improperly admitted or excluded, or has been misread or non-read by the trial court. Even non-filing of appeal or withdrawal of appeal by the convicted person,[3] or any concessional statement by the state counsel[4] does not relieve the High Court from performing its duty of reappraising the whole evidence available on record. Ordinarily, in a criminal appeal against conviction, the appellate Court, under section 423 of the CrPC, can dismiss the appeal if the court is of the opinion that there is no sufficient ground for interference, after examining all the grounds urged before it for challenging the correctness of the decision given by the trial court. It is not necessary for the appellate court to examine the entire record for the purpose of arriving at an independent decision of its own whether the conviction of the appellant is fully justified. The position is, however, different where the appeal is by an accused who is sentenced to death, so that the High Court dealing with the appeal has before it, simultaneously with the appeal, a reference for confirmation of the capital sentence under section 374 of the CrPC. On a reference for confirmation of sentence of death, the High Court is required to proceed in accordance with sections 375 and 376 of the CrPC and the provisions of these sections make it clear that the duty of the High Court, in dealing with the reference, is not only to see whether the order passed by the trial court is correct, but to examine the case for itself and even direct a further enquiry or the taking of additional evidence if the Court considers it desirable in order to ascertain the guilt or the innocence of the convicted person.[5]

7. Section 374 of the CrPC provides that when the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court. As the death sentence passed by the trial court, i.e., the Court of Session, cannot be executed without being it confirmed by the High Court,

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[3] See Noorul Haq v. State, 1989 PCrLJ 1322 (DB)
[4] See Fakiro v. State, PLD 1964 (W. P.) Karachi 344 (DB).
[5] See Bhupendra Singh v. State of Punjab, AIR 1968 SC 1438.

proceedings before the High Court on reference under section 374, CrPC is yet another tier of judicial assessment of the evidence to examine "any point bearing upon the guilt or innocence of the convicted person." The High Court has been given very wide powers to prevent any possible miscarriage of justice. The proceedings are a reappraisal and reassessment of the entire facts of the case and of the law applicable. This extensive power actually casts an onerous duty on the High Court to ensure safe administration of criminal justice by considering in the reference proceedings all aspects of the case and coming to an independent conclusion, apart from the view expressed by the Court of Session. The High Court has to decide on reappraisal of the whole evidence whether the conviction is justified and, having regard to the circumstances of the case, whether the sentence of death is appropriate.[6]

8. As back as in the year 1921, Madgaonkar, A.J.C., while exploring the scope of power of High Court in confirmation proceedings under Section 374 in the case of *Gul v. Empror*,[7] observed that the worth and sanctity of human life are a test and mark of civilized societies, and are increasingly reflected in the criminal jurisprudence. The Legislature has provided, he noted, in confirmation proceedings a final safeguard and has laid this duty upon the High Court. The duty of judgment is laid in the first instance upon the trial Judge. But equally and with all that weight, the High Court in confirmation proceedings must finally weigh for itself the whole evidence, and is to confirm the conviction and sentence or make any other order according to its own final conclusion on the guilt or innocence of the sentenced person in the discharge of the duty laid upon it by law. These significant observations of the learned Judge become more nuanced when viewed in the constitutional context. Right to life and liberty, right to fair trial and right to dignity are fundamental rights guaranteed under Articles 9, 10A and 14 of the Constitution. The importance of human life goes to the heart of these fundamental rights, the rigorous two-tiered process of appraisal, assessment and examination under section 374 CrPC also meets the test of these

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[6] See Jumman v. State of Punjab, AIR 1957 SC 469; Ram Shankar v. State of West Bengal, AIR 1962 SC 1239; Masalti v. State of U.P., AIR 1965 SC 202.
[7] AIR 1921 Sindh 84 (FB).

fundamental rights. The duty cast on the High Court in deciding a murder reference under section 374 CrPC is a heavy one and can only be discharged once the entire evidence is reappraised to fully exhaust all the points having a bearing upon the guilt or innocence of the convicted person.

9. The High Court, in the present case, has made only a general and cursory reference to the prosecution evidence in its judgment, and has failed to reappraise it thoroughly. In such a situation, we would have ordinarily remanded the matter to the High Court to hear and decide the case afresh, but in the present case much water has flown under the bridge. Remand will entail further delay and hardship, besides, the points of law noted above also require a clear determination by this Court. We, therefore, decided to answer those points of law and to reappraise the prosecution evidence ourselves for safe administration of criminal justice.

Heinous nature of allegations and appraisal of evidence

10. 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.[8] 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.[9] 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

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[8] Observations of the Lahore High Court and the Federal Shariat Court in this regard made in Muhammad Fazil v. State, 1982 PCrLJ 510; Abdul Ghaffar v. State, 2005 PCrLJ 887; Muhammad Arif v. State, 2006 PCrLJ 1827; Kazim Hussain v. State, 2008 PCrLJ 971 are approved.
[9] See Azeem Khan v. Mujahid Khan, 2016 SCMR 274.

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.[10] It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10-A 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.

Standard of care required for relying on circumstantial evidence

11. The occurrence in the present case is unseen one, and the case of the prosecution against the petitioners is wholly based on the following circumstantial evidence: (i) last seen evidence of Mirza Muhammad Umar (PW-13); (ii) recovery of a motorcycle allegedly used for reaching the place of occurrence; (iii) recovery of the alleged stolen property; (iv) recovery of the alleged bloodstained weapons of offence and gloves; and (v) medical evidence as to post mortem examination of the deceased persons. Before examining the said circumstantial evidence, we think it necessary to state the standard of care required for relying on circumstantial evidence and the approach to determine sufficiency of such evidence for reaching the conclusion of guilt of an accused person.

12. Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined. In cases like the present one that rest entirely on circumstantial evidence, it is of the utmost importance that the circumstances should be ascertained with minute care and caution, before any conclusion or inference adverse to the accused person is drawn. The process of inference

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[10] See State v. Mushtaq Ahmad, PLD 1973 SC 418.

and deduction involved in such cases is of a delicate and perplexing character, liable to numerous causes of fallacy. This danger points the need for great caution in accepting proof of the facts and circumstances, before they are held to be established for the purpose of drawing inferences therefrom. A mere concurrence of circumstances, some or all of which are supported by defective or inadequate evidence, can create a specious appearance, leading to fallacious inferences. Hence, it is necessary that only such circumstances should be accepted as the basis of inferences that are, on careful examination of the evidence, found to be well-established. A high quality of evidence is, therefore, required to prove the facts and circumstances from which the inference of the guilt of the accused person is to be drawn.[11]

13. There are chances of fabricating evidence in cases that are based solely on circumstantial evidence; therefore, the court, in such cases, should take extra care and caution to examine the evidence with pure judicial approach on strict legal standards to satisfy itself about its proof, probative value and reliability. When there are apparent indications of possibility of fabricating evidence by the investigating officer in making the case, the court must be watchful against the trap, which may misled to drawing a false inference, and satisfy itself about the fair and genuine collection of such evidence. The failure of the court to observe such care and caution can adversely affect the proper and safe administration of criminal justice.[12]

Approach to determine sufficiency of circumstantial evidence

14. The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person is this: If, on the facts and circumstances proved, no hypothesis consistent with the innocence of the accused person can be suggested, the case is fit for conviction of the accused person on such conclusion; however, if such facts and circumstances can be reconciled with any reasonable hypothesis compatible with the innocence of the appellant, the case is to be treated one of insufficient evidence, resulting in acquittal of the

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[11] See Lejzor Teper v. Queen, PLD 1952 PC 117; Fazal Elahi v. Crown, PLD 1953 FC 214; Saeed Ahmad v. Muhammad Irfan, PLD 1986 SC 690 (5-MB).
[12] See Hashim Qasim v. State, 2017 SCMR 986; Fayyaz Ahmad v. State, 2017 SCMR 2026.

accused person.[13] Circumstantial evidence, in a murder case, should be like a well-knit chain, one end of which touches the dead body of the deceased and the other the neck of the accused. No link in chain of the circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances has to be completed to establish guilt of the accused person beyond reasonable doubt and to make the plea of his being innocent incompatible with the weight of evidence against him. Any link missing from the chain breaks the whole chain and renders the same unreliable; in that event, conviction cannot be safely recorded, especially on a capital charge.[14] Therefore, if the circumstantial evidence is found not of the said standard and quality, it will be highly unsafe to rely upon the same for conviction; rather, not to rely upon such evidence will a better and a safer course.[15]

Last seen evidence of Mirza Muhammad Umar (PW-13)

15. In the present case, the first link in the chain of circumstantial evidence relied upon by the prosecution is the last seen evidence of Mirza Muhammad Umar (PW-13). The said witness while appearing in the witness-box deposed that on 20.01.2010 at about 08:00 or 08:30 p.m. he was passing by in front of the house of the deceased, Pervaiz Akhtar. He saw three persons there who had worn shawls (*Chaddar*) over themselves. A motorcycle High Speed 70 was also parked there. The said three persons knocked the door of house of the deceased, Pervaiz Akhtar. The door was opened, and the said three persons went inside the house along-with the motorcycle. He further stated that the three accused persons present in the court were the same persons. This was his statement made in examination-in-chief. He explained in cross-examination that on 20.01.2010 when he happened to pass by in front of the house of the deceased, Pervaiz

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[13] See Siraj v. Crown, PLD 1956 FC 123 (4-MB); Nazir Hossain v. State, 1969 SCMR 388 (4-MB); Sairan v. State, PLD 1970 SC 56.
[14] See Karamat Hussain v. State, 1972 SCMR 15; Saeed Ahmad v. Muhammad Irfan, PLD 1986 SC 690 (5-MB); Barkat Ali v. Karam Elahi, 1992 SCMR 1047; Ibrahim v. State, 2009 SCMR 407; Muhammad Hussain v. State, 2011 SCMR 1127; Imran v. State, 2015 SCMR 155.
[15] See Azeem Khan v. Mujahid Khan, 2016 SCMR 274.

Akhtar, he was going from his house to "*Wattay di Dari*" for condolence on the death of the father of some person known to him. He stated that he did not know the name of the person on whose death he went to condole. He denied the suggestion put to him that he did not know the name of that deceased person because no such death had taken place. He stated that the village "*Wattay di Dari*" was at a distance of about one kilometer from his house. On questioning about identification of the accused person, he explained that the accused person though had put on shawls (*Chaddar*) at that time but their faces were visible. There was light, not darkness, at that time in front of the house of the deceased, Pervaiz Akhtar. He had not mentioned the names of the accused persons in his statement to the police. He did not know the names of the accused person at that time. He had not mentioned the description, the age and colour of the complexion, of the accused person to the police. He was specifically asked, which he denied, that in his statement before the police he had mentioned that because of darkness he could not identify the accused persons. Then, he was duly confronted with his statement (Exh-DE) made to the investigating officer under section 161, CrPC, and it was noted by the trial court that it was so recorded in that statement. Then, he denied the suggestion put to him that he had deposed about identification of the accused persons only on instruction of the prosecution.

16. Reading of the statement of Mirza Muhammad Umar (PW-13) shows that he is a chance witness: a witness who in view of his place of residence or occupation and in the ordinary course of events is not supposed to be present at the place of the occurrence but claims to be there by chance. Testimony of such witness requires cautious scrutiny and is not accepted unless he gives satisfactory explanation of his presence at or near the place of the occurrence at the relevant time.[16] The explanation of Mirza Muhammad Umar (PW-13) is that he happened to pass by in front of the house of the deceased, Pervaiz Akhtar, as he was going from his house to "*Wattay di Dari*" for condolence on the death of the

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[16] See Javed Ahmad v. State, 1978 SCMR 114; Zafar Hayat v. State, 1995 SCMR 896; Muhammad Rafique v. State, 2004 SCMR 755; Muhammad Khalid v. Abdullah, 2008 SCMR 158; Sughra Begum v. Qaiser Pervez, 2015 SCMR 1142; Ibrar Hussain v. State, 2020 SCMR 1850.

father of some person known to him. He, however, did not mention the name of the person known to him on whose father's death he was going for condolence; nor could he tell the name of the late person on whose death he was going for condolence. Further, his assertion of going for condolence at such odd hours, i.e., about 08:30 p.m., on a winter-night of the month January does not fit in the customary time of visiting people for condolence on death of someone, in rural areas: people usually make such visits during daytime. His explanation of being present before the house of the deceased, Pervaiz Akhtar, at the relevant time is thus found far less than being satisfactory one. His testimony may be discarded on this ground alone. But there is another solid reason also that makes him unreliable: a very material improvement made by him in his testimony as to recognizing the accused persons at the time of seeing them in the night of the occurrence and identifying them at the time of making his statement in court.

Effect of material improvements made by a witness

17. Deliberate and dishonest improvements made by a witness in his statement to strengthen the prosecution case cast serious doubts on his veracity, and makes him untrustworthy and unreliable. It is quite unsafe to rely on testimony of such witness, even on facts deposed by him other than those improvements unless it receives corroboration from some other independent piece of reliable evidence.[17] In the case of *Shahzada v. Hamidullah*,[18] a five-member Bench of this Court, on appraising the evidence of a witness, found that he had improved upon the version he had earlier given to the police while making statement in Court, and upon such finding held that the improvement had affected his veracity rendering it unsafe to rely upon his evidence. Hamoodur Rahman, J., speaking for the Bench observed: "[The witness] also tried to improve upon the version he earlier gave to the police by introducing the story of his having seen the [accused] respondent Hamidullah actually loading his gun in the middle of the bazar. In

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[17] See Hadi Bakhsh v. State, PLD 1963 (W. P.) Karachi 805 (DB); Shahzada v. Hamidullah, 1968 PCrLJ 176 (5-MB); Amir Zaman v. Mahboob, 1985 SCMR 685 (4-MB); Saeed Muhammad v. State, 1993 S C M R 550; Khalid Javed v. State, 2003 SCMR 1419; Akhtar Ali v. State, 2008 SCMR 6 (4-MB); Muhammad Rafique v. State, 2010 SCMR 385; Muhammad Saleem v. Muhammad Azan, 2011 SCMR 474; Sardar Bibi v. Munir Ahmed, 2017 SCMR 344.
[18] 1968 PCrLJ 176.

his police statement he had only stated that when he saw Hamidullah first he appeared to be proceeding to the shop of the deceased to purchase snuff. This definite attempt at embellishment clearly affected his veracity and rendered it unsafe to rely upon his evidence." In the case of *Akhtar Ali v. State*,[19] the complaint initially made statement that four unknown persons had committed the offence and did not name any person therein, but subsequently nominated the accused persons in his supplementary statement despite the fact that one of the accused person was already known to him. A four-member Bench of this Court, which heard the case, noted with concern that improvement made by the complaint even during investigation and discarded his testimony making the observations that "when a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful."

18. Mirza Muhammad Umar (PW-13) stated to the investigation officer in his statement (Ex-DE) recorded under section 161, CrPC that due to darkness he could not recognize the accused persons when he saw them standing at the door of the house of the deceased, Pervaiz Akhtar; but in his statement in court he said that the accused persons were those whom he saw at the door of the deceased, Pervaiz Akhtar. He stated also that there was light, not darkness, at the door of the house of the deceased, Pervaiz Akhtar at that time. This was a very glaring and material improvement made by the witness. He admitted in cross-examination that he had not mentioned any identifying features, like age, height, colour of their complexion etc., of those persons in his that statement. If he had really seen and recognized the persons standing at the door of the deceased, Pervaiz Akhtar, he would definitely have described their identifiable features to the investigating officer. And had he described such recognizable features of those persons, the investigating officer would have got conducted the test identification of the accused persons on their arrest in the case. This deliberate and dishonest improvement made by the witness makes him unreliable. The observation of the

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[19] Akhtar Ali v. State, 2008 SCMR 6.

High Court that the value of his testimony is not diminished despite the said improvement is totally flawed and untenable.

Recovery of motorcycle allegedly used for reaching the place of occurrence

19. The second incriminatory circumstantial evidence relied upon by the prosecution is the recovery of a motorcycle, Speed Smart CD SR-70, that is alleged to have been used by the petitioners for reaching the place of occurrence. Sub-Inspector Fazal Hussain, the investigating officer, appeared in the witness-box as PW-16. About the said recovery, he stated that on 27.01.2010 he raided the house of the accused Qadeer at *Langurpur Baily*. The accused Qadeer was not found there. One Bashir, the brother of the accused Qadeer, met there and led to the recovery of the motorcycle from his house. Bloodstains were found present on the seat-cover of the motorcycle. He took the motorcycle into his possession vide recovery-memo (Exh-PR), which was owned by the accused Khurram Shahzad. In cross-examination, he explained that the semi-washed bloodstains on the seat-cover of the motorcycle suggested use of the said motorcycle in the commission of crime. He admitted that he did not send the bloodstained part of the seat of the motorcycle for examination to the Chemical Examiner. He denied the suggestion that there were no bloodstains on the seat of the motorcycle. He stated that on 27.01.2010 he had no proof of ownership of the motorcycle; Bashir, brother of the accused Qadeer, told him that motorcycle was of the accused Khurram Shahzad. He admitted that throughout the investigation he did not collect any proof as to ownership of the motorcycle. He also admitted that he did not prepare the site-plan of the place from which the motorcycle was recovered. He denied the suggestion that the site-plan was not prepared as the motorcycle was not recovered from the house of the accused Qadeer in village *Langarpur Baily*. The recovery witness, Waheed Ahmad, 459/c (PW-9) made similar statement as to proceedings of the recovery of the motorcycle.

20. By close examination of the prosecution-evidence as to the recovery of that motorcycle as well as the assertion that the same was used in commission of the crime, we have noticed that no specification of the motorcycle, i.e., its make, colour, power-70, 100 or 125, or registration number was mentioned in the FIR.

Therefore, it cannot be said with certainty that it is the motorcycle that Mirza Muhammad Umar (PW-13) saw with the persons outside the house of the deceased Pervaiz Akhtar and was mentioned in the FIR. The statement of the investigating officer (PW-16) that the seat-cover of the recovered motorcycle was bloodstained and this fact suggested that it was the same motorcycle that was used in the crime is not found confidence-inspiring; had the seat-cover of the motorcycle been really bloodstained, the investigating officer would have sent the same for examination by the Chemical Examiner for ascertaining whether the bloodstain is that of human blood and whether that bloodstain matches with the blood of any of the deceased persons or the accused persons. In absence of the reports of the Chemical Examiner and the Serologist on these facts, the assertion of the investigating officer as to use of the said motorcycle in commission of the crime carries no legal worth. The failure on part of the investigating officer to ascertain registration number and name of the registered owner of the motorcycle is also fatal to his assertion that the recovered motorcycle is of the accused Khurram Shahzad. He stated that Bashir brother of the accused Qadeer told him that the motorcycle was of the accused Khurram Shahzad; but neither the statement of the said Bashir to this effect was recorded in the course of investigation under section 161, CrPC nor was he examined as a witness during trial about the alleged ownership of the accused Khurram Shahzad as well as about the alleged recovery of the motorcycle on his pointation from the house of the accused Qadeer. The non-preparation of the site-map of the place of recovery of motorcycle adds further suspicion to the alleged recovery of the motorcycle from the house of the accused Qadeer. The recovery of the motorcycle, in view of the said omissions made by the investigating officer, is found completely deficient as an incriminatory piece of circumstantial evidence to connect the accused Qadeer or the accused Khurram Shahzad with the commission of the offence.

Recovery of gold ornaments etc alleged to be stolen property

21. Recovery of the alleged stolen or looted property is the third link that the prosecution tried to join in the chain of circumstantial evidence. Sub-Inspector Fazal Hussain, the investigating officer, (PW-16) deposed that during the inspection of

the place of occurrence he found empty boxes of jewellery scattered there which indicated the commission of offence of robbery; therefore, he also added section 392, PPC to the crime report. He arrested the accused persons, Khurram Shahzad, Qadeer and Naveed, on 31.01.2010, in a raid made at a snooker club in village *Pakwal*. On interrogation, the accused persons made disclosure that they could lead to recoveries. Firstly, the accused Qadeer led him to the recovery of gold bangles, gold rings, gold locket, five currency notes of Rs.1000, four currency notes of Rs.5000 and two Defence Saving Certificates of the deceased Pervaiz Akhtar, from his rented house situated in village *Pakwal*. Thereafter, the accused Khurram Shahzad led to the recovery of gold bangles, gold ring, gold ear ring, gold chain, fourteen currency notes of Rs.500, three Defence Saving Certificates, one laptop, one movie camera and two still cameras, from his house situated in village *Aima Ilyas*. Then the accused Naveed led to the recovery of gold ring, pair of ear rings, pair of ear topes, fourteen currency notes of Rs.500, one Defence Saving Certificate, from his house situated in village *Jandal*. He took the said recovered things into his possession, and prepared their recovery-memos and site-plans of the places of recovery. In cross-examination, he admitted that the fact of finding scattered empty boxes of jewellery at the place of occurrence was not mentioned in the FIR, and he did not take any such empty box into his possession. About interrogation of the accused person and recoveries, he explained that he interrogated the accused persons outside the snooker club for about one hour. From the snooker club they first went to the house of the accused Qadeer. The accused Qadeer got key of the main gate of the house from an old lady and then opened the gate. He admitted that he did not mention this fact in the case dairy that the accused Qadeer opened the gate by obtaining key from an old lady. He denied the suggestion that the accused Qadeer had not hired any house, nor was any recovery made on his pointation. About the recovery made from the house of the accused Khurram Shahzad, he stated that nobody was present in the house of the accused Khurram Shahzad; however, one woman came there and opened the lock of the door. He admitted that he did not record statement of the said woman. As to the recovery from the house of the accused Naveed Asghar, he said that four or five women were there in the house of the accused Naveed Asghar when they reached there. He stated

that he did not join any person from the locality in the recovery proceedings. He denied the suggestion that the whole recovery proceedings were recorded fictitiously by him while sitting in the police station, and that the accused persons were already in police custody and their arrest was fictitiously shown to have been made on 31.01.2010. The recovery-witness, Tahir Akhtar (PW-11) who is cousin of the complainant made statement supporting the due conduct of the recovery proceedings, in his examination-in-chief. He, however, could not tell the time when the recoveries were made from the houses of the accused persons, Qadeer, Khurram Shahzad and Naveed Asghar. He denied the suggestion that recoveries were planted on the accused persons and nothing was recovered from them.

22. It may be said straight away without any deep deliberation that the prosecution story of interrogation of the accused persons at the place of their arrest and then leading of the accused persons from the very place of their arrest to the recoveries of the alleged stolen property appears to be intrinsically doubtful: it does not even fit in with the ordinary human conduct. The accused persons who, as per the prosecution story, were enjoying play snooker in a snooker club, admitted the commission of offence that may entail death penalty forthwith on their arrest, and not only admitted the commission of offence but also cooperated well to lead to the recovery of the stolen property then and there. It is very hard for a prudent person to believe such story. Non-mentioning the alleged fact of finding any scattered jewellery boxes at the place of occurrence in the FIR shakes the foundation of the story. Fazal Hussain, SI (PW-16) also stated in his examination-in-chief that crime scene expert Masood Ahmad was summoned at the spot, who took photographs of the dead bodies and the place of occurrence. Masood Ahmad appeared in the witness-box as PW-7, and tendered the photographs of the deceased persons in evidence as Exh-P1 to P5 and the photographs of the crime scene as Exh-P6 to P10. All these photographs are available on record of the case. In none of the photographs there are any scattered empty jewellery boxes. These photographs, tendered in evidence by the prosecution itself, completely negate the alleged fact of finding scattered empty jewellery boxes at the place of occurrence.

23. It was denied on behalf of the accused Qadeer by putting suggestion in cross-examination to the investigating officer (PW-16) in the terms that the accused Qadeer had not hired any house. The investigating officer did not join in investigation the landlord of that alleged rented house to bring on record the facts when the accused Qadeer had got the house on rent from him, especially when as per its own version of the prosecution the accused Qadeer was resident of the village, *Langurpur Baily,* from where the investigating officer recovered the motorcycle allegedly used for reaching the place of occurrence. Further, not associating the women in investigation, who brought the keys of the houses of the accused persons Qadeer and Khurram Shahzad, and even non-mentioning their names in the case dairy create dent in the story of recoveries.

Recovery of alleged stolen property in absence of prior description

24. Even otherwise, in absence of any description of the stolen property given in the FIR, or in the supplementary statement of the complainant or any witness recorded under section 161, CrPC, prior to the alleged recovery, it cannot be said with certainty the recovered property is that which was allegedly stolen.[20] The recovered jewellery, the alleged stolen property, has been attempted to be identified and proved as the one belonging to the deceased Pervaiz Akhtar by the testimony of the goldsmith, Mehmood Ahmad (PW-12). The said witness (PW-12) stated in his examination-in-chief that he identified the gold ornaments produced before him by the investigating officer in the police station. The said gold ornaments were got prepared from him by the deceased Pervaiz Akhtar. On 07.08.2008, the deceased Pervaiz Akhtar got repaired the said gold ornaments from him, and he had issued the receipt (Exh-PPP) at the time of receiving the gold ornaments for repair. In cross-examination, he said that the receipt (Exh-PPP) was not produced by him to the investigating officer. Record of the case is silent from where the said receipt was found by the investigating officer, or who tendered it to him. The goldsmith, Mehmood Ahmad (PW-12), did not state the date when

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[20] Observations of the Federal Shariat Court on this point made in Noor Ullah v. State, 2012 YLR 2618; Changez v. Shahid, 2018 MLD 1136; Tariq Hussain v. State, 2018 MLD 1573 are approved.

the deceased Pervaiz Akhtar had purchased the said gold ornaments from him. He did not produce any receipt book of his shop showing any entry of sale of gold ornaments to the deceased Pervaiz Akhtar, nor did he bring with him, at the time of his testimony in court, the receipt book containing the entry of receiving the gold ornaments from the deceased Pervaiz Akhtar for repair. His testimony is therefore of little value to prove that the gold ornaments allegedly recovered from the accused persons really belong to the deceased Pervaiz Akhtar. Tahir Akhtar (PW-11), the witness to the alleged recoveries, who is the cousin of the complainant and of the deceased Pervaiz Akhtar said in his cross-examination that the deceased Pervaiz Akhtar had five daughters. Two daughters of the deceased Pervaiz were killed in the incident of the present case, but the remaining three daughters would have been the best persons to identify the gold ornaments. If these ornaments had really belonged to their deceased father Pervaiz Akhtar, they must have been in use of their deceased mother or their deceased sisters and they would definitely have seen those ornaments in their use. Similar is the position with the identification of laptop and cameras, the alleged stolen articles. The investigating officer neither got them identified from the daughters of the deceased Pervaiz Akhtar, nor got done forensic audit of these articles from the expert concerned who may have retrieved data therefrom indicating the person who were in use of these cameras and laptop. Such failure on part of the investigating officer makes the recovery of these articles, even if presumed to have been effected from the accused persons, useless for the purpose of crafting any link in the chain of circumstantial evidence against the petitioners to connect them with the commission of offences of robbery and murders.

Recovery of mobile phones and sims

25. As to the alleged recovery of the mobile phones of the deceased persons Bushra, Ghazal and Zarmina, Fazal Hussain, SI, (PW-16) deposed that on 02.02.2010 after making recoveries of the alleged weapon of offences at *Manara Pulley* the accused Naveed Asghar produced the mobile phone of the deceased Bushra by sending for the same from his house through his brother, and at the same place the accused person Khurram Shahzad also produced two mobile phones of the deceased persons, Zarmina and

Ghazala by calling the same through his brother. He further stated that he took the said mobile phones into his possession vide recovery-memos, Exh-PLL and Exh-PNN. In cross-examination, he admitted that he did not mention the fact of calling the mobile phones by the accused persons at *Manara Pulley* from their houses through some third persons. He admitted that the persons through whom the accused persons had sent for the mobile phones were not associated in the investigation proceedings. He admitted it also that the names and particulars of those persons who had brought the mobile phones were not mentioned in the case dairy. He expressed his inability to tell the names of those persons. We have also read the recovery-memos, Exh-PLL and Exh-PNN. It is mentioned in the recovery-memo, Exh-PLL, that the accused Naveed Asghar has got recovered from his house the mobile phone that was in use of the deceased Bushra. Similarly, in recovery memo, Exh-PNN, it is mentioned that the accused Khurram Shahzad has got recovered from his house the two mobile phones that were in use of the deceased persons, Zarmina and Ghazala. The clear contradiction in the oral stance of the investigation officer (PW-16) and the proceedings of recovery reduced into writing by him in the recovery memos (Exh-PLL and Exh-PNN) makes the recoveries doubtful. It is not understandable how did the accused persons who were in police custody call their brothers to bring the mobile phones at a place where they were making recoveries of the alleged weapons of offence, i.e., *Manara Pulley*, not in the police station, and why did they not get those mobile phones recovered on 31.01.2010 when, as per version of the prosecution, they got recovered the other stolen articles from their houses. It is also not consistent with the normal human conduct that the offenders would have taken the mobiles phones of some of the deceased persons, and had left the mobile phone of the deceased Pervaiz Akhtar laying it on a conspicuous place, i.e., on a table beside the dead body of the deceased Pervaiz Akhtar. Non-mentioning the theft of the mobile phones of the deceased persons in the FIR or in the supplementary statement of the complainant, non-joining in investigation the brothers of the accused persons who had allegedly brought the mobile phones, and not bringing on record their names and the details as to the place from where they got the said mobile phones, all these omissions, also make these alleged recoveries unreliable.

26. The prosecution has also attempted to connect the accused Khurram Sahzad with the commission of offence with the assertions that mobile phone having sims number 0333-5841554 and 0332-5801685 was recovered from him on his arrest on 31.01.2010 as per recovery-memo, Exh-PEE, and that the sim bearing number 0332-5801685 was used from 27.01.2010 to 28.01.2010 in the phone set bearing IMEI No. 354176029652580 of the deceased Bushra, as per the calls data (Exh-PTT). These assertions has been made on behalf of the prosecution during arguments in the courts below as well as in this Court, and was not stated as facts by the complainant (PW-15) and the investigating officer (PW-16) in their statements while appearing in the witness-box; therefore, the accused persons could not get opportunity to test the veracity of the said facts in cross-examination. Nor was this fact with the said specification put to the accused Khurram Shahzad in his statement recorded under section 342 of the CrPC, and he, therefore, could not explain his stance to the prosecution evidence on it against him. Although the said assertions of the prosecution, which appears to have greatly influenced the mind of the courts below against the accused persons, cannot be entertained on these grounds only, but the close scrutiny of the prosecution evidence relied upon for making the said assertions also shows several flaws in it to connect the accused Khuram Shahzad with the commission of offence. Firstly, the empty box of a mobile phone set bearing IMEI No.354176029652580 is alleged to have been tendered by the complainant to the investigating officers on 21.01.2010, the day on which the FIR was registered, the investigating officer (PW-16) made site inspection, and the crime scene expert (PW-7) took photographs of the place of occurrence. But the fact of finding the said empty box was not mentioned in the FIR, nor was it noticed by the investigating officer during site inspection, nor was it captured by the crime scene expert while taking the photographs of the place of occurrence. Had it really been there at the place of occurrence on 21.01.2010, the investigation officer himself, not waiting for its tendering by the complainant, would have taken it into his possession. Secondly, the complainant (PW-15) stated that the said empty box was of mobile phone Nokia which was owned by the deceased Zarmina Mehak but was in use of the deceased Bushra. However, he did not state how did he came to know about

these facts on 21.01.2010 when the investigating officer had not yet even applied for obtaining the calls data of the sims of the deceased persons. Thirdly, as per the calls data (Exh-PTT), on 27.01.2010 two outgoing calls were made from a phone set bearing IMEI No.354176029652580 with sim number 0332-5801685 to some person having sim number 0345-5526628 and on 28.01.2010 two outgoing calls were made to some person having sim number 0303-5431302, one outgoing call to and one incoming call from some person having sim number 0301-5826884, and one outgoing call to some person having landline number 54-4656497. But none of the said persons were joined in investigation to bring on record who had made those calls to them from that phone, nor was the record as to registered owner of the sim number 0332-5801685 obtained. Therefore, it cannot be said with certainty that the accused Khurram Shahzad used the mobile phone bearing IMEI No.354176029652580 and made calls to those persons with sim number 0332-5801685, on January 27 and 28, 2010. Lastly but very importantly a fact has been noted, which coupled with the said noted flaws makes the whole story of recording supplementary statement of the complainant as to finding scattered jewellery boxes, his tendering the empty box of mobile phone and addition of the offence of robbery punishable under section 392, PPC in the case by the investigating officer on 21.01.2010 untrustworthy and unreliable. It is this: Admittedly the investigating officer received the clothes of the deceased persons after their postmortem examination on 22.01.2010 and took the said clothes in his possession as a piece of evidence in the case vide recovery memos (Exh-PP, PQ, PT, PU and PV) dated 22.10.2010. In all these five recovery memos prepared on 22.01.2010 the offence of robbery punishable under section 392, PPC is not mentioned; this fact clearly shows that the section relating to the offence of robbery, i.e, section 392, PPC had not been added in the case till 22.01.2010. Then mentioning of section 392, PPC on the recovery memo (Exh-PRR) purportedly prepared on 21.01.2010 as to recovery of empty box of a mobile phone bearing IMEI No.354176029652580 makes that recovery and the recovery proceedings entirely doubtful.

Recovery of the bloodstained weapons of offence and gloves

27. The fourth incriminatory circumstantial evidence relied upon by the prosecution is the recovery of the bloodstained weapons of offence, i.e., two knives (*Churri*), and gloves allegedly made on pointation of the accused persons during investigation. Statement of Fazal Hussain, SI (PW-16) about the said recovery is as follows. He stated that he arrested the accused persons, Khurram Shahzad, Qadeer and Naveed, on 31.01.2010 and obtained their physical remand on 01.02.2010 for five days. On 02.02.2010 during investigation, the accused persons disclosed that they could lead to recovery from underneath *Manara Pulley*. In pursuance to the disclosure of the accused persons he took them to *Manara Pulley* situated on Mangla Road. On reaching *Manara Pulley*, firstly the accused Naveed Asghar led him to the recovery of knife (*Churri*) from underneath *Manara Pully* by digging out the soil. Thereafter, the accused Khuram Shehzad got recovered a bloodstained knife (*Churri*) and a pair of gloves from underneath *Manara Pulley* by digging out the earth. And then the accused Qadeer led to the recovery of a pistol and a pair of gloves from underneath the *Manara Pulley* by digging out the earth. He also got exhibited the recovery memos of the said recoveries as Exh-PKK, Exh-PMM and Exh-POO respectively. In cross-examination, he stated that the witnesses to the recovery, Tahir Akhtar (PW-11) and Gul Awaiz, had reached the police station on their own. The said persons were the witnesses to all recoveries made on 27.01.2010, 31.01.2010 and 02.02.2010. There were about 7/8 shops beside the *Manara Pulley*, the place of alleged recoveries, but no person from amongst the shopkeepers was associated in the recovery proceedings. Village *Ladhar* was located at a distance of about 100/150 yards and village *Shiekhupur* at a distance of about 200/300 meters, from the place of recovery. No person from the localities of those villages was associated in the recovery proceedings. *Manara Pulley* was situated on the main road. Traffic was plying on that road round the clock. The recovery proceedings were not seen by any person from public other than the said witnesses to the recovery. The depth of *Manara Pulley* was about 5/6 feet from the road. Water flow area of the *Manara Pulley* was about 15/20 feet. The place of recovery was not inside the *Manara Pulley*. The accused persons dug out the earth beneath the pulley

from outside. The knives (*Churri*) got recovered by the accused Naveed Asghar and Khurram Shahzad were wrapped in polythene shopper bags. The pistol got recovered by the accused Qadeer and the gloves got recovered by the accused Khurram shahzad were also wrapped in polythene shopper bags. That shopper bags were not taken into possession. In the recovery memo, recovery of shopper bags was not mentioned. Tahir Akhtar (PW-11), one of the witnesses to the alleged recoveries made the similar statement. He, however, admitted in cross-examination that he was the cousin of the complainant and the other witness to the recovery proceedings, Gul Awaiz, was also his cousin, and on question stated that river *Jehlum* was at a distance of 100/150 yards form village *Sheikhupur* onwards.

28. It may be stated at the outset of the appraisal of the prosecution evidence as to the recoveries of the knives (*Churri*), the alleged weapons of offence, that it is quite astonishing that both Tahir Akhtar (PW-11) and Gul Awaiz were close relatives of the complainant reached the police station at the time when the investigating officer planned to make a raid for arrest of the accused persons and also when the accused persons were ready to cooperate for making recoveries during investigation, and thus become witnesses to all the recoveries made on 27.01.2010, 31.01.2010 and 02.02.2010. The story becomes further doubtful when we notice that the particulars of these witnesses are written on the recovery-memos (Exh-PKK, Exh-PMM and Exh-POO) in handwriting patently different from all other writings thereon. It indicates that the particulars of the witnesses were added and their signatures obtained subsequently on the already prepared recovery memos. There were, as per version of the investigating officer, 7/8 shops and two villages near the place of alleged recoveries, but no person from those nearby shops and villages was associated in the recovery-proceedings. We are aware of the fact that the persons from the general public usually do not come forward to be witness to such police proceedings, but the assertion of the investigating officer that no person of the locality other than the said witnesses was there to see the proceedings that allegedly continued for about three hours of the day from about 02:15 to 5:00 p.m. makes the proceedings further doubtful. The story of wrapping up bloodstained knives, the alleged weapons of offence,

and gloves into polythene shopper bags and then burying them in the ground close to a water stream by the offenders, for a future recovery therefrom, instead of throwing them into that water stream or a nearby river also does not appeal to a prudent mind. In the case of *Sardar Bibi v. Munir Ahmed*,[21] this Court disbelieved the alleged recovery of bloodstained weapon of offence, i.e. a chaff cutter (*Toka*), made after about one month of the occurrence, with the observations that "it is not expected from an accused person to keep such weapon (stained with blood) as souvenir because during the said period there was ample time to destroy or at least washout the said weapon." Similarly, in the case of *Muhammad Asif v. State*[22] this Court did not believe the alleged recovery of weapon of offence, i.e., a dagger, observing that 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 [of recovering the dagger from the shop of the appellant] 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."

Recovery of weapon of offence, a corroborative evidence

29. Even otherwise, recovery of weapon of offence is only a corroborative piece of evidence; and in absence of substantive evidence, it is not considered sufficient to hold the accused person guilty of the offence charged. When substantive evidence fails to connect the accused person with the commission of offence or is disbelieved, corroborative evidence is of no help to the prosecution as the corroborative evidence cannot by itself prove the prosecution case.[23] A four-member Bench of the Federal Court of Pakistan[24]

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[21] 2017 SCMR 344.
[22] 2017 SCMR 486.
[23] See Saifullah v. State, 1985 SCMR 410 (4-MB); Ali Muhammad v. Bashir Ahmed, 2003 SCMR 868; Israr-Ul-Haq v. Muhammad Fayyaz, 2007 SCMR 1427; Hayatullah v. State, 2018 SCMR 2092 (5-MB).

while reappraising the circumstantial evidence in *Siraj v. Crown*,[25] held that two out of three circumstances had not been proved while the third, namely, recovery of the blood stained handle of hatchet, that had been alleged to be weapon of offence, was insufficient to form the basis of a conviction. Muhammad Munir, C.J., speaking for the Bench said: "The circumstance that the appellant [accused] produced the handle of a hatchet, which had stains of human blood on it, is by itself plainly insufficient to prove that the, appellant [accused] committed the murder in question." Likewise, in *Saifullah v. State*[26] a four-member Bench of this Court held the recovery of a blood-stained knife, the alleged weapon of offence, insufficient for conviction on excluding the testimony of alleged eyewitness from consideration and finding the occurrence as an unseen one. The Court observed: "Considering all the facts on the record we are of the view that it was an unwitnessed occurrence... We have therefore no option but to exclude the testimony of the aforementioned two witnesses from consideration with the result that no evidence is left on the record to connect the accused with the crime in question, as the recovery of the blood-stained knife, even if believed, could only be used as evidence corroborating the testimony of the eye-witnesses, if any. But since evidence of the eye-witnesses in this case has been excluded this recovery is hardly of any use."

Evidentiary value of a bloodstained alleged weapon of offence without a forensic report matching the blood found thereon with that of the deceased

30. The recovery of bloodstained knives and gloves if presumed to have been made from the petitioners, for the sake of argument, it cannot even then connect them with the commission of murders of the five deceased persons in the present case. This Court observed in the case of *Irfan Ali v. State*[27] as to recovery of bloodstained alleged weapon of offence, i.e., dagger, that "when no grouping of the blood was made with the blood stained clothes of the deceased to create a nexus between the two, the same is of no help to the prosecution." Similarly in the case of *Khalid Javed v.*

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[24] Predecessor Court of this Court.
[25] PLD 1956 FC 123.
[26] 1985 SCMR 410.
[27] 2015 SCMR 840.

State,[28] this Court discarded the prosecution evidence of recovery of bloodstained alleged weapon of offence, i.e., the dagger and knife (*Churri*), and of bloodstained clothes of the accused persons in absence of matching report of the bloodstains with the blood group of deceased. In *Hamid Nadeem v. State*,[29] a five-member Shariat Appellate Bench of this Court rejected the recovery of bloodstained clothes of the accused as an incriminating piece of evidence while observing that the bloodstains on the recovered clothes were not got matched with the blood of the deceased. While, in the case of *Muhammad Asif v. State*,[30] this Court deemed it essential to point out that "mere sending the crime weapons, blood stained, to the chemical examiner and serologist would not serve the purpose of the prosecution nor it will provide any evidence to inter link different articles...unless the blood stained earth or cotton and blood stained clothes of the victim are not sent with the same for opinion of serologist to the effect that it was human blood on the crime weapons and was of the same group which was available on the clothes of the victim and the blood stained earth/cotton, such inconclusive opinion cannot be used as a piece of corroboratory evidence." The legal position may be summed up thus: As in absence of a positive report of Forensic Science Laboratory as to matching of crime empty with the allegedly recovered firearm from an accused person, the recovery of alleged weapon of offence cannot be considered as the corroborative piece of evidence against that accused person,[31] so is the legal position regarding recovery of a bloodstained alleged weapon of offence without a positive forensic report matching the blood found thereon with that of the deceased. It can also be not used as a substantive or corroborative piece of evidence against an accused person to connect him with the commission of offence. Therefore, the prosecution evidence as to recoveries of bloodstained knives (*Churri*) and gloves that are alleged to have been used for the commission of offence is also not found sufficient to connect the petitioners with the commission of the offences charged.

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[28] 2003 SCMR 1419.
[29] 2011 SCMR 1233.
[30] 2017 SCMR 486.
[31] See Sardar Bibi v. Munir Ahmed, 2017 SCMR 344; Azhar Mehmood v. State, 2017 SCMR 135.

Medical evidence, not corroborative rather supporting evidence

31. The prosecution has attempted to complete the chain of circumstantial evidence by medical evidence relating to the post mortem examinations of the deceased persons. This evidence proves only the factum that death of the deceased persons was caused by cutting their throats through some sharp edge weapon; it does in no way indicate who had cut their throats and with what particular weapon. Medical evidence is in the nature of supporting, confirmatory or explanatory of the direct or circumstantial evidence, and is not "corroborative evidence" in the sense the term is used in legal parlance for a piece of evidence that itself also has some probative force to connect the accused person with the commission of offence. Medical evidence by itself does not throw any light on the identity of the offender. Such evidence may confirm the available substantive evidence with regard to certain facts including seat of the injury, nature of the injury, cause of the death, kind of the weapon used in the occurrence, duration between the injuries and the death, and presence of an injured witness or the injured accused at the place of occurrence, but it does not connect the accused with the commission of the offence. It cannot constitute corroboration for proving involvement of the accused person in the commission of offence, as it does not establish the identity of the accused person.[32] Therefore, the medical evidence is of little help to the prosecution for bringing home the guilt to the petitioners.

32. We have noted it also that although Mirza Muhammad Umar (PW-13) had stated in his statement recorded under section 161, CrPC on 21.01.2010 by the investigating officer during investigation that due to darkness he could not identify the persons standing at the door of the deceased Pervaiz Akhtar, but one Fazal Hussain is alleged to have stated in his statement recorded under section 161, CrPC on 24.01.2010 that in the evening of 20.01.2010 he had seen the petitioner, Qadeer (who was

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[32] See Yaqoob Shah v. State, PLD 1976 SC 53; Machia v. State, PLD 1976 SC 695; Muhammad Iqbal v. Abid Hussain, 1994 SCMR 1928; Mehmood Ahmad v. State, 1995 SCMR 127; Muhammad Sharif v. State, 1997 SCMR 866; Dildar Hussain v. Muhammad Afzaal, PLD 2004 SC 663; Iftikhar Hussain v. State, 2004 SCMR 1185; Sikandar v. State, 2006 SCMR 1786; Ghulam Murtaza v. Muhammad Akram, 2007 SCMR 1549; Altaf Hussain v. Fakhar Hussain, 2008 SCMR 1103; Hashim Qasim v. State, 2017 SCMR 986.

known to him) going towards the locality where the house of the deceased Pervaiz Akhtar was situated, on a motorcycle with two other persons who were not known to him. Therefore, it was necessary for the investigating officer to get conducted the test identification proceedings as to the identification of the petitioners, Khurram Shahzad and Naveed Asghar, by the said Fazal Karim and to join him in investigation, on their arrest. As per record of the case, the said Fazal Karim was never joined again in investigation after his that alleged statement dated 24.01.2010. Non-joining of Fazal Karim, purportedly the most important witness, in investigation after arrest of the petitioners in the case creates doubt even about his statement that is alleged to have been recorded on 24.01.2010. The said Fazal Karim died during trial of the case, and could not be examined as witness by the prosecution for proving the facts allegedly narrated by him in his statement dated 24.01.2010, nor was veracity of his that statement could be checked through cross-examination on behalf of the petitioners. Therefore, his alleged statement under section 161, CrPC dated 24.01.2010 could not be used for drawing any adverse inference against the petitioners. The omission of the investigating officer to get conducted the test identification proceedings of the petitioners, Khurram Shahzad and Naveed Asghar, was a serious failure in performance of his duty to conduct the investigation of the case diligently and efficiently. The way how the investigation of this very serious case involving gruesome murder of five persons of one family was conducted speaks loudly about lack of expertise and competency of the investigating officer to collect the legally admissible evidence and detect the real culprits in cases that solely rest upon circumstantial evidence. The investigating officer, in the present case, instead of collecting the evidence attempted to create it. Apart from the omissions and faults noted above in the course of appraising the prosecution evidence, the observation of the Magistrate made while declining application of the investigating officer for recording confessional statement of the petitioner, Naveed Asghar that “the accused appeared to be under pressure of the Police” also throws some light on the manner in which the investigation was conducted.

33. It is a well-established principle of administration of justice in criminal cases that finding of guilt against an accused

person cannot be based merely on the high probabilities that may be inferred from evidence in a given case. The finding as regards his guilt should be rested surely and firmly on the evidence produced in the case and the plain inferences of guilt that may irresistibly be drawn from that evidence. Mere conjectures and probabilities cannot take the place of proof. If a case is decided merely on high probabilities regarding the existence or non-existence of a fact to prove the guilt of a person, the golden rule of giving "benefit of doubt" to an accused person, which has been a dominant feature of the administration of criminal justice in this country with the consistent approval of the Constitutional Courts, will be reduced to a naught.[33] The prosecution is under obligation to prove its case against the accused person at the standard of proof required in criminal cases, namely, beyond reasonable doubt standard, and cannot be said to have discharged this obligation by producing evidence that merely meets the preponderance of probability standard applied in civil cases. If the prosecution fails to discharge its said obligation and there remains a reasonable doubt, not an imaginary or artificial doubt, as to the guilt of the accused person, the benefit of that doubt is to be given to the accused person as of right, not as of concession.[34] The rule of giving benefit of doubt to accused person is essentially a rule of caution and prudence, and is deep rooted in our jurisprudence for safe administration of criminal justice. In common law, it is based on the maxim, "It is better that ten guilty persons be acquitted rather than one innocent person be convicted". While in Islamic criminal law it is based on the high authority of sayings of the Holy Prophet of Islam (peace be upon him): “Avert punishments [hudood] when there are doubts”;[35] and “Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him [accused], let him have his way, because the leader's mistake in pardon is better than his mistake in punishment”.[36] A three-member Bench of this Court has quoted probably latter part of the last mentioned saying of the Holy Prophet (peace be upon

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[33] See Muhammad Luqman v. State, PLD 1970 SC 10.
[34] See Tariq Pervez v. State, 1995 SCMR 1345.
[35] Musnad Abi Huthayfa, Hadith No.4. Kitab ul Hadood, p. 32., relied upon by the Federal Shariat Court in Kazim Hussain v. State, 2008 PCrLJ 971.
[36] Mishkatul Masabili (English Translation by Fazlul Karim) Vol. II, p. 544, relied upon by the Federal Shariat Court in State v. Tariq Mahmood, 1987 PCrLJ 2173; Sunnan Tarimzi, Hadith No. 1344, Kitab ul Hadood.

him) in *Ayub Masih v. State*[37] in the English translation thus: "Mistake of *Qazi* (Judge) in releasing a criminal is better than his mistake in punishing an innocent."

34. Keeping in view the said golden rule of giving benefit of doubt to an accused person for safe administration of criminal justice, we are firmly of the opinion that all the circumstantial evidence discussed above is completely unreliable and utterly deficient to prove the charge against the petitioners beyond reasonable doubt. The prosecution has miserably failed to complete the chain of circumstances so as to establish conclusively the guilt of the petitioners in a manner that can rule out every hypothesis inconsistent with their innocence. The circumstantial evidence tendered by the prosecution is not found to be like a well-knit chain, one end of which can touch the dead body of the deceased persons and the other the neck of the petitioners. We find that the missing links have been liberally filled up by the courts below, apparently being influence by the heinous nature of the charges involved in the case, on the basis of surmises and conjectures, and this has resulted in grave injustice. The courts below have overlooked serious pitfalls and grave infirmities in the prosecution evidence by adopting a superficial and cursory approach, not befitting the seriousness of the crime charged in the present case. The concurrent verdict returned by the courts below (trial court and appellate court) is manifestly erroneous, having been arrived at without a complete and comprehensive appreciation of all the evidence and relevant aspects of the case. The petition is therefore converted into appeal and is allowed: the judgments of the courts below are set aside and the petitioners are acquitted of the charges. They shall be released forthwith, if they are not required to be detained in some other case.

35. Before parting with the judgment, we feel constrained to observe though at the cost of some repetition but for the sake of clarity that in a criminal trial an accused person cannot be convicted on the basis of mere “suspicion” or “probability” unless and until the charge against him is “proved beyond reasonable doubt”, a standard of proof required in criminal cases in almost all

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[37] PLD 2002 SC 1048.

common law jurisdictions. An accused person cannot be deprived of his constitutional right[38] to be dealt with in accordance with law, merely because he is alleged to have committed a gruesome and heinous offence. The zeal to punish an offender even in derogation or violation of the law would blur the distinction between arbitrary decisions and lawful judgments. No doubt, duty of the courts is to administer justice; but this duty is to be performed in accordance with the law and not otherwise. The mandatory requirements of law cannot be ignored by labelling them as technicalities in pursuit of the subjective administration of justice. One guilty person should not be taken to task at the sacrifice of the very basis of a democratic and civilised society, i.e., the rule of law. Tolerating acquittal of some guilty whose guilt is not proved under the law is the price which the society is to pay for the protection of their invaluable constitutional right to be treated in accordance with the law. Otherwise, every person will have to bear peril of being dealt with under the personal whims of the persons sitting in executive or judicial offices, which they in their own wisdom and subjective assessment consider good for the society.

36. Foregoing are the reasons for our short order dated 07.12.2020, which for ease of reference and completion of record is reproduced hereunder:-

> "For reasons to be recorded later, the instant jail petition is converted into an appeal and the same is hereby allowed. The convictions and sentences of appellants Naveed Asghar, Khurram Shehzad and Qadeer Ahmed @ Saqib are set aside. They are acquitted of the charge(s) framed against them. They are behind the bars and are ordered to be released forthwith, if not required to be detained in any other case."

Judge

Judge

Islamabad,
07th December, 2020.
Approved for reporting.

Judge

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[38] See The Constitution of the Islamic Republic of Pakistan, 1973, Article 4.