

**JUDGMENT SHEET**

**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**(JUDICIAL DEPARTMENT)**

**Criminal Appeal No.117/2017**

*Fakhar Aman v. Additional Sessions Judge & 2 others*

Appellant by: Mian Asad Hayat Awan, Advocate.  
Respondents by: Mr. Muhammad Sohail Khurshid, State Counsel.  
Mr. Anis Yaqub Rathore, Advocate for Respondent No.2

*and*

**Criminal Revision No.115/2017**

*Sajjad Hussain v. Fakhar Iman & 2 others*

Petitioner by: Mr. Anis Yaqub Rathore, Advocate.  
Respondents by: Mr. Muhammad Sohail Khurshid, State Counsel.  
Mian Asad Hayat Awan, Advocate for Respondent No.1.  
Date of Hearing: 16.04.2020.

**MOHSIN AKHTAR KAYANI, J:** Through this common judgment, I intend to decide the captioned criminal appeal and criminal revision having been arisen out of judgment passed by the learned Additional Sessions Judge (East), Islamabad, dated 20.07.2017, whereby Fakhar Aman/appellant has been convicted in case FIR No.283, dated 10.11.2015, U/S 302 PPC, P.S. Khanna, Islamabad and sentenced to life imprisonment under Section 302(b) PPC along with payment of fine of Rs.300,000/- as compensation to the legal heirs of deceased, in default whereof, the said accused/appellant has to further undergo simple imprisonment for one year. The accused has also been extended benefit of Section 382-B Cr.P.C.

2. Brief facts as referred in FIR (Exh.PA/1), registered on the complaint (Exh.PA) of PW-1 Sajjad Hussain, are that on 09.11.2015, complainant's younger brother namely Muhammad Ibrar went missing after 8 p.m. and was not located by the next morning until his dead body was found lying nearby One Minar Masjid. The complainant by recording his supplementary statement nominated the appellant for commission of Qatl-e-Amd of deceased by strangulation as well as by slitting his throat with knife. Pursuant to arrest of appellant and

completion of investigation, report under Section 173 Cr.P.C. was sent up to the learned trial Court, to which the appellant pleaded not guilty and claimed trial on merits. Accordingly, the prosecution had produced 17 witnesses and the learned trial Court pursuant to recording of prosecution evidence and statement of accused under Section 342 Cr.P.C., passed the impugned judgment, dated 20.07.2017, and awarded life imprisonment to appellant under Section 302(b) PPC along with fine of Rs.300,000/- as compensation to be paid to the legal heirs of deceased, in default whereof, the appellant to further undergo simple imprisonment for one year. Benefit of Section 382-B has also been extended to the appellant/accused. Hence, the captioned criminal appeal and criminal revision.

3. Learned counsel for appellant contended that impugned judgment is not sustainable in the eyes of law as undue benefit was extended in favour of prosecution despite the fact that the prosecution has miserably failed to discharge the burden of proof; that learned trial Court has not appreciated the stance of defence that the occurrence was unseen and the case established by the prosecution suffers from missing links and the chain set up by the prosecution is broken, which is not enough to hold the appellant for the allegation of commission of offence; that the prosecution case suffers from numerous inconsistencies, additions and improvements of material facts, but the learned trial Court has relied upon such trembling evidence and passed the impugned judgment in violation of law, therefore, the same is liable to be set-aside and appellant may be acquitted of the charge.

4. Conversely, learned State Counsel as well as learned counsel for complainant opposed the instant criminal appeal and supported the impugned judgment by contending that the learned trial Court has rightly appreciated the evidence available on record to the extent of conviction of appellant, but the learned trial Court has awarded lesser punishment of life imprisonment to the appellant as the prosecution has proved the case beyond any shadow of doubt;

that the impugned judgment suffers from misreading and non-reading of evidence as the learned trial Court has failed to note that the appellant with premeditation in his mind has brutally murdered the deceased with a sharp edged weapon, which he had also recovered during the course of investigation; that the findings of the learned trial Court to the extent of awarding lesser punishment of life imprisonment are based on misconception of law, therefore, the impugned judgment may be modified to the extent of imposing of death sentence instead of imprisonment for life to the appellant.

5. Arguments heard, record perused.

6. Perusal of record reveals that PW-1 Sajjad Hussain i.e. elder brother of deceased, resident of Dhoke Nagial, presently residing at Iftikhar Town, Khanna Dhak, Islamabad along with his family members, stated that on 09.11.2015, at about 7:20 p.m., when he came back to his house his brother Muhammad Ibrar (deceased) was present in the house, who, at about 8 o'clock in the night, went to a nearby market and was having chit-chat with his friends as he was seen by his father namely PW-2 Tasawwar Hussain, however, his younger brother did not come back, who was searched till morning, but they received information that a dead body of a young boy is lying near One Minar Masjid, next to the graveyard. Thereafter, the complainant and his younger brother namely Saddam Hussain went to the said place, where they found the dead body of their deceased brother, who was found to be murdered with a sharp edged weapon as his throat was slit.

7. PW-16 Anees Akbar/S.I. having been the first Investigating Officer reached at spot and prepared the inquest report Exh.PB by referring the eyes and mouth of deceased semi-opened in Column No.8. He also referred the injuries in Column No.10 in the following manner:

"تیزدار آلہ سے گلہ کٹا ہوا خون خونچکھا ہائیں بازو کہنی کے قریب تیزدار آلہ سے نشان زخم خونچکھا پیٹ پر چار زخم خونچکھا۔"

PW-16 Anees Akbar/S.I. drafted application for conduct of postmortem examination (Exh.PZ), sent the dead body through Arshid/Constable to PIMS

Hospital on official vehicle and prepared rough site plan Exh.PZ-A followed by collection of bloodstained earth vide recovery memo Exh.PC and recording of statements of witnesses under Section 161 Cr.P.C. However, on 24.11.2015, the investigation of this case was transferred from him to CIA staff. During the course of cross-examination, PW-16 Anees Akbar/S.I. acknowledged that name of deceased's father i.e. Tasawwar Hussain was not mentioned in the inquest report Exh.PB and he has not recorded statement of deceased's father despite the fact that his name was mentioned in complaint Exh.PA. He further acknowledged that it revealed to him during the course of investigation that deceased had relation with a girl and he was telephonically in contact with her. He also acknowledged that till transfer of investigation, there was no evidence which could lead to the arrest of appellant and even he had not noticed any injury on the appellant's finger.

8. Pursuant to transfer of investigation to CIA Staff on 24.11.2015, PW-17 Tariq Cheema/S.I. has taken over the investigation of the case and recorded the statements of PW-1 Sajjad Hussain and PW-2 Tasawwar Hussain under Section 161 Cr.P.C. He has also obtained the CDR (Exh.P9 to 37) of appellant as well as of the deceased through separate application, which was taken into possession vide recovery memo Exh.PT, dated 07.12.2015. He also recorded the statements of Asad, Bilal and Usman on 28.11.2015. PW-17 Tariq Cheema/S.I. arrested the appellant on 20.12.2015, who on the same day had disclosed the incident as well as about the place of occurrence. On 25.12.2015, the appellant got recovered the weapon of offence i.e. knife Exh.P5 together with a wire Exh.P6 and LCD of mobile phone Exh.P8, through recovery memos Exh.PW, Exh.PX & Exh.PY, respectively, as well as a chip/SIM Exh.P7 from his house situated at Ashraf Town. A site plan of recovery was also prepared vide Exh.PZ-C and a separate criminal case under Sections 13/20/65 of Arms Ordinance was registered against

the appellant. PW-17 Tariq Cheema/S.I. prepared the challan against the appellant after dispatch of Churri Exh.P5 to Forensic Science Laboratory, Lahore.

9. Keeping in view the background of the case, since the entire case rests upon material points of medical evidence, motive, last seen evidence, recovery of weapon of offence, and CDR, therefore, in order to untangle the threads of murder of deceased, the said material points needed to be thrashed out separately.

### **MEDICAL EVIDENCE**

10. PW-7 Dr. Muhammad Naseer conducted the autopsy of deceased on 10.11.2015, at 10:30 a.m. and explained the dead body as of a young man of 18 years having height of 5'11" with good physique, small beard, eyes and mouth having been semi opened, wearing black color *Shalwar Qameez* and white bunyan, which were bloodstained. After the postmortem examination, PW-7 Dr. Muhammad Naseer has produced the postmortem report Exh.PH/1-6, wherein he has observed the following injuries on the dead body of deceased.

- i. *Cut throat in the middle of neck transversely deeply seated cutting all the organs and vessels of neck measuring 14 x 4.5 c.m.*
- ii. *Incise wound on the medial aspect of middle of left elbow measuring 6 x 4 c.m. which was on the muscle deep.*
- iii. *Incise wound just below the right nipple transversely seated measuring 5 x 2 c.m. penetrating deeply.*
- iv. *Incise wound on the epigasric area penetrating up downward measuring 4 x 2 c.m. deeply seated.*
- v. *Incise wound on the left hypochondria area transversely 6 x 2 c.m.*
- vi. *Incise wound over the middle of sternum bone in area of third intercostals scale measuring 3 x 1 c.m. which was muscle and skin cut penetrating deeply in the chest cavity mainly on the left side of chest cavity.*

*On skull examination all the organs were found healthy while on neck dissection all the muscles subcutaneous tissues, skin vessels, nerves, thyroid gland, tracea, Esophagus were completely cut.*

*On thorax examination chest walls were ruptured, both pleurae were ruptured and contained clotted and unclotted blood. Trachea was*

*cut at the level of neck. Right lung was ruptured while left lung was found healthy. There was rupture of pericardium and contained unclotted blood while heart itself was found healthy.*

*On abdominal examination, abdominal wall and peritoneum were ruptured. Esophagus was ruptured at the neck level in an area of cut throat. Stomach was ruptured and contained mostly semi digested food and little amount of undigested food. Large intestine was ruptured in the descending colon area. All other organs of abdominal were found healthy.*

### **OPINION**

*Deceased sustained cut thorax of injury No.1, which resulted in rupture of all the blood vessels, draining and supplying the brain, the most vital organ of the body plus obstruction in the respiratory tract leading loss of function of brain and lungs causing death of deceased. All injuries were ante mortem in nature and sufficient to cause death in ordinary cause of nature. As there were low defense marks on the body of deceased, therefore, gastric lavage, piece of stomach, spleen, liver kidney and small intestine taken for any drug intoxication to chemical examiner, Lahore.*

***Probable time between injury and death:- 03 to 05 minimum.***

***Time between death and post mortem:- 10 to 11 hours.***

11. However, during the course of cross-examination, PW-7 Dr. Muhammad Naseer acknowledged that:

- a) no ligature mark was found on the surroundings of neck;*
- b) there were six injuries of sharp in nature, there is a chance of more than one accused.*
- c) I have the time period between the postmortem and death as 10 to 11 hours, so there is a chance of murder in between 11.30 p.m. or 12 midnight.*
- d) At the time of postmortem examination, the deceased mouth and eyes were semi open and were not fully opened.*
- e) Name of Tasawwar Hussain who is the father of deceased is nowhere mentioned in the inquest report signed by Anees Akbar, S.I.*

### **MOTIVE**

12. The prosecution in order to prove the motive part of this case has produced PW-10 Usman Ahmad i.e. neighbor and mutual friend of deceased as well as of

appellant, PW-11 Muhammad Bilal and Asad, who referred the reason and motive of commission of offence in the following manner:

*"Fakhar Aman had good attraction and friendship towards Asad. He very much liked him. But parents of Asad asked to refrain from friendship of Accused Fakhar Aman. As Fakhar Aman is pathan and older to Asad. That's why Asad cut of his friendship with the accused Fakhar Aman and Fakhar Aman was very depressed. I along with Bilal attempted for reconciliation but Asad refused. We used to play cricket together. One day we were playing cricket together when deceased Ibrar gave a slap to Asad. Upon this, accused had a quarrel with deceased that why you slapped Asad. Due to this, Asad was in talking terms with Ibrar but not with accused. On various opinions accused Fakhar Aman said that he will not spare anyone who will come in his way as to friendship between him and Asad."*

13. Similarly, the other witness of motive appeared as PW-11 Muhammad Bilal, who stated the reasons in the following manner:

*"Stated that deceased Ibrar Hussain was my neighbor and friend as well Asad, Usman, and Fakhar Aman were also my friend, Fakhar Aman had good attraction and friendship towards Asad. He very much liked him. But parents of Asad asked to refrain from friendship of Accused Fakhar Aman. Asad cut of his friendship with the accused Fakhar Aman and Fakhar Aman was very depressed. I along with Usman attempted for reconciliation but Asad refused. Asad told us that Fakhar is pathan as well he is older then so his parents forbid him from his friendship. One day we were playing cricket together when deceased Ibrar gave a slap to Asad. Upon this, accused had a quarrel with deceased that why you slapped Asad. Due to this, Asad was in talking terms with Ibrar but not with accused and accused felt jealousy."*

#### **EVIDENCE OF LAST SEEN**

14. PW-2 Tasawwar Husasin, father of deceased, stated that on 09.11.2015, when he was on his way back to home after offering *Isha* prayer, he saw his deceased son standing with the appellant and PW-11 Muhammad Bilal, whereas in his presence, PW-11 Muhammad Bilal went to his house, while the appellant made accompanied his deceased son to his house, whereafter he heard that appellant took the deceased nearby *Minar Wali Masjid*, near *Chota Qabristan*, where he murdered his son with *Churri* blows.

15. The above referred stance of PW-2 Tasawwar Hussain was also confirmed by PW-11 Muhammad Bilal as he stated that on 09.11.2015, they in routine were standing in front of deceased's house and at 7/8 o'clock, PW-1 Sajjad Hussain/complainant gave them money and asked to pay amount of committee and load mobile balance/easy load at Sheikh General Store. On return, they were standing in front of deceased's house, PW-2 Tasawwar Hussain/deceased's father had also met them. PW-11 Muhammad Bilal further stated that at 8 p.m., he left for his house while the appellant and deceased went towards the appellant's house.

#### **RECOVERY OF WEAPON OF OFFENCE AND OTHER BELONGINGS**

16. PW-17 Tariq Cheema/I.O. stated that on 25.12.2015, the appellant during physical remand disclosed and got recovered the weapon of offence i.e. Churri (Exh.P5), wire Exh.P6 and Chip (Exh.P7) lying in a plastic tub kept in his house vide recovery memos Exh.PW, Exh.PX and Exh.PY, which are witnessed by PW-14 Liaqat Bhatti Masih, Muhammad Ibrar and PW-13 Sikandar Ali/Constable. He further confirmed that Churri (Exh.P5) despite being easily available in market is not common use in household items, rather generally used by butchers. He also stated that Churri (Exh.P5) was recovered after more than one and a half months after the occurrence. The recovery witness i.e. PW-13 Sikandar Ali/HC also confirmed the recovery of weapon of offence (Exh.P5) being bloodstained and explained the weapon of offence as 14 inches of knife having a wood handle and 9 inches of blade in length. He further stated that red wire Exh.P6 having length of 4'8" was also recovered on the pointation of appellant from the same plastic tub along with broken Q Mobile Chip Exh.P7 and LCD Exh.P8, which belonged to the deceased.

17. The other witness of recovery namely Liaqat Bhatti Masih appeared as PW-14, resident of New Shakrial, Zia Masjid, Islamabad, who stated that on



25.12.2015, he went to Iftikhar Town in connection with some work and in his presence, the S.I. along with appellant came there. In his presence and the people gathered there after seeing them, appellant got recovered the bloodstained knife (Exh.P5) and a red color wire having length of 4'8" from same tub along with broken Q Mobile Chip and LCD.

### **COLLECTION AND VERIFICATION OF CDR**

18. On 07.12.2015, PW-17 Tariq Cheema/S.I. obtained the CDR of deceased and appellant vide memo Exh.PT, consisting of 29 pages, and inquired about phone numbers mentioned in CDR. The SIM found during the course of recovery was issued in the name of Latif Idrees and not in the name of deceased, while the said Latif Idrees has not been produced as witness in this case, whereas the SIM used by the appellant was in the name of his father, but even this aspect has not been clarified by the Investigating Officer. The CDR further discloses that the mobile phone of deceased having IMEI No.356019057458220 was used on 09.11.2015, at 8:04, with SIM No.0304-5536935, which belongs to appellant. However, this aspect has not been explained by the Investigating Officer in his examination-in-chief, except he produced the CDR.

### **CONCLUSION**

19. The entire matter, if seen in light of evidence of PW-1 Sajjad Hussain/complainant, he has acknowledged the followings facts during the course of cross examination.

- a) *I did not see by myself the accused along with two friends standing at market and same was seen by my father.*
- b) *It is correct that I did not mention name of any person in Exh.PA those were seen standing in Bazaar prior to the occurrence.*
- c) *It is correct that I did not mention specifically in Exh.PA that my father had also seen Bilal, Ibrar deceased and Fakhar Aman.*

- d) *It is correct that I did not mention in Exh.PA that in the meanwhile, Muhammad Bilal went to his own house whereas accused Fakhar Aman brought my brother to his own house.*
- e) *It is correct that I did not mention in Exh.PA the detail of inquiry which we held for tracing out deceased.*
- f) *It is correct that I mention in Exh.PA that my brother was murdered by some unknown person.*
- g) *It is correct that Exh.PB (inquest report) does not contain my father presence.*
- h) *I accompanied the dead body of my brother to hospital at about 8 a.m. We reached hospital where postmortem of my brother was carried out.*
- i) *After 5 days of my brother burial I joined police investigation again. After that on 26.11.2015 my statement was recorded by police.*
- j) *My father did not make any statement till 26.11.2015.*
- k) *I did not mention in Exh.PA that my brother had two mobile phones.*
- l) *It is correct that no statement regarding two mobiles which I stated in my statement bey which I recorded before the police.*
- m) *It is correct that motive about strained friendship was not mentioned in Exh.PA.*
- n) *It is correct that alleged motive which I have mentioned in my statement was not stated to police before 26.11.2015.*

20. Similarly, the witness of last seen i.e. PW-2 Tasawwar Hussain/father of deceased has admitted three following important factors.

- a) *My first visit was after a week of burial of my son. I did not tell the police on my first visit that on my presence Bilal went to his house and Fakhar Aman took deceased son to his house.*
- b) *It is correct that I did not mention before the police that my son had two mobile phones prior to 26.11.2015.*
- c) *It is also correct that I did not mention that the SIM was missing before 26.11.2015.*
- d) *I did not mention to police that finger of Fakhar Aman had an injury on his index finger. Volunteered that my son had told about it to the police.*
- e) *The motive about strained relationship was not in my knowledge.*

21. The crux of the evidence of above two star witnesses namely PW-1 Sajjad Hussain/complainant and PW-2 Tasawwar Hussain is that it has been noted in complaint Exh.PA that on 10.11.2015, the deceased along with his friends went out to the market at about 8 p.m., who had been seen by PW-2 Tasawwar Hussain/father. This aspect is a hearsay evidence as even the names of friends

were not disclosed in complaint Exh.PA, though the same were disclosed by PW-2 Tasawwar Hussain/father on 26.11.2015 i.e. after about 16 days of the alleged occurrence. Similarly, I have also attended to the statements of PW-10 Usman Ahmad, PW-11 Muhammad Bilal and PW-12 Asad Mehmood being witnesses of motives and last seen to corroborate the testimony of PW-2 Tasawwar Hussain/father, but surprisingly the statements of all the said witnesses were recorded by the police on 28.11.2015 i.e. after 19 days of the alleged occurrence, about which no logical explanation has been placed on record as to why the statements of the said witnesses were recorded with delay. The effect of recording of statement with delay has been considered in the light of cases reported as 2011 P.Cr.LJ 1126 Lahore (Qaiser Hussain alias Kashi alias Kashif vs. The State), 1975 P.Cr.LJ 1304 Karachi (PINYO vs. The State, 2017 YLR 724 Lahore (Shaukat Ali vs. The State), 1998 SCMR 570 (Muhammad Khan vs. Maula Bakhsh) and 1996 SCMR 1553 (Abdul Khaliq vs. The State), whereby it has been settled that statements under Section 161 Cr.P.C. recorded at belated stage loses its value and the creditability of witnesses is looked with serious suspicious when no plausible explanation was offered for recording of statement with delay. In this case, all these witnesses have joined the investigation with delay despite the fact that prosecution cases rests upon circumstantial evidence including the ingredients of last seen, whereas the delay factor in recording the statement of the prosecution witness affects the case on merits, which means that the star witnesses have deliberated/consulted with each other and they have nothing in their mind to link the chain of evidence and as such, there is no logical explanation available on record as to why the statements of these witnesses were recorded with delay.

22. PW-2 Tasawwar Hussain/father has stated in his examination-in-chief that on 09.11.2015, when he was going back home after offering *Isha* prayer, he

had seen his son (deceased) standing with the appellant and PW-11 Muhammad Bilal, but this fact was not disclosed till 26.11.2015 as per his own admission. Similarly, PW-11 Muhammad Bilal being the second last seen witness has narrated the same story that when he was standing in front of deceased's house with deceased, appellant, Asad and Usman on 09.11.2015, the elder brother of deceased i.e. PW-1 Sajjad Hussain gave him amount to pay committee and load mobile balance, but PW-1 Sajjad Hussain/complainant has not referred this factor in his complaint Exh.PA nor he had seen the friends of deceased in the market as it was seen by his father, even he did not mention specifically the names of Muhammad Bilal, Ibrar deceased and Fakhar Aman in Exh.PA that they were standing in front of the house, therefore, the testimony of PW-11 Muhammad Bilal has no significance which has not been corroborated by the testimony of PW-1 Sajjad Hussain/complainant on this material fact.

23. PW-11 Muhammad Bilal further stated that PW-2 Tasawwar Hussain/father also met them, whereafter he left for his house, however the appellant and deceased left towards appellant's house, this crucial part of the evidence was also narrated to the police by PW-11 Muhammad Bilal for the first time on 28.11.2015, but he acknowledged in his evidence that, "it is correct that on 09.11.2015 after 8 p.m. when I left for my house I never saw or met deceased or accused prior to recovery of dead body." This aspect negates his earlier stance recorded in examination-in-chief that whether "the appellant and deceased left towards the house of appellant and whether they were seen in company of each other alive, whereafter nobody had seen the deceased alive till recovery of his dead body. These important links have not been justified by PW-11 Muhammad Bilal or PW-2 Tasawwar Hussain.

24. In such type of proposition of last seen, this Court has gone through the principles settled by the apex Court in cases reported as 2001 SCMR 1914 (Mst.

Robina Bibi vs. The State), 2008 SCMR 1103 (Altaf Hussain vs. Fakhar Hussain), 2010 SCMR 939 (Zafar Abbas vs. The State) and 2016 SCMR 2123 (Muhammad Mushtaq vs. Mustansar Hussain) and observed that the minimum obligation upon the prosecution is to prove proximity of time and the witnesses should have seen the deceased alive in company of accused person shortly before the time he was presumed to have been met with death near the place of occurrence, and such evidence of last seen should be corroborated with other material evidence, even otherwise, all these aspects of last seen are not visible in this case.

25. Besides the above referred position, the dead body of deceased was recovered with six (06) injuries including the stab wounds and a cut throat in middle of neck. Such commission of offence discloses the anger, rage and force used by the accused in committing murder of the deceased through brutal and callous manner, which reciprocate the reason and motive, hence this Court has considered the statements of PW-10 Usman Ahmad and PW-11 Muhammad Bilal being witnesses of motive, who stated that, "We used to play cricket together. One day we were playing cricket together when deceased Ibrar gave a slap to Asad. Upon this, accused had a quarrel with deceased that why slapped Asad. Due to this, Asad was in talking terms with Ibrar but not with accused". Similarly, the second factor highlighted by PW-10 Usman Ahmad in his evidence is that, "Fakhar Aman (appellant) had a good attraction and friendship with Asad. He very much liked him." Whereas, PW-12 Asad Mehmood cut off his friendship with appellant on the direction of his parents that he is younger to appellant and appellant is *Pathan* by caste. Similarly, PW-11 Muhammad Bilal also verified the said position by stating that "Asad became closer to deceased and maintained distance with the appellant, due to which appellant was depressed." However, no time or date about the incident of slapping has been referred by either witness, even otherwise, the witness which is cause of motive in this case, i.e. PW-12 Asad Mehmood has not

narrated the incident of slapping at the hands of deceased nor he stated a word that since he was closer to deceased, the appellant had grudge against the deceased. Hence, the motive spelled out by PW-10 Usman Ahmad and PW-11 Muhammad Bilal has not been confirmed by PW-12 Asad Mehmood, even otherwise, the first Investigating Officer namely PW-16 Anees Akbar/S.I. acknowledged in his cross-examination that "it is correct that it came to my knowledge during investigation that deceased had relation with a girl and he was in contact with her telephonically." Such aspect further casts doubt on the motive brought by the prosecution.

26. It is trite law that motive is a double edged weapon and it is necessary to prove the motive if it is alleged by the prosecution as held in 2017 SCMR 713 (Muhammad Ismail vs. The State). In this case, the motive was initially not known to PW-1 Sajjad Hussain/complainant or PW-2 Tasawwar Hussain/father, even otherwise, the motive has not been disclosed during the first 19 days of the incident, neither any time, date or place was referred, nor the said motive was corroborated from any independent source. Hence, the motive could not be believed.

27. The prosecution has tried to establish the case by way of evidence of recovery of weapon of offence i.e. *Churri* Exh.P5 recovered on the pointation of appellant after one and a half month of occurrence in presence of PW-13 Sikandar Ali/HC, who confirmed that the *Churri* was found bloodstained. Although, the *Churri* Exh.P5 is easily available in market, but it has been stated by the witness that same is not common in household use, rather generally used by butchers. I have gone through the testimony of recovery witnesses namely PW-13 Sikandar Ali/HC, who stated that on 25.11.2015, he and Sargul Khan (not produced) joined the investigation and in his presence, the appellant disclosed during interrogation that he can get recovered the knife, the wire through which

deceased was strangled, Chip of mobile phone and LCD belonging to deceased from his house. Consequently, Investigating Officer along with PW-13 Sikandar Ali/HC and Sargul Khan reached Iftikhar Town, Pindorian, where recovery was effected at the pointation of appellant. However, PW-13 Sikandar Ali/HC further introduced PW-14 Liaquat Bhatti and one Ibrar as witnesses of the recovery proceedings.

28. I have gone through all the recovery memos i.e. Exh.PW, Exh.PX and Exh.PY, regarding of weapon of offence (Churri), Wire, Q-Mobile Chip & LCD and found it to be signed by the same three witnesses, which is an unusual practice. However, the prosecution has only produced PW-13 Sikandar Ali/HC and PW-14 Liaquat Bhatti Masih in this case as witnesses of recovery. I have considered their testimonies on material aspects and it has been observed that PW-14 Liaquat Bhatti Masih being resident of New Shakrial could not justify any valid reason for visiting the place of recovery on the day of recovery, even he had not explained as to how he is related to the appellant or the complainant and why he has been selected as a witness of recovery, nor he is able to verify the number of rooms at the place of recovery, rather he simply stated about his acquaintance with complainant 3/4 months prior to the occurrence, even certain factors regarding disclosure and presence of PW-14 Liaquat Bhatti Masih at the place of occurrence have rightly been discarded by the learned Trial Court on the objection raised by the appellant. It has further been observed in the statement of PW-13 Sikandar Ali/HC that parents, brothers and sisters of appellant were also living in said house, hence the place of recovery is not in exclusive possession of the appellant. He also acknowledged that the recovered Churri (Exh.P5) is ordinary one widely used in domestic work, which is also easily available in the market.

29. As per record, the appellant was arrested on 20.12.2015 by PW-17 Tariq Cheema/I.O. while the recovery of weapon of offence was effected on 25.12.2015

i.e. after five days of the arrest. Such type of delayed recoveries have negative effect on the prosecution case as held in 1999 MLD 1208 Lahore (Muhammad Javaid vs. The State) and 2013 P.Cr.LJ 783 Karachi (Ammar Yasir Ali vs. The State). As such, the recovery of weapon of offence could not be related by the Investigating Officer as to its origin or from where it was purchased by the appellant or his family members. I have also considered the recovery of LCD Exh.P8 and Chip Exh.P7, vide recovery memo Exh.PY, but it is nobody's case that deceased was in possession of the Chip Exh.P7 and LCD Exh.P8, at the time of his murder, even this aspect has been confronted to PW-1 Sajjad Hussain/complainant and PW-2 Tasawwar Hussain/father, who confirmed that they did not mention that SIM was missing or the deceased had two mobile phones prior to 26.11.2015, even otherwise, the SIM and LCD have not been sent for forensic analysis for the purpose of verification nor there is any document of a cellular company to verify that SIM was in use by the deceased and even PW-17 Tariq Cheema/S.I. confirmed that he inquired about mobile numbers mentioned in CDR, but he did not make it part of the challan file. One mobile phone was recovered from dead body containing a SIM registered in the name of one Latif, therefore, this Court believes that the recovery of LCD and SIM has no bearing to the case of prosecution nor it helps the prosecution in any manner, hence, when the link has not been proved, such recovery is inconsequential. Furthermore, the Investigating Officer intended to prove from the CDR, consisting of 29 pages (Exh.P9-37) and stated that appellant had used his own SIM (0304-5536935) in the deceased's mobile phone (Model QE 787) at 08:04 pm on 09.11.2015. This aspect has not been justified as IMEI No.35601-9057458220 belongs to one Latif, who was not cited as witness of this case, even otherwise, it has not been confirmed through any independent source or proof as to whether the appellant was using the said mobile number with his SIM (0304-5536935).



30. Much emphasis has been placed by the prosecution upon the cut mark injury observed on the index finger of appellant's right hand, which was seen after the murder of deceased, although there was no medical evidence to that extent. However, the appellant had acknowledged such injury and given his explanation while answering Question No.6 in his statement under Section 342 Cr.P.C., that the injury received was a result of trying to open a nut in a workshop. I have gone through the statement of appellant, who has denied his involvement in the alleged incident.

31. While considering the above background of the case, I have gone through the impugned judgment of the learned Trial Court, whereby conviction of appellant was based upon the following observations.

*"Though it is a case of last seen evidence supported technological supportive and circumstantial evidence but as there is no enmity, recoveries were made on the pointation of accused from his house and there is no rebuttal. The last seen witnesses have appeared, CDR has been produced wherein the accused used cell phone of deceased on the day and time of occurrence. There is no question of mis-identity. There was no enmity between the witnesses and the accused. The explanation given for index finger injury proved that there was injury on the day of occurrence on the right finger of accused. The prosecution has proved the case under the circumstances. The report of serologist is positive wherein it is mentioned that the knife blood stained contains human blood. There is last seen evidence supported by medical evidence and there is motive which was duly proved through independent witnesses coupled with recovery made in the presence of independent witnesses and accused was nominated through supplementary statement after getting certainty about his involvement. There are witnesses of last seen and upon the pointation of accused, recoveries have been affected. The report of chemical examiner has been received positive knife being blood stained. The recovery was made from the house of accused, so bloodstained remained intact till recovery. After discovery of dead body within 1 ½ hours, the FIR was lodged, so there is no question of any deliberation, concoction or falsification. The accused is known to the witnesses, therefore, there was no chance of mis-identification. The witnesses are natural witnesses not related to the complainant. The time of postmortem full rigor mortus was developed, so approximate time by doctor about death is irrelevant. There is CDR wherein it is proved that the accused used cell of deceased at the time of occurrence and as per Article 73 automated generated record is per se admissible. The accused has right hand index finger injury and the same was also authenticated by the doctor when he was examined after arrest."*

32. The detailed insight of evidence as well as the portion of impugned judgment reproduced above clearly spells out that the learned Trial Court has not appreciated the chain of circumstantial evidence in a proper manner, although the motive has not been proved and recovery along with evidence of last seen was wrongly believed. The verification and authentication of CDR as well as confirmation of Chip Exh.P7 and LCD of Q-Mobile (E787) Exh.P8 has not been justified from the testimony of PW-1 Sajjad Hussain/complainant. Similarly, PW-2 Tasawwar Hussain, father of deceased, also confirmed that his son was using two mobile phones, though he acknowledged that he did not mention before the police that his son had two mobile phones prior to 26.11.2015, nor mentioned that SIM was missing before 26.11.2015. Hence, it has been concluded that the improvements made in testimonies of both these witnesses are afterthoughts, which were made in order to strengthen the prosecution case, whereas they have not disclosed missing of the mobile phone or the SIM of the deceased at the time of alleged occurrence, even otherwise, it has been observed from recovery memo of the articles recovered from the dead body of deceased that, "Q Mobile ایک عدد", which has not been explained from its features nor any reference was given in inquest report Exh.PB. No ligature mark was seen by doctor despite the fact that red wire Exh.P6 was recovered on the pointation of appellant. Two of the witnesses have seen the injury on the index finger of appellant's right hand, but this aspect has not been confirmed through medical evidence, even otherwise, the murder was committed in brutal and sensational manner as highlighted in inquest report Exh.PB at Column No.8, which reads that:

(۸) وضع اعضا و چشم و دہن	آنکھیں کھلی ہوئی۔ منہ کھلا ہوا۔ زبان نکلی ہوئی
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33. This fact was also confirmed by PW-7 Muhammad Naseer/Doctor, who stated that, "he was a young man of good physique, small beard, eyes and mouth were semi opened." This aspect was observed during the course of postmortem

examination, even the doctor has confirmed that "no ligature mark was found near the surrounding of neck" and probability of involvement of more than one accused was not ruled out by the doctor. There was no logical explanation on the part of PW-1 Sajjad Hussain/complainant, brother of deceased, and PW-2 Tasawwar Hussain/father as to why the eyes and mouth of deceased were left opened and tongue was protruding from mouth at the time of preparing of inquest report or even at the time of postmortem despite the fact that they were present at the place of occurrence when dead body was being dispatched to the hospital. It is usual conduct of family members of any deceased person as a religious ritual to close down the eyes and mouth of deceased and this practice is not followed by the strangers. Such manner has also been highlighted in case reported as 2019 SCMR 1068 (Muhammad Rafique alias Feeqa vs. The State), wherein it has been held that presence of close family members at the time of recovery of dead body in such like condition is doubtful.

34. All the incriminating evidence were put to accused while recording his statement under Section 342 Cr.P.C., however the recovery of Q Mobile Chip Exh.P7 and LCD Exh.P8 is inadmissible as the same were not identified by any of the family member that these were the articles which belong to deceased and taken by accused person at the time of murder, in such type of circumstantial evidence case, the prosecution was bound to link every piece of evidence with another in a manner that it forms a continuous chain of circumstances connecting the accused with alleged offence, however if one link of chain is missing then the entire edifice crumbles down and chain of prosecution case would fall on ground. Reliance is placed upon 2009 SCMR 407 (Ibrahim vs. The State) and 2011 SCMR 1127 (Muhammad Hussain vs. The State).

35. The learned Trial Court has not appreciated the inconsistencies and the improvements made by the witnesses of motive, even otherwise, the evidence of

last seen is defective and the motive has been disbelieved by this Court, therefore, the conviction on capital charge could not be justified only on the basis of recovery of weapon of offence Exh.P5. The cumulative effect of entire case of prosecution raises suspicion and doubts, even the first Investigating Officer of the case i.e. PW-16 Anees Akbar/S.I. has acknowledged in his testimony a different motive that deceased had relation with a girl as he was telephonically in contact with her. This aspect was concealed by the other witnesses of prosecution and not explained, which could give rise to possibility that someone had committed the murder of deceased due to family honor, which could not be ruled out, especially while taking into account the injuries of deceased.

36. In view of above, the appellant earns a benefit of doubt as the evidence of last seen is not sufficient to maintain the conviction of appellant, even otherwise, it is a weak type of evidence requiring strong corroboration, but this aspect is also missing in this case. Clouds of doubts are looming large rendering the same to have been based on polluted evidence of the witnesses, who were otherwise interested and recorded their initial statements after 18 days of the incident to strengthen the prosecution case, therefore, the principle extracted from Islamic jurisprudence that it is better that ten guilty persons go free than that one innocent person be convicted should be given preference. It is not necessary that there should be many circumstances creating doubts as a single circumstance creating a doubt in a prudent mind about guilt of accused makes him entitle for relief not as a matter of grace or concession but as a matter of right. Reliance is placed upon 1995 SCMR 1345 (Tariq Pervez vs. The State).

37. Hence, the upshot of discussion made above is that prosecution has failed to complete the chain of circumstantial evidence to justify the conviction of appellant, thus the prosecution has failed to establish its case against appellant beyond reasonable shadow of doubt. Accordingly, the captioned Criminal Appeal No.117/2017 (Fakhar Aman v. Additional Sessions Judge & 2 others) is **ALLOWED**.

The impugned judgment dated 20.07.2017 is set aside, the appellant is acquitted of the charge of murder of deceased and he be released from jail immediately, if not required in any other criminal case.

38. In sequel to discussion made in preceding paragraph, the captioned Criminal Revision No.115/2017 (Sajjad Hussain v. Fakhar Iman & 2 others) filed by the complainant for enhancement of sentence from life imprisonment to death to the appellant is hereby **DISMISSED**.

39. Before parting with this judgment, it has been observed with great concern that the first Investigating Officer of this case i.e. PW-16 Anees Akbar/S.I. has not investigated the case in a proper and determined manner, which shows his lackadaisical attitude in the entire matter making the case in hand a fiasco example as he had not bothered to record the statements of prosecution witnesses at the earliest, rather delayed the matter without any justified reason and the statements of witnesses of motive as well as of PW-2 Tasawwar Hussain, witness of last seen, were recorded when investigation was transferred and handed over to PW-17 Tariq Cheema/S.I.. This aspect shows that PW-16 Anees Akbar/S.I. is incompetent police official having no working knowledge to investigate the crime of murder. Hence, copy of instant judgment be transmitted to I.G. of Police, Islamabad and SSP, Islamabad for future guidance and to ensure that such type of police officers shall not be entrusted with investigation of murder with view to cure intentional delay in collection of evidence and recording of statement of witnesses.

MOHSIN AKHTAR KAYANI  
JUDGE

Announced in open Court on: 30th April 2020.

JUDGE

Khalid Z.