

**JUDGMENT SHEET**

**ISLAMABAD HIGH COURT, ISLAMABAD,**  
**JUDICIAL DEPARTMENT**

**Criminal Appeal No.99/2017**

Allah Ditta

versus

The State

Appellant by: Mian Asad Hayat Awan, Advocate.

Complainant by: Sardar Ali Khan, Advocate.

State by: Mr. Sadaqat Ali Jahangir, State Counsel.

Date of Hearing: 26.10.2018.

**MOHSIN AKHTAR KAYANI, J:** Through this criminal appeal, Allah Ditta/appellant has assailed the judgment dated 16.05.2017 passed by the Judge Juvenile Court (West), Islamabad whereby Allah Ditta/appellant has been convicted and sentenced according to the provisions laid down in Juvenile Justice System Ordinance, 2000 in the following manner:

- (a) U/S 302(b) PPC accused named above is sentenced to life imprisonment with fine of Rs.2,00,000/- and in default of payment of fine, accused named above to further undergo simple imprisonment for six (06) months.
- (b) U/S 376 PPC accused named above is sentenced to 10 (ten) years imprisonment with fine of Rs.1,00,000/- and in default of payment of fine, accused named above to further undergo simple imprisonment of three (03) months.
- (c) U/S 201 PPC accused named above is sentenced to three (03) years imprisonment with fine of Rs.50,000/- and in default of payment of fine, accused named above to further undergo simple imprisonment of three (03) months.

2. Brief facts as unfolded by PW-9 Abdul Malik/complainant in his complaint Exh.PM are that he is resident of Afghanistan, presently resident of Chelo, Islamabad, and is a vegetable vender. On 21.11.2008, his daughter Khatima Bibi, aged 8 years, left after Maghrib prayer time to fetch milk but she did not come back and on 22.11.2008, he reported the missing of his daughter to P.S. Golra Sharif. On 07.01.2009, he received information regarding a dead body in a drainage ditch (barsati naala) nearby Jamia Masjid Zahida Hanfiya, Sadaat Colony, Jhangi Syedan, Islamabad, which he and his brother Abdul Baki identified as Khatima Bibi on the basis of her dress (red color *Ghagra*), white color Shalwar with design stitching at the bottom (*Pauncha*), and black socks, whereas the clothes were on the body, but the cause of death was not known. Muhammad Mursaleen/ASI on receiving a wireless call from Rescue-15 reached at the spot along with Tasneem Ahmad/ASI, Mumtaz Habeeb/ASI, Azeem Khan/C and Muhammad Farooq/C, whereafter the complainant recorded his statement, which was converted into a complaint, and ultimately into FIR No.11 dated 13.01.2009, U/S 302/34 PPC, P.S. Golra Sharif, Islamabad (Exh.PZ). The dead body was then shifted to PIMS Hospital for postmortem. The police also registered *naql* report No.36 Exh.PA in the police record and after preparation of entire record of this case, the Investigation Officer arrested Allah Ditta/appellant, who recorded his statement U/S 164 Cr.P.C. (Exh.PT) before the PW-11 Muhammad Liaquat Abbasi/Magistrate and also got recovered Balti (bucket used to fetch milk and one chappal of the deceased) from Dheira of Muhammad Hafeez, milk seller. The Investigation Officer submitted final report U/S 173 Cr.P.C. before the Court, whereupon the Court awarded death sentence U/S 302(b) PPC for committing murder of deceased and also convicted Allah Ditta/appellant U/S 376 PPC for committing Zina with minor girl vide judgment dated 20.07.2010.

3. The appellant has assailed the said judgment by filing Crl. Appeal No.131/2010 (Allah Ditta vs. The State) and Murder Reference No.2/2011 (The State vs. Allah Ditta) before the Hon'ble Islamabad High Court, whereby the judgment dated 20.07.2010 was set-aside vide judgment dated 02.11.2016 mainly on the ground that Allah Ditta/appellant was minor at the time of alleged occurrence and his rights under Juvenile Justice System Ordinance, 2000 have not been protected by the learned Trial Court, hence, the matter was remanded. After retrial, the learned Session Court vide judgment dated 16.05.2017 convicted and sentenced Allah Ditta/appellant U/S 302(b) for life imprisonment as well as U/S 376 PPC for ten (10) years imprisonment with fine of Rs.1,00,000/- and U/S 201 PPC for three (03) years simple imprisonment along with fine of Rs.50,000/-.

4. The prosecution in order to prove the case has produced 16 prosecution witnesses in the learned Trial Court including doctors, witnesses of recovery as well as Magistrate, who recorded the statement of Allah Ditta/appellant U/S 164 Cr.P.C. and several other police officials.

5. Dr. Shazia Zammurad, Medical Officer, PIMS appeared as PW-14, who conducted postmortem of deceased Khatima Bibi and recorded her version as under:

*It was dead body of 08 years old female child, wearing red coloured clothes. Body was foul smelling, putrefied, and unidentifiable by appearance. Following injuries were observed on her body:-*

- 1. Wounds on both cheeks.*
- 2. Wounds on chest*
- 3. Wounds on both arms and forearms.*
- 4. Wounds on both thighs medially.*
- 5. Neck mobile freely at C-1 and C-2 joints (dislocated)*
- 6. Looking to be raped as per external genitalia.*

*Chest walls were ruptured. Almost rest of the organs were healthy but putrefied. Genitalia were widened and open.*

*In my opinion, deceased died due to multiple injuries, i.e. dislocation of C-1 and C-2, injury on cheeks, injuries on both arms and forearms, injuries on both thighs medially. All injuries were ante-mortem in nature and sufficient to cause death in ordinary course of life.*

*As per report of chemical examiner of high vaginal swabs, semen was detected in the swabs and the girl/deceased was raped. Probable time between injury and death was few minutes to one hour, while time between death and post mortem was between one to two months as the body was putrefied. Postmortem report and Pictorial grams Ex-PU/1-6 bear my signatures as Ex-PU/7-8.*

6. During the course of cross-examination, PW-14 Dr. Shazia Zammurad acknowledged that according to her report, the deceased was raped before murder and she sent the swabs to chemical examiner for analysis and acknowledged that the dead body was dry and even if the dead body was submerged in water, swabs can be taken for detection of semen, but that could be negative, however she conceded that swabs in this case were positive and the external genitalia is widened. She further acknowledged that there was no injury on tongue, hands (including fingers), and feet, and as per postmortem report, larynx and trachea, lung, mouth, pharynx, and esophagus were healthy. She also conceded that there was no bone injury in the upper and lower jaw and the deceased has not died due to suffocation, although there is no wound on the neck of deceased, except there was dislocation of neck and the injuries noted on the body of deceased were possibly caused due to physical trauma, rather than instrument. However, PW-14 Dr. Shazia Zammurad also acknowledged that the walls of diaframe were ruptured and it could be assumed from the ruptured walls of thorax that physical trauma could have been a fall, whereas she also acknowledged that if a body falls from a height and the impact point is chest, it is likely that the bones of the neck would be fractured. She also acknowledged decomposition starts after 4/5 days after death of the person. According to her opinion, the time between death and postmortem was less than one month and by less than one month she meant it could be few days more or less than one month, and she finally acknowledged that an organ could be either healthy or putrefied and it cannot be both at one time.

7. The prosecution has produced Dr. Farrukh Kamal, MLO, PIMS as PW-15, who stated that on 08.01.2009, he was associated, facilitated and assisted by PW-14 Dr. Shazia Zammurad in conducting postmortem of deceased and he prepared the postmortem report on the dictation of PW-14 Dr. Shazia Zammurad and the postmortem report and pictorial diagrams Exh.PU/1-6 contain his signature. He also examined Allah Ditta/appellant and found him fit to perform sexual intercourse vide his report Exh.PY. During the course of cross-examination, he acknowledged that in Exh.PU, there is no authority by which he could conduct postmortem of deceased. He also acknowledged that he taken samples of accused on 06.02.2009 and handed over it to the Investigation Officer the same day.

8. The prosecution has produced the complainant Abdul Malik as PW-9, who stated that he is an Afghan citizen and living in Islamabad from last 25/30 years and on 07.01.2009, he found a dead body in a drainage ditch, which he positively identified as of his daughter who had disappeared on 21.11.2008 when she was going to fetch milk and having a bucket in her hand, however he was not confirmed as to who committed murder of his daughter. He also stated that on 21.11.2008, when his daughter disappeared, he visited buffalo shed of Abdul Hameed where he inquired from Allah Rakha and Allah Ditta/appellant, servants of Abdul Hameed, but they replied that she had not come there. On 22.11.2008, PW-9 Abdul Malik/complainant went to P.S. Golra Sharif and submitted complaint regarding missing of his daughter and also advertised in newspaper regarding missing of his daughter. He again visited Dera of Abdul Hameed and inquired from him of Allah Ditta/appellant, whereby Abdul Hameed informed the complainant that Allah Ditta/appellant has disappeared and after recovery of dead body of deceased, the PW-9 Abdul Malik/complainant again inquired from Abdul Hameed regarding his servant Allah Ditta/appellant, who stated that his

whereabouts are still not known, which raised his suspicion that Allah Ditta/appellant killed his daughter after ravishing her chastity and put the dead body in a gunny bag and threw the same in a drainage ditch/barsati naala. On 28.01.2009, he visited Malkhana of P.S. Golra Sharif and identified the bucket (P8 & P9) to be the same which the deceased had taken to fetch milk when she disappeared and he signed the memo of identification of bucket Exh.PP, which was attested by me, Naz Bibi and Abdul. On 31.01.2009, PW-9 Abdul Malik/complainant again identified one chappal of deceased lying in Malkhana of Police Station, which is of China made and of purple color (P7) through identification memo Exh.PE. PW-9 Abdul Malik/complainant recorded his statement on 07.01.2009 Exh.PM and 13.01.2009 Exh.PQ before the police.

9. Naz Bibi, mother of deceased, recorded her stance as PW-8 before Zulfiqar Ali/I.O. on 13.01.2009 and stated that on 21.11.2008 she sent her daughter Khatima Bibi deceased to fetch milk from Dera of Abdul Hameed (employer of Allah Ditta/appellant) and herself went to nearby shop in connection to purchase some commodities, however when she came back, she did not find her daughter Khatima Bibi, who had not returned, thereafter she started searching for her daughter in the neighborhood, but she was not traced. She further stated that her husband PW-9 Abdul Maalik also inquired from Dera of Abdul hameed as well as from Allah Ditta/appellant regarding whereabouts of her daughter but Allah Ditta/appellant showed his ignorance regarding the same. She further stated that on 22<sup>nd</sup> of the said month, they informed the local police about missing of their daughter, who was wearing red colour qameez, white shalwar and china made chappal of purple color and she further stated that they also published a public notice in newspaper regarding missing of their daughter. On 7<sup>th</sup> of the month, police informed them a dead body of female child is lying in drainage ditch and they have

been called to identify the same, and on reaching at place of occurrence, they identified the dead body as Khatima Bibi. She further stated that Allah Ditta/appellant disappeared from vicinity and they suspect that he had murdered Khatima Bibi and threw the same in Naala. PW-8 Naz Bibi identified the bucket P8 & P9 in Police Station on 28<sup>th</sup> of the month, which were taken by deceased Khatima Bibi to fetch milk, regarding which memo of identification Exh.PP was prepared and thumb marked by PW-8 Naz Bibi. She also visited P.S. Golra Sharif on 31.01.2009 and identified shoe (P7) of Khatima Bibi vide memo of identification Exh.PE which was thumb marked by PW-8 Naz Bibi, mother of deceased. During the course of cross-examination, she notified the date of incident as 21.11.2008 and acknowledged that deceased never went to fetch milk prior to said incident and there are elder sons and daughters. She also acknowledged that they have not informed the Police Station that their girl went missing on 21.11.2008 and deceased was wearing purple color chappal P7 when she went missing. She also do not remember regarding the number of statements recorded by the police, however she stated that on three papers her thumb impressions were inscribed, i.e. one regarding chappal, second regarding bucket, which were thumb marked on different dates.

10. The prosecution has produced Sher Muhammad as PW-10, who is also an Afghan national, who stated that on 21.11.2008, he along with Aurangzeb visited the house of his friend PW-9 Abdul Maalik/complainant, who told them that his daughter has gone to fetch milk from Dera of Abdul Hameed but did not come back and Abdul Maalik was worried. PW-10 Sher Muhammad stated that after staying there for a short, he along with Aurangzeb went to a nearby shop to buy cigarettes and when they heard Azaan of Esha, they offered prayer in mosque of village Chelo and when they were coming from the mosque towards Kashmir Highway, they saw Allah



Ditta/appellant was going while carrying a gunny bag on his right shoulder and they presumed that the gunny bag may contain *khall* or *choker*, and Allah Ditta/appellant was heading towards barsati naala located towards Sadaat Colony. PW-10 Sher Muhammad further stated that on 13.01.2009, he came to know that dead body of Abdul Maalik's daughter has been recovered from barsati naala and when he reached at the house of Abdul Maalik, the inmates of the house informed him that the dead body was recovered from a gunny bag and on hearing this, they believed that the deceased was done to death by Allah Ditta/appellant after subjecting her to illicit fornication and in order to screen the offence, he packed the dead body of Khatima Bibi in a gunny bag and threw the same in a barsati naala. He identified the gunny bag P1 in the Court. However, during the course of cross-examination, PW-10 Sher Muhammad acknowledged that he was the employer of PW-9 Abdul Maalik and Aurangzeb was his friend and on 21.11.2008, when he came to know about the missing daughter of the complainant, he did not offer him help to search her daughter and on 21.11.2008, he along with Aurangzeb visited PW-9 Abdul Maalik by chance. He neither asked PW-9 Abdul Maalik regarding the recovery of his daughter in next one and half month nor visited the Dera of Abdul Hameed before the occurrence, even he is not able to tell direction towards Dera of Abdul Hameed from Chelo village. He also acknowledged that he never seen the accused person when he was on Kashmir Highway and he has seen the accused from outside the village upon a passage, who was heading towards barsati naala and both barsati naala and Dera of Abdul Hameed are in opposite direction.

11. The prosecution has produced Muhammad Mursaleen/ASI as PW-5, who stated that he was duty officer on 07.01.2009 at P.S. Golra Sharif and on receiving information regarding dead body of a minor girl lying near Sadaat Colony, he along with Mumtaz Habib/ASI, Tasneem Ahmad/ASI,



Farooq/Constable and Azeem Khan/Constable went to place of dead body which was lying in a gunny bag. He recorded the statement of complainant and taken into possession the patson bag vide recovery memo Exh.PB, sent the dead body to PIMS Hospital for postmortem through Abdul Maalik complainant, Mumtaz Habib/ASI and Azeem Khan/Constable and sent complaint Exh.PM for rapt to the police station and prepared the inquest report Exh.PN. He stated that complainant Abdul Maalik identified the dead body vide identification memo Exh.PK on 08.01.2009 after postmortem and dead body was handed over to complainant for funeral purpose vide Exh.PL and on 27.01.2009, on the pointation of Allah Ditta/appellant, he got recovered bucket P8 and P9, which were taken into possession vide memo Exh.PJ and signed by him and on 30.01.2009, Allah Ditta/appellant got recovered slipper of deceased PW-7/complainant, which was taken into possession vide recovery memo Exh.PG and signed by him. During the course of cross-examination, PW-5 Muhammad Mursaleen/ASI acknowledged that he received the information of dead body on 07.01.2009 at about 1 p.m., but he did not write any roznamcha and he was the first Investigation Officer of the case. He further acknowledged that when they reached at place of occurrence, the dead body was lying in a patson bag and the same was not taken out from the bag and only few kids were present near the dead body, whose statements have not been recorded. From the appearance of the dead body, he could not tell whether it was of a girl nor he recorded any foul smell in his investigation report and complaint Exh.PM dated 07.01.2009 was in his handwriting. He has also not mentioned in Column No.7 of the inquest report whether any grass or hey or any other thing else attached with the clothes of deceased and in Column No. 8, he mentioned that eyes and mouth of deceased were semi opened and body of deceased was relatively dark as referred in Column No.9. However, he

admitted that grand Jamia Masjid Hanfiya is located at approximate distance of 15 paces from the place of occurrence. He also confirmed that he neither made any person a witness from the vicinity or from the mosque as to whether they observed the dead body prior to date of recovery or not nor he investigated the fact that dead body was lying in naala for 45 days and nobody have noticed the dead body and he has not written the cause of death in Column No.20 of the inquest report. However, he stated that the body of deceased was not decomposed and was in healthy state. PW-5 Muhammad Mursaleen/ASI acknowledged that Allah Ditta/appellant made disclosure in his presence regarding recovery of bucket P8 and P9 and got recovered the same, however no one associated the recovery proceedings. PW-5 Muhammad Mursaleen/ASI also confirmed that shoes recovered on 30.01.2009 were of purple color and the same were recovered from outside the gate in bushes and the place of recovery is an open place and anybody can go and visit the same.

12. Saleem Akhtar/Constable-4208 appeared as PW-1 and produced wireless log report Exh.PH regarding missing details of Khatima Bibi lodged by Abdul Maalik in which age of Khatima Bibi has been referred as 8 years, wheatish color, clad in red frock and wearing China made chappal, disappeared from village Chelo, earlier in the evening time on the date of information i.e. 22.11.2008. He acknowledged that whatever was stated by the complainant, it was transmitted and the same was not altered in any manner.

13. PW-2 Tahir Shabbir has recorded rapt No.36 dated 07.01.2009 pertaining to this case, referred as Exh.PA. During the course of cross-examination, he acknowledged that he incorporated the complaint in Roznamcha and gave a copy of rapt to Farooq/Constable and the same was transferred through Manzhoor Ahmad/ASI being itla dahinda. He further

acknowledged that FIR was not lodged on 07.01.2009 by him after receipt of *istighasa*.

14. Azeem Khan/Constable put appearance as PW-3 and stated that on 07.01.2009, he along with Zulfiqar/ASI and PW-9 Abdul Maalik/complainant took dead body of Khatima Bibi/deceased from barsati naala in a bag of patson P1 vide recovery memo Exh.PB and on 13.01.2009, CMO PIMS Hospital handed over last worn clothes of deceased i.e. qameez maroon P2, shalwar white color P3, bunyan of red color P4, and socks black color P5, which were taken into possession vide recovery memo Exh.PC. PW-3 stated that on 25.01.2009, during the personal search of Allah Ditta/appellant Rs.60 (P6/1-2) was recovered from him, which were taken into possession vide recovery memo Exh.PD and on 30.01.2009, during the interrogation of the case, Allah Ditta/appellant disclosed that he can get recovered slippers of deceased and he led the police party to Dera of Abdul Hameed and from the bushes, he got recovered right foot slipper of light purple color and handed over it to the Investigation Officer, which was taken into possession vide recovery memo Exh.PE. During the course of cross-examination, he acknowledged that wireless call was received regarding information of the incident and he went along with PW-5 Muhammad Mursaleen/ASI along with Muhammad Farooq to the place of occurrence in a private taxi and when they reached there, only kids were present and patson bag was torn and upper portion of dead body was visible and the patson bag was about 3x2 feet in specification and dead body was placed outside by someone and neither anybody was willing to record his statement nor the Investigation Officer recorded the names of persons present on spot and water was flowing next to the dead body.

15. Abdul Baaqi, brother of complainant, appeared as PW-12 and stated that on 08.01.2009, he become witness of identification of dead body of

deceased Khatima Bibi and attested the memo Exh.PK with his thumb mark and has also received the dead body through Exh.PL. He further stated that on 28.01.2009, he identified the bucket P8 lying in Police Station Malkhana vide identification of bucket Exh.PP, which was attested by him and his brother. He also recorded his supplementary statement on 10.03.2009.

16. Alamgir Khan/S.I. appeared as PW-7 and stated that on 13.01.2009, he was posted as Moharrar in Police Station Golra Sharif and Zulfiqar Investigation Officer handed over to him three parcels to keep in Malkhana. On 19.01.2009, he handed over one sealed parcel to Muhammad Azeem/Constable for DNA test, which was returned to him as it could not be deposited. The same was again handed over to Muhammad Azeem/Constable on 21.01.2009, which was deposited in KRL Hospital. On 20.01.2009, he handed over two parcels regarding chemical examiner and pathologist to Aftab/Constable to deposit in Lahore and on 28.01.2009, complainant and his brother Abdul Baaki appeared in Police Station and identified the steel bucket through identification memo Exh.PP and on 31.01.2009, complainant and his wife PW-8 Naz Bibi appeared in Police Station and identified the slippers (chappal) through Exh.PE and on 09.02.2009, he received two sealed parcels from Zulfiqar Ahmad/S.I. to keep in Malkhana, which was dispatched to laboratory through Jangrez khan/Constable. During the course of cross-examination, PW-7 Alamgir Khan/S.I. acknowledged that the witnesses identified bucket P8 and P9 in Malkhana and he neither given the description of articles lying in Malkhana in his statement U/S 161 Cr.P.C. nor the total number of articles lying in Malkhana and on 31.01.2009, complainant and his wife came to identify the shoe lying in Malkhana and neither any mark whatsoever was placed on the article for identification purposes nor any Magistrate was present for identification of the articles.

17. Muhammad Liaquat Abbasi, the then Magistrate, appeared as PW-11 before the Court and stated that on 06.02.2009, Zulfiqar/S.I. of P.S. Golra Sharif submitted an application (Exh.PR) for recording of statement of Allah Ditta/appellant U/S 342 Cr.P.C., whereupon he passed his formal orders, referred as Exh.PR/1 and Exh.PR/2, which are in his handwriting and signed by him, who also completed codal formalities before recording of statement of accused Exh.PX and finally recorded the statement of Allah Ditta/appellant U/S 342 Cr.P.C., referred Exh.PT, which is in the handwriting of PW-11 Muhammad Liaquat Abbasi/Magistrate and certificate was signed by him at the end of statement Exh.PP/1. He further stated that before producing Allah Ditta/appellant before him, he had already been sent to judicial custody by concerned judicial Magistrate and after recording of statement, he was sent back to judicial custody. The statement U/S 164 Cr.P.C. (Exh.PT) of Allah Ditta/appellant is reproduced as under:

"وہ لڑکی دودھ لینے کیلے ایک دن پہلے آئی تو میں نے اسکو دودھ ویسے ہی دے دیا تھا۔ کوئی پیسے نہ لیے تھے۔ میں نے دودھ چوری اسکو دیا تھا۔ اسکے 2 دنوں کے بعد پھر وہ دودھ لینے آئی اور اس نے مجھے "چھنگڑ" بولا۔ میں نے اسکو "گھسن" مکا مارا۔ وہ سڑک والے گیٹ سے اندر آئی تھی۔ اور یہ جگہ بھینسوں کا احاطہ ہے۔ میں نے سخت غصے میں اسکو مکا مارا تھا۔ وہ اسکو سر کے ایک طرف کانوں کے قریب لگا۔ وہ بے ہوش ہو کر گر پڑی۔ میں اسکو اٹھا کر اندر کھڑی میں رکھا۔ اور پھر اسکا گلا دبا دیا۔ میں ڈرتا تھا کہ اگر اسکو ہوش آگیا تو یہ ماں باپ کو بتائے گی اور وہ مجھے مار دیں گے۔ اسکے والدین پٹھان ہیں۔ ان سے ڈر لگتا تھا۔ میں نے اسکا گلا دبائے کے بعد اسکی گردن بھی "مروڑی" تھی اسکے بعد وہ بالکل بولی نہیں۔ یہ تمام باتیں شام چھ بجے کے قریب کی ہیں۔ پھر میں نے اسکو بوری میں ڈالا اور اوپر سے اسکو باندھ کر پھر بوری کو کندھے پر اٹھایا۔ اس وقت عشاء کی اذانیں ہو رہی تھی۔ میں گندم کے کھیتوں میں سے گزرتے ہوئے نالہ لئی کی طرف گیا۔ اور پھر اسکو نیچے نالے میں رکھ دیا۔ اور میں خود واپس ہوٹل میں آگیا۔ میں نے ہاتھ دھو کر روٹی کھائی۔ اور کھانا کھا کر کمرے میں سو گیا۔"

18. During the course of cross-examination, PW-11 Muhammad Liaquat Abbasi/Magistrate conceded that it is not written in application Exh.PR that Allah Ditta/appellant has already been sent to judicial custody by the concerned Magistrate and the said fact is not recorded. He also acknowledged that he observed all the formalities to ensure that accused has

not been subjected to torture and he asked the accused about the factum of torture, however he has not physically inspected the accused for this purpose and all the proceedings have been conducted by him, even Exh.PT was in his handwriting. PW-11 Muhammad Liaquat Abbasi/Magistrate acknowledged that he has given half an hour to accused before recording of statement Exh.PT and he admitted that the accused while recording his statement U/S 164 Cr.P.C. has not made any statement regarding rape with deceased and as per Exh.PT deceased was done to death by strangulation and punching the deceased. He further acknowledged that all the officials were out of Court when the statement was recorded.

19. Zulfiqar Ahmad/S.I., Investigation Officer of the case, appeared as PW-16 and stated that on 13.01.2009, he was posted at P.S. Golra Sharif when investigation of the case was entrusted to him. He acknowledged the application of complaint Exh.PQ, FIR Exh.PZ, postmortem report Exh.PU, and last worn clothes of deceased Shalwar P2, Qameez P3, Bunyan P4, Socks P5, vide recovery memo Exh.PC. He also submitted the site plan without scale Exh.PAA and recorded the statement of witnesses U/S 161 Cr.P.C. on the same day. He also acknowledged that the submission of inquest report Exh.PN, recovery memo of gunny bag Exh.PB, naql rapt Exh.PA, wireless message Exh.PH, death certificate and outdoor ticket of Khatima Bibi/deceased Exh.PAG, memo of identification parade Exh.PK, receipt of dead body Exh.PL, site plan prepared by draftsman Exh.PB, personal search of accused vide recovery memo Exh.PD, recovery of bucket P8 through recovery memo Exh.PJ and site plan of place of recovery Exh.PAB, identification of bucket P8 by the wife and brother of complainant through identification memo Exh.PB. On 30.01.2009, Allah Ditta/appellant got recovered shoe/chappal of deceased Exh.P7 through recovery memo Exh.PG, which was identified by the mother of deceased and Abdul Maalik through

identification memo Exh.PE. He also acknowledged the application for recording of statement of Allah Ditta/appellant on 06.02.2009 through Exh.PR and the confessional statement of Allah Ditta/appellant Exh.PT and Allah Ditta/appellant was produced before Radiologist at PIMS Hospital on 18.03.2009 vide entry ticket Exh.PAE and report of Radiologist Exh.PAF, and has also produced chemical examiner report of Lahore Exh.PAD.

20. During the course of cross-examination, PW-16 Zulfiqar Ahmad/S.I. conceded that he prepared Exh.PAB, explained the place of recovery of bucket (P8 & P9), and acknowledged that Bara of Abdul Hameed is divided into 2 rows as referred in Exh.PG/1 where on the northern side there are five rooms including Bethak of Abdul Hameed and on the southern side, there are six rooms. He also acknowledged that in Exh.PG/1, he has not shown any bushes at Point No.1 from where shoe (P7) of deceased was recovered, even he has not mentioned at Point No.1 that shoe was recovered on the pointation of accused from inside the bushes. He also acknowledged that he tried to associate private individuals to become witness in the recovery proceedings but no one was willing to become witness of recovery and he has not mentioned the names of those individuals, who refused to join the recovery proceedings. He also acknowledged that he was not present at the time of recovery of dead body on 07.01.2009 but the site plan of place of recovery of dead body (Exh.PV) was prepared on his pointation and Exh.PAA is the site plan without scale of the place of recovery of dead body which was prepared after inspection of the site. PW-16 Zulfiqar Ahmad/S.I. further acknowledged that Allah Ditta/appellant was arrested on 25.01.2009 and Allah Rakha was arrested on 27.01.2009. He also acknowledged that grand Mosque Hanfia is right next to bank of naala where dead body of deceased was recovered and he neither investigated Imam of the mosque nor any witness of the locality was associated from where dead body was recovered. He also conceded that



Allah Ditta/appellant is an illiterate person and never attended school and he has not recorded the statement of Abdul Hameed, owner of Dera, and there was no other servant at the Dera. He also acknowledged that Allah Ditta/appellant was in custody on 02.02.2009, who on 30.01.2009, pointed out the place where occurrence took place and sequence of occurrence. He also acknowledged that Allah Ditta/appellant was sent to judicial lockup on 06.02.2009 and from 25.01.2009 to 06.02.2009, statement U/S 164 Cr.P.C. of Allah Ditta/appellant was not recorded and he has not mentioned in his written application that Allah Ditta/appellant was already sent to judicial lockup before recording of statement U/S 164 Cr.P.C. He also acknowledged that during 25.01.2009 to 06.02.2009, Allah Ditta/appellant was presented before Judicial Magistrate for a number of times. He further acknowledged that shoe (P7) is of light purple color and there is difference between red and purple, even the bucket (P8 & P9) is common kitchen article and easily available in the market and all these articles were identified by PW-9 Abdul Maalik/complainant in the Police Station Malkhana.

21. The abovementioned evidence brought by the prosecution in this case reveals that Khatima Bibi/deceased, aged about 8 years, daughter of PW-9 Abdul Maalik/complainant was sent to Dera of Abdul Hameed to fetch milk in bucket (P8 & P9) at evening time in the village Chelo but she did not turn back and PW-9 Abdul Maalik/complainant has informed the P.S. Golra Sharif on 22.11.2008 and lodged the report of *Gumshudgi*. On information of the police, he along with his brother PW-12 Abdul Baaki visited the *Naala* on 07.01.2009, where he found a dead body of his daughter Khatima Bibi/deceased, who was wearing a maroon color *Gagra*, white *Shalwar* with embroidery at the bottom. The dead body was identified by PW-9 Abdul Maalik/complainant (father) and PW-12 Abdul Baaki (uncle), whereafter the police started investigation. His complaint Exh.PM has been entertained by

Investigation Officer and same was converted into FIR No.11, dated 13.01.2009, U/S 302/34 PPC, P.S. Golra Sharif, Islamabad Exh.PZ. The police recorded the complainant version in Rapt No.36 vide Exh.PA and prepared recovery memo of gunny bag (P1) through Exh.PB in which dead body of Khatima Bibi/deceased was lying in Naala. The police also took into possession last worn clothes of Khatima Bibi/deceased vide recovery memo Exh.PC. The postmortem of deceased was conducted by PW-14 Dr. Shazia Zammurad/MLO, who submitted postmortem report along with pictorial diagrams (Exh.PU/1-6) and referred six different kinds of injuries on the dead body, including dislocation of C1 and C2 joints of the neck, and the said postmortem report was further confirmed by PW-15 Dr. Farrukh Kamal. Allah Ditta/appellant was arrested on 25.01.2009 by the police, who got recovered the bucket (P8 & P9) as well as a *Chapal* (P7) belonged to Khatima Bibi/deceased, which were identified by her father PW-9 Abdul Maalik/complainant and PW-8 Naz Bibi/mother. Allah Ditta/appellant was charged in this case U/S 302 PPC by the Investigation Officer and he was also produced before PW-11 Muhammad Liaquat Abbasi/Magistrate to record his confessional statement U/S 164 Cr.P.C.

22. After the closing of above referred evidence, Allah Ditta/appellant has taken the stance against the prosecution evidence in his statement U/S 342 Cr.P.C. in the following manner.

“Q16. Why this case against you and why the PWs deposed against you?  
 Ans. No case was registered against me. I.O. dishonestly arrayed me as an accused and got the false witnessed deposed against me.”

23. Keeping in view the above portrayal, the entire case rests upon mainly on the following four points.

- i. Last seen evidence/wajtakar;

- ii. Evidence of recovery of bucket (P8 & P9) and chappal (P7) of Khatima Bibi/deceased from Allah Ditta/appellant;
- iii. Confessional statement of Allah Ditta/appellant U/S 164 Cr.P.C., referred as Exh.PT; and
- iv. Medical evidence/autopsy report Exh.PU/1-6 with the statement of PW-14 Dr. Shazia Zammurad.

24. I have gone through the entire evidence attached with this appeal and the entire story narrated by prosecution in this case, whereby it has been observed that Khatima Bibi/deceased, aged 8 years approximately, Afghan citizen, daughter of PW-9 Abdul Maalik/complainant and PW-8 Naz Bibi, went missing on 21.11.2008 when she was sent to Dera of Abdul Hameed to fetch milk but she did not turn back, whereafter her parents started looking for her, even PW-9 Abdul Maalik/father inquired from Allah Ditta/appellant, who shown his ignorance as recorded in the statement of PW-8 Naz Bibi/mother. On 22.11.2008, PW-9 Abdul Maalik/father lodged complaint in P.S. Golra Sharif for missing of her daughter and on 07.01.2009, police informed PW-9 Abdul Maalik/complainant that a dead body was lying in barsati naala and PW-5 Muhammad Mursaleen/ASI reached at the spot near Sadaat Colony along with other police officials and found the dead body of a minor girl lying in a gunny bag and taken into possession the patson bag vide recovery memo Exh.PB. The prosecution has also produced a witness of wajtakar i.e. PW-10 Sher Muhammad, who stated that on 21.11.2008, he along with Aurangzeb visited the house of PW-9 Abdul Maalik/complainant, who told them that his daughter has gone to fetch milk from Dera of Abdul Hameed but did not come back and he was worried and under acute tension. PW-10 Sher Muhammad after meeting with PW-9 Abdul

Maalik/complainant left the house along with Aurangzeb and purchased cigarettes from a nearby shop, in the meanwhile, he heard Azaan of Esha from the mosque of village Chelo and after offering the prayer, when they were coming towards Kashmir Highway, they seen Allah Ditta/appellant going while carrying a gunny bag in his right shoulder, whereas on 13.01.2009, he heard the news of recovery of dead body of Khatima Bibi/deceased from a barsati naala. The said witness, later on, confirmed the gunny bag used by Allah Ditta/appellant but in my humble view, PW-10 Sher Muhammad acknowledged in his evidence that he visited PW-9 Abdul Maalik/complainant *by chance* on 21.11.2008 and he neither asked PW-9 Abdul Maalik/complainant after the day of missing of Khatima Bibi/deceased about recovery of his daughter nor he ever visited Dera of Abdul Hameed before the occurrence, even he did not offer PW-9 Abdul Maalik/complainant any help for search of his missing daughter. Lastly, he had seen the accused outside the village upon a passage and the direction referred in his cross-examination regarding Dera of Abdul Hameed and barsati naala is in opposite direction and he had seen the accused from 50 meters from barsati naala. All these aspect give rise to a difficult situation in which it is not possible to identify a person who was earlier not known by the witness, especially in the late hours of night and even when there is no light referred in his statement, therefore, at this stage, the statement of PW-10 Sher Muhammad seems to be doubtful and it is settled law that statement of chance witness could not be believed if it does not verify from any independent source.

25. The medical evidence of the dead body recorded by PW-14 Dr. Shazia Zammurad reveals that *deceased died due to multiple injuries i.e.*

**dislocation of C1 and C2.** This aspect of the medical aspect plays a significant role in the entire evidence and it relates to the confessional statement of Allah Ditta/appellant (Exh.PT), wherein he stated that:

میں نے اسکا گلا دبانے کے بعد اسکی گردن بھی "مروڑی" تھی اسکے بعد وہ بالکل بولی نہیں۔

This aspect has been confirmed by PW-5 Dr. Farrukh Kamal/MLO PIMS Hospital in his statement and even confirmed in Exh.PU/1-6, where the doctor has referred "Neck mobile freely at C-1 and C-2 joints (dislocated)", therefore, the statement of appellant with medical evidence is a key factor in the entire prosecution case, however in order to prove this aspect, I have to go through the testimony of PW-11 Muhammad Liaquat Abbasi/Magistrate, who recorded the confessional statement of Allah Ditta/appellant, and to form opinion as to whether he has fulfilled the requirements of Section 164 Cr.P.C. read with Section 364 Cr.P.C. or otherwise. In this regard, I have gone through the case law reported as 2017 SCMR 986 (Hashim Qasim vs. The State), wherein prerequisites for accepting the confession have been defined as follow:

*"Firstly, that the confession was made voluntarily and was based on true accounts of facts leading to the crime and, second, the same was proved at the trial."*

Similarly, in case reported as 2017 SCMR 713 (Muhammad Ismail vs. The State), the requirements and standard of recording of confession has been listed in the following manner:

- (i) *that, the accused was in full senses and understood the consequences of making a confession;*
- (ii) *that, the confession was not a result of any duress, coercion or any promise by the prosecution to be made an approver;*
- (iii) *that, during transit of the accused by the police from the prison to the Trial Court and back, on each "Paishi" no threat or pressure was applied by the escorting police guard or incharge thereof;*
- (iv) *that, actual facts be determined, which induced the accused to confess after facing trial, during which he pleaded innocence all the way;*
- (v) *that, the court recording the confession had to ensure that the mental capacity of the accused was not diminished due*

*to any illness and if some indication of abnormality was suspected by the court, it was better to refer the accused to the Standing Medical Board to ascertain the true cause thereof;*

- (vi) that, while recording the confession, safeguards and precautions be adopted, by directing the Public Prosecutor, the complainant's counsel, the Naib Court and all other officials to leave the court. If need be, the counsel who represented the accused, may be given an opportunity to be present inside the court during the whole process, if the accused person, on asking by the Trial Judge, so demanded;*
- (vii) that, the handcuffs of the accused be removed and he be provided a chair on the dais. He may be given some time to think over the making of the confession and in that regard particular questions be put to him, as to why he was making the confession when he had already pleaded innocence and claimed trial at the time when the formal charge was framed;*
- (viii) that, the Trial Judge should explain to the accused that, in case of making confession, he had to face a capital sentence in a murder case or any offence punishable with death;*
- (ix) that, the entire record of all the questions and answers recorded, should be properly maintained and thereafter, a proper certificate be appended thereto, showing the satisfaction of the Trial Judge that the accused person was not mentally sick and he was making the confession voluntarily, based on true facts and that, there was no other compelling reason behind that.*

I have also gone through the judgment reported as 2016 SCMR 274 (Azeem Khan vs. Mujahid Khan), where the Hon'ble Supreme Court has laid down procedure and precaution in the following manner:

15. Keeping in view the High Court Rules, laying down a binding procedure for taking required precautions and observing the requirements of the provision of section 364 read with section 164, Cr.P.C. by now it has become a trite law that before recording confession and that too in crimes entailing capital punishment, the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that, all signs of fear inculcated by the Investigating Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person is willing to confess, then all required questions formulated by the High Court Rules should be put to him and the answers given, be recorded in the



*words spoken by him. The statement of accused be recorded by the Magistrate with his own hand and in case there is a genuine compelling reason then, a special note is to be given that the same was dictated to a responsible official of the Court like Stenographer or Reader and oath shall also be administered to such official that he would correctly type or write the true and correct version, the accused stated and dictated by the Magistrate. In case, the accused is illiterate, the confession he makes, if recorded in another language i.e. Urdu or English then, after its completion, the same be read-over and explained to him in the language, the accused fully understand and thereafter a certificate, as required under section 364, Cr.P.C. with regard to these proceedings be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official/officer whether he is Naib Court wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.*

26. Keeping in view the above case laws and principles laid down by the apex Court, I have gone through the statement U/S 164 Cr.P.C. of Allah Ditta/appellant (Exh.PT), which reveals that application for recording of confession was given by PW-16 Zulfiqar Ahmad/S.I. on 06.02.2009 and PW-11 Muhammad Liaquat Abbasi/Magistrate recorded the same in his own handwriting after opening the handcuffs of Allah Ditta/appellant, where he has recorded the following precautionary measures:

"درخواست بابت قلمبندل بیان زیر دفعہ 164 ض ف ملزم اللہ دتہ عرف دتو درج بالا ازاں ذوالفقار SI تھانہ گولڑہ بعدالت جناب ADM صاحب اسلام آباد پیش ہوئی جہاں سے مزید کاروائی کیلئے درخواست مقدمہ عدالت ہذا میں مرسل کی گئی۔ جس پر تفتیشی آفیسر نے ملزم کو عدالت میں پیش کیا گیا۔ ملزم کی ہتھکڑی کھلوا دی گئی اور پولیس اہلکاروں کو کمرہ عدالت سے باہر بھیج دیا گیا۔ ملزم کمرہ عدالت میں موجود ہے۔ اسکو بتایا گیا کہ وہ ایک مجسٹریٹ درجہ اول کی عدالت میں موجود ہے۔ اگر وہ کوئی بیان اپنی مرضی سے دے گا تو لکھا جاوے گا ورنہ انہیں کو ایسا بیان کل اس کے خلاف بھی بطور شہادت پیش ہو سکتا ہے۔ اور اس بیان کے بعد اسکو جیل میں بھیج دیا جائے گا پھر وہ دوبارہ پولیس کے پاس نہ جائے گا لہذا اسکو سوچنے کیلئے مزید وقت دیا جاتا ہے۔ اسکو الگ بٹھا دیا گیا۔ تقریباً آدھے گھنٹے کے بعد اس سے دوبارہ استفسار کیا گیا کہ آیا وہ کوئی بیان دینا چاہتا ہے یا کہ نہیں۔ اس نے کہا کہ جو کچھ میں نے کہا وہ میں صرف بیان کرنا چاہتا ہوں۔ لہذا اس مرحلے پر اس سے درج ذیل سوالات کیے جاتے ہیں۔

- س۔ آپکو معلوم ہے کہ اس وقت کہاں پر بیٹھے ہوئے ہو؟
- ج۔ جی ہاں۔ میں اس وقت جج صاحب/مجسٹریٹ صاحب کی عدالت میں ہوں۔
- س۔ تم کتنے پڑھے ہوئے ہو؟
- ج۔ میں بالکل اُن پڑھ ہوں۔
- س۔ تمہاری عمر کیا ہے؟
- ج۔ میری عمر تقریباً 15/16 سال ہے۔
- س۔ تم یہ بیان کیوں دے رہے ہو؟



- ج۔ میں اپنی سچائی بتا رہا ہوں۔  
 س۔ تمہیں معلوم ہے کہ یہ بیان تمہارے خلاف استعمال ہو سکتا ہے؟  
 ج۔ جی ہاں۔ "آپ نے رحم کرنا ہے" جو غلطی میں نے کی اسکی سزا مجھے ملنی چاہیے۔ بھائی بے قصور ہے۔  
 س۔ کیا بیان دینے کے حوالے سے کسی پولیس یا کسی اور کا تم پر کوئی دباؤ ہے؟  
 ج۔ نہیں سر۔ مجھ پر کوئی دباؤ نہ ہے۔  
 درج بالا سوالات اور جوابات کے بعد پایا جاتا ہے کہ ملزم اپنی مرضی سے بیان دینا چاہتا ہے۔ لہذا اسکا بیان حسب ضابطہ تحریر کیا جاتا ہے۔"

27. Keeping in view the above portion of statement recorded by PW-11 Muhammad Liaquat Abbasi/Magistrate, I am of the confirmed view that statement Exh.PT is based upon true facts, recorded with full conscious responsibility and fulfills the requirements of voluntariness. I have not seen any element of coercion, undue influence or pressure on Allah Ditta/appellant, although he was a juvenile at the relevant time and the statement recorded by him had fully covered the procedural and legal requirements of law to be called as confessional statement, especially when the same is corroborated with the medical evidence discussed above. I find no illegality or irregularity in recording of the confessional statement, similarly, the then Magistrate PW-11 Muhammad Liaquat Abbasi has been cross-examined at length but no fruitful result has been achieved by the defence side.

28. Allah Ditta/appellant has been confronted with the confessional statement Exh.PS and Exh.PT in Question No.13 of statement U/S 342 Cr.P.C., which has been recorded as under:

Q13. *It is in prosecution evidence that you were produced before Mr. Liaquat Abbasi, Executive Magistrate and you got recorded your confessional statement (Exh.PS and Exh.PT) wherein you confessed your guilt and narrated the events of the occurrence. What do you say about it?*

Ans. *I did not make any statement of confession.*

The above referred stance taken by Allah Ditta/appellant clearly expresses his retraction from the confessional statement recorded prior to trial before the Magistrate, but law on the subject is clear, where retracted confession can be relied upon provided it gets corroboration on material points. Reliance is

placed upon PLD 2008 SC 115 (Muhammad Talha Hussain vs. The State).

Similarly, the Shariat Appellate Bench of the Supreme Court of Pakistan in case reported as PLD 2007 SC 202 (Nazir alias Wazir vs. The State) has also laid down a principle, wherein it was held that:

*“notwithstanding procedural violation of recording confessional statement on oath, if Court finds that confession is true and voluntary and if satisfied that by such procedural defect, no prejudice was caused to accused and there was also no failure of justice, may on the basis of such retracted judicial confession, convict an accused.”*

It has further been held that:

*“In case in which judicial confession is retracted, if the same is found true, voluntary and confidence – inspiring such confession can be considered sufficient evidence for compensation and sentence for murder as Tazir.”*

29. Keeping in view the above principles settled by the superior Courts, I am of the view that mere retraction of confessional statement in statement U/S 342 Cr.P.C. does not absolve Allah Ditta/appellant, especially when his confessional statement recorded by PW-11 Muhammad Liaquat Abbasi/Magistrate reveals different corroborative pieces of evidence, which link Allah Ditta/appellant with the heinous crime of murder of minor Khatima Bibi/deceased.

30. On 27.01.2009, Allah Ditta/appellant in presence of PW-5 Muhammad Mursaleen/ASI got recovered the bucket (P8 & P9), which was used by Khatima Bibi/deceased to fetch milk, which was taken into possession vide recovery memo Exh.PJ and similarly, on 30.01.2009, Allah Ditta/appellant pointed out and got recovered chappal (P7) of deceased vide recovery memo Exh.PG and both these articles were identified the parents i.e. PW-8 Naz Bibi and PW-9 Abdul Maalik, and even they have been cross-examined in this regard but defence has not achieved any discrepancy, although the bucket (P8 & P9) are of ordinary nature and easily available in open market, but this

does not mean that the prosecution has foisted these recoveries upon Allah Ditta/appellant.

31. The parents of Khatima Bibi/deceased i.e. PW-8 Naz Bibi and PW-9 Abdul Maalik remained consistent upon the details of recovery i.e. bucket (P8 & P9) and identified the same through Exh.PP (فرد شناخت بالٹی سٹیل) (P6). The defence has only made certain questions regarding color of Chappal (P7) in order to create a doubt, whereas I have gone through the log book Exh.PH dated 22.11.2008, wherein a message of *Gumshudgi* was transmitted through wireless from P.S. Golra Sharif in which details of Khatima Bibi/deceased have been given by PW-9 Abdul Maalik/Complainant to the police and PW-1 Saleem Akhtar/Constable submitted the same details. However, the said contain “*Laal Chappal*”, whereas Exh.PG (فرد مقبوضگی جوتا از قسم پلاسٹک 1 عدد) refers (ایک عدد جوتا پلاسٹک برنگ ہلکا جامن) (P10) was recovered on the pointation of Allah Ditta/appellant in presence of witnesses. Similarly, Exh.PE dated 31.01.2009 (فرد شناخت جوتا پلاسٹک زنانہ) duly identified by the parents reveals (ایک عدد جوتا برنگ ہلکا جامنی از قسم پلاسٹک) (P7). All these recovery memos, when produced by the prosecution, the defence has cross-examined PW-8 Naz Bibi/mother, whereby she stated that “*the deceased was wearing purple color chappal (P7) when she went missing.*”, but in my humble view, the mother of deceased is an illiterate lady and hardly differentiate the color of Chappal (P7) and such minor discrepancy has no bearing in this case, especially the recovered Chappal (P7) is of a minor deceased duly identified by the mother, even otherwise, it is not the case of defence that Chappal (P7) belongs to someone else.

32. I have also considered the evidence of rape brought by the prosecution on record where PW-14 Dr. Shazia Zammurad referred in her statement at Point No.6 that:

“*Looking to be raped as per external genitalia*”

Similarly, she also stated that:

*“Genitalia were widened and open”*

During the course of cross-examination, PW-14 Dr. Shazia Zammurad acknowledged that:

*“Even if the dead body was submerged in water, swabs can be taken for detection of semen, but that could be negative. It is correct that in present case, swabs were tested to be positive.”*

33. The above said evidence of PW-14 Dr. Shazia Zammurad, if seen in the light of Chemical Examiner report dated 26.02.2009 (Exh.PAD), where it has been mentioned that, *“semens is detected in the above swabs”*. However, the said swabs, although confirm the spermatozoa in the chemical examiner test report but the entire record is silent qua the grouping of semen and there is no report produced by the prosecution in which DNA has been confirmed. It is necessary to take guidance from different pronouncements of superior Courts to resolve this controversy as to whether DNA profiling/grouping of semen test is obligatory and what its affect are if the same has not been conducted. In this regard, I am fortified with the view given in 2017 PCr.LJ 789 (Allah Ditta, etc. vs. The State, etc.), 2016 MLD 1219 (Tanveer Ahmad vs. The State, etc.,) and 2013 PCr.LJ 772 (Mst. Zohra Bibi vs. The State, etc.), wherein it has been held that in absence of semen grouping as well as DNA test, no accused could be held guilty of commission of the offence of “zina”.

34. In view of above case laws, I am of the view that if classification or grouping of semen is not conducted in a rape case, it could not be proved that particular accused person had committed the offence, although there is allegation of rape in this case and it is incumbent upon the prosecution to discharge this onus positively as required under the law, therefore, despite the observations made by PW-14 Dr. Shazia Zammurad on physical examination of Khatima Bibi/deceased, the opinion of rape could not be substantiated through technical evidence of chemical and forensic report of

DNA, and this aspect delinks the allegation of rape with Khatima Bibi/deceased by Allah Ditta/appellant, even otherwise, this technical aspect has to be seen in the light of confessional statement of Allah Ditta/appellant Exh.PT, who categorically admitted that he has not raped the minor girl Khatima Bibi/deceased, therefore, in my humble view, the charge of rape U/S 376 PPC is not proved against Allah Ditta/appellant.

35. Besides the above referred discussion, another important aspect of juvenility has to be considered as Allah Ditta/appellant, at the time of alleged occurrence, was approximately 15/16 years of age and in the previous round of proceedings, Dr. Anees-ul-Hassan/Radiologist PIMS Hospital appeared before the Court and on the basis of x-rays and different knee joints test, he assessed the age of Allah Ditta/appellant as 17/18 years, however the said evidence was not taken into consideration by the Trial Court in previous judgment and the question of juvenility in terms of JJSO, 2000 was appreciated by this Court vide judgment dated 06.10.2016 passed in Jail Appeal No.No.131/2010 and Murder Reference No.02/2011, as a result whereof, the conviction awarded by the Trial Court in previous round was set aside and matter was remanded to the Trial Court for retrial. There is no denial to the proposition that legislature has promulgated the Juvenile Justice System Ordinance, 2000 to safeguard the rights of minors involved in criminal cases. Section 2(b) of the JJSO, 2000 narrates that child is a person who at the time of commission of offence has not attained the age of 18 years and his trial has to be conducted in terms of Section 4 by the Special Court constituted for juvenile offenders, even otherwise, the statement U/S 164 Cr.P.C. also reveals that Allah Ditta/appellant claimed his age to be 15/16 years at the time of recording of his statement and the trial was conducted by the Juvenile Court, therefore, the question of juvenility has to be considered at the time of awarding of punishment to minor accused under the law. Reliance

is placed upon PLD 2010 SC 1080 (Faisal Saleem vs. The State), PLD 2009 SC 777 (Muhammad Aslam, etc. vs. The State, etc.), PLD 2006 Karachi 331 (Qamar Hussain Shah vs. The State), 2012 PCr.LJ 142 Sindh (Asghar Khan vs. The State), and 2015 PCr.LJ 1163 Baluchistan (Rehmatullah vs. The State).

36. Keeping in view the above background and the law, I am of the confirmed view that Allah Ditta/appellant is guilty of murder of Khatima Bibi/deceased, aged 8 years, the said offence was voluntarily admitted by Allah Ditta/appellant in his confessional statement (Exh.PS and Exh.PT), which was recorded without any inducement or coercion, and as such, the confessional statement qualifies the test settled in different judgments of the superior Courts and I have no hesitation to hold that the confessional statement was recorded in accordance with law, which fully corroborates the facts narrated by the prosecution witnesses with other corroborative pieces of evidence, especially, recovery of bucket (P8 & P9) and chappal (P7) of Khatima Bibi/deceased on the pointation and disclosure of Allah Ditta/appellant, and even the most crucial evidence which confirms the manner and mode of commission of murder when Allah Ditta/appellant in his confessional statement confirmed that “اسکی گردن بھی مروڑی تھی” and fact has been confirmed by PW-14 Dr. Shazia Zammurad in autopsy report that Khatima Bibi/deceased died to multiple injuries in which dislocation of C1 and C2 has been observed and her neck is having free mobility and the joints of C1 and C2 were dislocated, therefore, Allah Ditta/appellant is guilty of commission of murder of Khatima Bibi/deceased and the entire chain of evidence links Allah Ditta/appellant with the heinous crime of murder of an innocent minor girl. Although, the motive has not been established in this case and even PW-10 Sher Muhammad/wajtakar witness is a chance witness, therefore, while considering these two mitigating circumstances and the age of Allah Ditta/appellant at the time of commission of offence as of less than

18 years, who falls within the definition of child in terms of Section 2 of JJSO, 2000, therefore, the captioned Criminal Appeal No.99/2017 (Allah Ditta vs. The State) is hereby **PARTLY ALLOWED** and the conviction and sentence awarded to the appellant/ Allah Ditta U/S 376 PPC is hereby **SET-ASIDE** as charge U/S 376 PPC has not been proved, whereas the conviction and sentence awarded to appellant/Allah Ditta under other Sections is **MAINTAINED** in the following manner:

- (a) U/S 302(b) PPC for life imprisonment with fine of Rs.200,000/-, and in default of payment of fine, Allah Ditta/appellant to further undergo S.I. for six (06) months.
- (b) U/S 201 PPC for three (03) years imprisonment with fine of Rs.50,000/- and in default of payment of fine, Allah Ditta/appellant to further undergo S.I. for three (03) months.

**(MOHSIN AKHTAR KAYANI)**  
**JUDGE**

Announced in open Court on: 19<sup>th</sup> December, 2018.

**JUDGE**

Khalid Z.

*Uploaded By: Engr Umer Rasheed Dar*