JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No.142 of 2010
Nadeem Qayyum and others
Versus
The State

Crl. Revision No.71 of 2010
Arshad Mehmood Abbasi
Versus
Nadeem Qayyum and others

Dates of hearing:	13.05.2019, 07.08.2019, 18.09.2019 and 04.10.2021
Appellant by:	M/s Muhammad Ilyas Siddiqui and Imran Feroz Advocate
Respondents by:	Rao Abdur Raheem and Mr. Saad Hassan, Advocates for the respondent/complainant in Crl. Appeal No.142/2010 and petitioner in Crl. Revision No.71/2010
State by:	Mr. Muhammad Atif Khokhar, Advocate

MIANGUL HASSAN AURANGZEB, J:- Through this judgment, we propose to decide criminal appeal No.142/2010 and criminal revision No.71/2010.

2. Through criminal appeal No.142/2010, the appellants, Nadeem Qayyum **("Qayyum")**, Tanvir Hussain **("Tanvir")** and Muhammad Usman **("Usman")** assail the judgment dated 16.02.2010 passed by the Court of the learned Sessions Judge, Islamabad, whereby each of them having been convicted under Section 302(b) read with Section 34 of the Pakistan Penal Code, 1860 **("PPC")** were sentenced to suffer imprisonment for life and payment of compensation of Rs.1,00,000/- to the legal heirs of the deceased, Nadeem Arshad. It was stipulated that in case of a default in paying the compensation by each of the appellants, they had to suffer another six months rigorous imprisonment. Additionally, the appellants were convicted under Sections 201 and 34 PPC and sentenced to seven years of rigorous imprisonment with a fine of Rs.1,00,000/- on each of them. Through criminal revision No.71/2010, the complainant seeks an enhancement in the sentence awarded to the appellants.

3. The appellants had been tried and convicted for murdering Nadeem Arshad, who was about 20 years of age, and for concealing his body by putting it in a gunny bag and throwing it in a well.

4. On 21.01.2009, the complainant, Arshad Mehmood Abbasi (PW-4), who is the deceased's father, submitted a criminal complaint to the Station House Officer, Police Station Koral, District Islamabad. As per the contents of the said complaint, while the complainant was offering his *Maghrib* prayers his son, Nadeem Arshad, answered a telephone call and told the caller that he could not go out of the house due to cold weather; Nadeem Arshad went out of the house while talking on the phone; when Nadeem Arshad did not return till late night, the complainant reported his son's disappearance at the said Police Station; the complainant along with his friends and relatives had been searching for Nadeem Arshad; the complainant was informed by Tariq Mehmood (PW-1) that at about 06:15 p.m., he had seen Nadeem Arshad coming out of his house and going with Qayyum; and the complainant was informed by Tassawar Hussain (PW-2) and Sufi Muhammad Manzoor that at about 07:00 p.m. while they were coming in their vehicle towards Koral, they saw Nadeem Arshad with Qayyum, Tanvir and Usman (hereinafter referred to as "the appellants") on the service road near Khattak's old brick kiln at Gangal.

5. In the complaint, it was mentioned that Nadeem Arshad's mobile phones were not responding, and that the complainant believes that the appellants had abducted him with the intention either to murder him or to obtain ransom. The complainant also gave details of his son's mobile phones and other items in his possession before he disappeared.

6. Initially F.I.R.No.30, dated 21.01.2009 was registered at Police Station Koral under Sections 365 and 34 PPC.

7. On 21.01.2009, Qayyum was arrested by Investigation Officer, Arshad Ali, Sub Inspector (PW-10) ("I.O."), who produced him before the Court on 22.01.2009 and obtained his physical remand. The I.O. also arrested Tanvir and Usman on 22.01.2009and obtained their physical remand from the Court on 23.01.2009.

THE PROSECUTION'S CASE:-

8. The prosecution's case is that Tariq Mehmood (PW-1) had last seen the deceased alive in the company of Qayyum whereas Tasawwar

Hussain (PW-2) had last seen the deceased with all the three appellants. During interrogation, Qayyum informed the I.O. that he along with Tanvir and Usman had murdered the deceased and thrown his body in a well after packing it in a gunny bag. Furthermore, Qayyum had disclosed that he could lead to the recovery of the deceased's body. This disclosure/extra-judicial confession caused the I.O. to take Qayyum to Khattak's brick kiln near the service road in Village Gangal. Qayyum pointed out three locations i.e. (i) the place where the deceased was murdered, (ii) the place where his body was packed in a gunny bag, and (iii) the well where the deceased's body was thrown after he had been murdered. From this place, the following recoveries were said to have been made:-

i. **Rope (*rassi*) (Exh.P/20)**
ii. **Waist Coat Button (Exh.P/19)**
iii. **One boot of right foot (Exh.P/17) and**
iv. **One Telenor sim (Exh.P/18)**

9. The above items were secured in the memo of recovery (Exh.PT). Furthermore, Sher Afzal and Zummard Hussain (PW-7), after being lowered into the well through a spool, informed the I.O. that there was a dead body in a gunny bag which also contained bricks causing it to be heavy. Due to the gathering of a crowd, Qayyum was sent to the Police Station for the sake of his safety. After the gunny bag was taken out of the well, the deceased's body was recovered from it. Around the deceased's neck, a rope was tied; and his hands and feet were also tied with ropes. Pictures of the dead body were taken when it was recovered. Witnesses identified the dead body as that of the deceased. The I.O. prepared a memo of identification of the dead body; recorded the statements of the witnesses of recovery; and prepared an inquest report (Exh.PX) under Section 174 of the Code of Criminal Procedure, 1898 ("Cr.P.C."). He drafted an application for postmortem and sent the dead body to the hospital for this purpose. He also prepared a site plan (Exh.P.AA) of the place where the dead body was recovered.

10. On 21.01.2009, Dr. Muhammad Farrukh Kamal (PW-3), Pakistan Institute of Medical Sciences, Islamabad conducted the postmortem and handed over the dead body to the I.O., who in turn handed it over to the complainant for burial. The last worn clothes of the deceased were taken

into possession by the I.O. and handed over to the *Moharrir* at the Police Station.

11. As per the postmortem report (Exh.PA), the cause of death was strangulation. The deceased's trachea, larynx, hyoid bone, and neck vessels were ruptured. There were horizontal and continuous strangulation marks on the deceased's neck. There were scars on the deceased's wrists; the deceased's hands were tied behind his back. All the injuries were ante-mortem. The time between the injuries and death was a few minutes, and the time between death and the postmortem was 20 to 26 hours.

12. The I.O. had also interrogated Tanvir and Usman after arresting them on 22.01.2009. Both of them are said to have made disclosures as to the occurrence. They are also said to have told the I.O. that they could point out the place of the occurrence.

13. On 24.01.2009, the I.O. took all three accused in handcuffs to a spot near Khattak's brick kiln. Qayyum was first taken from the vehicle in which the three accused had been brought to the place of occurrence where he, once again, made pointation of the place of occurrence. Furthermore, Qayyum stated that he could lead to the recovery, from his house, of the deceased's mobile phone set (Nokia N95) and the remaining portion of the rope used in the deceased's murder. Qayyum was taken to his house from where the mobile phone set (Nokia N95) (Exh.P/5) and the rope (Exh.P/14) were recovered. These articles were taken into possession by the I.O. vide memo (Exh.PV) which was signed by witnesses. The I.O. also prepared an un-scaled site plan of the place of recovery of the said articles. After the recovery of the said articles, Qayyum was taken back to the Police Station.

14. The co-accused, Usman had also made pointation of the place where the deceased was murdered as well as the place where his body was packed in a gunny bag, and the well where his body was thrown. After this pointation, Usman was taken back to the vehicle. Thereafter, Tanvir was taken to the place of the occurrence, and he also identified the three spots which had been earlier identified by Usman. Tanvir and Usman also led the police to the recovery of the deceased's belongings from their respective houses.

15. Learned counsel for the appellants submitted that the FIR was registered with a substantial delay of nine hours; that the circumstances relied upon by the prosecution are not firmly established and they do not form a complete chain establishing the guilt of the appellants; that there was no complete chain of circumstances established which ruled out even any remote possibility of anybody else than the accused persons being the authors of the crime; that the learned Trial Court returned a finding of guilt without any plausible reasoning; that the appellants were coerced into making the confessional statements; that there was a substantial delay between the dates when the appellants were arrested and when they are alleged to have made their confessional statements; that the Executive Magistrate should not have recorded the appellants' confessional statements on oath; that the appellants had retracted the confessional statements allegedly made by them; that after recording the appellants' statements, the Magistrate handed over their custody back to the police and not the jail authorities; that the confessional statements made by the appellants whilst in police custody has no evidentiary value; that the appellants could not have been convicted on the basis of last seen evidence; that the gunny bag from which the deceased's body was recovered was open when taken out from the well; and that the evidence of prosecution witnesses is so improbable that no credence should be put on it. Learned counsel for the appellants prayed for the impugned judgment of the learned Trial Court to be set aside and for the appellants to be acquitted.

16. Per contra, learned counsel for the respondent/State contended that the deceased had been last seen alive in the company of the appellants; that after the prosecution has established that the deceased was last seen alive in the company of the appellants, it was for the appellants to explain as to what happened to the deceased and in the absence of any explanation from the appellants, the learned Trial Court rightly convicted the appellants on the basis of circumstantial evidence; that the testimony of the witness who had last seen the deceased in the appellants' company could not be shaken; that each of the appellants had led the police to the place of the occurrence and the well where the deceased body was recovered from; that the appellants had confessed to killing the deceased and placing the body in a gunny bag after tying

the hands and legs; that each of the appellants actively participated in putting the deceased to death; that the deceased's mobile phones and other belongings were recovered from the appellants' houses; that the appellants had made a judicial confession giving details of how the deceased was murdered and his body thrown into the well; that the appellants had placed bricks in the gunny bag which contained the deceased's body so that it sinks in the well; that the gunny bag had to be opened and the bricks removed therefrom so as to lighten its weight and pull it out of the well; and that the impugned judgment warrants no interference. Learned counsel for the State prayed for the appeal to be dismissed.

17. Learned counsel for the respondent/complainant in criminal appeal No.142/2010 and petitioner in the criminal revision No.71/2010 submitted that the learned Trial Court had given no justification for not awarding capital punishment to the appellants; that the prosecution had proved its case against the appellants beyond reasonable doubt; that all the three appellants were adults and well aware of the consequences of the heinous crime committed by them; and that for the brutal murder of Nadeem Arshad, the accused should have been sentenced to death. Learned counsel prayed for an enhancement in the sentence awarded to the appellants.

18. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

19. The F.I.R. was lodged on 21.01.2009 at 3:10 p.m. at Police Station Koral, District Islamabad under Section 365 PPC (kidnapping or abducting with intent secretly and wrongfully to confine person). In the said F.I.R., the complainant had nominated the appellants and alleged that they had abducted his son for ransom or with the intention to murder him. Tasawwar Hussain (PW-2) last saw the deceased alive in the company of the appellants at 7:00 p.m. on 20.01.2009. It was only when the deceased did not come home until it was late night that the complainant started searching for him. In cases where a person goes missing it is usual for his relatives to search for him and such search may take a long time. The police is invariably approached only after all

avenues for the search are exhausted. A delay in the lodging of an F.I.R. in such cases is not fatal to the case.

LAST SEEN EVIDENCE:-

20. An important circumstance, which the prosecution has relied against the appellants, is the evidence of the deceased being last seen alive in the company of the appellants. The complainant, in his complaint, submitted at Police Station Koral at 03:10 p.m. on 21.01.2009, had expressly mentioned that he had been informed by Tariq Mehmood (PW-1) that at about 06:15 p.m. he had seen the deceased come out of his house and go along with Qayyum; and that he had been informed by Tasawwar Hussain (PW-2) and Sufi Muhammad Manzoor that at about 07:00 p.m. when they were coming towards Koral in a vehicle, they saw the deceased with the appellants on the service road near Khattak's brick kiln at Gangal.

21. Tariq Mehmood (PW-1), in his examination-in-chief, deposed that on 20.01.2009 at about 06:15 p.m., he saw the deceased going with Qayyum in front of the outer gate of the complainant's house. He had also deposed that while he was taking his ailing daughter in a taxi to the hospital, he again saw the deceased standing with Qayyum outside Bilal Masjid. Tasawwar Hussain (PW-2) had also deposed that he along with Sufi Muhammad Manzoor, while coming towards Koral on the service road, had seen the deceased with the three appellants near Khattak's brick kiln at Gangal. Had Tariq Mehmood (PW-1) and Tasawwar Hussain (PW-2) not given evidence as to in whose company the deceased was last seen, the testimony of the complainant (PW-4) as to the deceased having been last seen with the three appellants would have been purely hearsay and not worthy of any consideration.

22. Tariq Mehmood (PW-1) is the complainant's brother whereas Tasawwar Hussain (PW-2) is the complainant's tenant and runs a school in the building owned by the complainant. Tasawwar Hussain (PW-2) explained in his testimony that he had given a room in his school on rent to a tutor, Iftikhar, who gave tuition to Qayyum, who would often be accompanied by the other two appellants. This is how he knew the appellants.

23. For an offence to be proved, it is not necessary that it must be seen to have been committed. It can be proved by circumstantial evidence

also. The *factum probandum* (the principal fact) may be proved indirectly by means of certain inferences drawn from *factum probans* (the evidentiary facts). Circumstantial evidence consists of evidence of facts that are so closely associated with the fact in issue that considered together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. It has consistently been held that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other persons. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. The cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. Where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused.

24. The "last seen evidence" is one of the categories of circumstantial evidence as held in the case of Fayyaz Ahmad Vs. The State (2017 SCMR 2026). The legal obligations which the prosecution are required to fulfill where a case is sought to be made on the basis of last seen evidence were enumerated in the said judgment. It was held *inter alia* that *"the proximity of the crime scene plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused and onus in this regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit."*

25. The theory of *"last seen together"* has recently been well explained by the Hon'ble Supreme Court in the case of Muhammad Abid Vs. The State (PLD 2018 SC 813) in the following terms:-

> ***"5. ... The theory of last seen together is one where two persons are 'seen together' alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is short,***

presumption can be drawn that the person alive is the author of the other's death. Time gap between the sighting and the occurrence should be such as to rule out possibility of somebody else committing the crime. The circumstance of the deceased being last seen in the company of the accused is not by itself sufficient to sustain the charge of murder. There must be evidence to link the accused with the murder of his companion, such as incriminating facts as recovery, strong motive and the proximate time when they were last seen together and the time when the deceased was killed. Last seen evidence as circumstantial evidence must be incompatible with the innocence of the accused and should be accepted with great caution. It must be scrutinized minutely so that no plausible conclusion should be drawn therefrom except guilt of the accused.

6. The foundation of the "last seen together" theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused. 2. proximity of the crime scene. 3. small time gap between the sighting and crime 4. no possibility of third person interference 5. motive. 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime."

26. The last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Tariq Mehmood (PW-1) deposed that he saw the deceased going with Qayyum at 06:15 p.m. on 20.01.2009 whereas Tasawwar Hussain (PW-2) deposed to have seen the deceased with the three appellants at 07:00 p.m. near Khattak's brick kiln at Gangal. Since the deceased's murder was an unseen occurrence, the time of the deceased's death can be gauged from the postmortem report (Exh.PA). The postmortem on the deceased's body was conducted by Dr. Farrukh Kamal (PW-3) at 08:30 p.m. on 21.01.2009. In his testimony, Dr. Kamal deposed that the time between the death and the postmortem was 20 to 26 hours approximately. This would make the approximate time of death between 06:30 p.m. on 20.01.2009 to 12:30 a.m. on 21.01.2009. Consequently, the time gap between when Tariq Mehmood (PW-1) last saw the deceased (i.e. 06:15 p.m. on 20.01.2009) and when he died would be 15 minutes to 06 hours, whereas the time gap between when Tasawwar Hussain (PW-2) last saw the deceased (i.e. 07:00 p.m. on 20.01.2009) and when he died would be up to five and half hours. There is no evidence on the record to show that after Tariq Mahmood and

Tasawwar Hussain had last seen the deceased he was seen in the company of any person other than the appellants before his death.

27. All three appellants opted not to give a statement on oath under Section 340(2) Cr.P.C. to disprove the charges against them. None of the appellants produced any *alibi* to show that during the period when Tariq Mahmood and Tasawwar Hussain last saw the deceased and the time of death, they were not with the deceased. During the recording of their statements under Section 342 Cr.P.C., the appellants were specifically questioned about them having been last seen with the deceased. This question was answered by the appellants by a simple denial.

28. The place where Tasawwar Hussain had last seen the deceased with the three appellants is in close proximity to the place from where the deceased's dead body was recovered. The site plan of the place of occurrence was made by Malik Muhammad Akram (draftsman). Since Malik Muhammad Akram died on 24.04.2009, his son was produced by the prosecution as PW-9 who deposed that he was well conversant with his father's handwriting and signatures, and that the site plan had been prepared by his father. He had identified his father's signature on the site plan. According to this site plan, the well from which the deceased's body was recovered is 157 feet from Khattak's brick kiln which is 120 feet from the service road from where Tasawwar Hussain had last seen the deceased with the three appellants. There is close proximity between the place where Tasawwar Hussain last saw the deceased in the company of the appellants and from where the deceased's body was recovered.

29. The memo of pointation (Exh.PU) was prepared by the I.O. (PW-10) who was the investigation officer. It was tendered in evidence by the I.O. According to the memo of pointation, the three appellants, on 24.01.2009, identified three spots i.e. (i) where the deceased was put to death by strangulation, (ii) where the deceased's body was placed in a gunny bag, and (iii) the well in which the deceased's body was thrown. The spot where the deceased's body was placed in a gunny bag is within whereas the other two spots are in close proximity to Khattak's brick kiln. It ought to be borne in mind that the pointation was made by the three appellants separately and not jointly. This is explicitly mentioned in

the memo of pointation and corroborated by the testimony of the I.O. (PW-10).

30. There is nothing on the record to show that the deceased was last seen in the company of someone other than the appellants. It is, however, not prudent to base a conviction solely on the last seen theory. The last seen theory should be applied taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen. Although the deceased having been seen last in the company of the accused constituted a significant ground for the appellants' conviction, is not the solitary evidence on the basis of which they were convicted by the learned Trial Court.

EXTRA JUDICIAL CONFESSION:-

31. Qayyum was arrested by the I.O. (PW-10) on 21.01.2009. As per the I.O.'s testimony, during interrogation, Qayyum disclosed that he along with Tanvir and Usman had murdered the deceased and threw his body in a well after placing it in a gunny bag. The deceased's body was recovered on 21.01.2009 on the pointation of Qayyum. On 22.01.2009, the I.O. arrested Tanvir and Usman.

32. The testimony of the I.O. (PW-10) as to the confession and disclosures made by Qayyum is corroborated by that of Zamurrad Hussain (PW-7), who had informed the police about Qayyum's address. Zamurrad Hussain (PW-7) deposed *inter alia* that Qayyum was arrested on 21.01.2009 in his presence and that the disclosure as to the occurrence and the place where the deceased's body was thrown had also been made by the Qayyum in his presence. Zamurrad Hussain was one of the persons who went down the well to recover the deceased's body on Qayyum's pointation. The gunny bag containing the deceased's body was opened by the police in Zamurrad Hussain's presence. He also signed the memo of recovery with respect to the gunny bag, the three cords and the left shoe recovered from the place of the occurrence.

33. The disclosure made by Qayyum on 21.01.2009 as to the deceased's murder by the three appellants and the place where his body was thrown is indisputably an extra judicial confession. It is not disputed that the confession made by Qayyum was whilst he was in police custody. Article 37 of the *Qanun-e-Shahadat* Order, 1984 ("the 1984

Order") provides that a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him. Furthermore, Article 39 of the 1984 Order provides that subject to Article 40, no confession made by any person whilst he is in the custody of a police officer, unless it shall be made in the immediate presence of a Magistrate, shall be proved against such person.

34. Given the fact that Qayyum had confessed to have committed the deceased's murder along with the other two appellants in police custody, such a confession cannot be relied upon by virtue of Articles 37 and 39 of the 1984 Order. To make an extra judicial confession reliable, it has to be shown that the same was voluntary, and not obtained by coercion, promise of favour or false hope etc. Zamurrad Hussain, in his cross-examination deposed *inter alia* that the *"police interrogated the accused by frightening him."* This testimony is sufficient to discard Qayyum's extra judicial confession. However, Qayyum, while in police custody, also disclosed the fact that after murdering the deceased, his body had been thrown into a well. Qayyum led the police to the well from where the deceased's body was recovered. Although an extra judicial confession is a weak type of evidence and a conviction cannot be solely made on its basis but when such a confession is in conformity with the statements of other witnesses and the dead body is found on the basis of such confession then it cannot be simply ignored.

35. Article 40 of the 1984 Order, which is an exception to Article 39, provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Article 40 of the 1984 Order has been interpreted by the Hon'ble Supreme Court in the case of Mst. Askar Jan Vs. Muhammad Daud (2010 SCMR 1604) in the following terms:-

9. … A perusal of above Article reveals firstly that it serves as a proviso to Articles 38 and 39 of the Order. Secondly, it is founded on the principle that if the statement or information of the accused amounts to confession or otherwise is supported by the discovery of a fact it may be presumed to be true and not to have been extracted. It comes into operation only (i) if and when certain facts are deposed to as discovered in consequences of information received from an accused person in police custody; and (ii) if the information relates distinctly to the fact discovered.

10. Thus, firstly there should be an information or statement of the accused whether it may be confession or otherwise and that too when he was in police custody and secondly on the basis of such information or statement a fact is discovered. If there is no statement of the accused or information given to the Police, which is an essential requirement of the Article, then the subsequent discovery would become inconsequential. Further such information either oral or recorded by the police is required to be proved by the prosecution through evidence. …

11. …

12. …

13. Thus, in order to apply Article 40 of the Order, the prosecution must establish that information given by the accused led to the discovery of some fact deposed by him and the discovery must be of some fact which the police had not previously learnt from any other source and that the knowledge of the fact was first derived from the information given by the accused. Reference is also invited to Jaffer Husain v. State of Maharashtra (AIR 1970 Supreme Court 1934). It is also important to note that the recovery of articles cannot be described as a discovery under Article 40 of the Order when they are not recovered, from any hidden place and if in the normal course of investigation the investigation agency is bound to see them and take in possession without the accused making any statement of pointing them out."

36. The statement of an accused regarding facts which are already in the knowledge of the police or any other person does not fall within the purview of Article 40 but Article 39 of the 1984 Order. However, a statement made by an accused in police custody can be taken into consideration only if it leads to the discovery of a fact which was not previously known to anybody. In the instant case, there is nothing on the record to show that prior to the disclosure made by Qayyum and the pointation of the well from where the deceased's body was recovered was known to any other person. Since Article 39 of the 1984 Order is subject to Article 40, the information disclosed by Qayyum, even though whilst in police custody, as to the place where the deceased's body was thrown by the appellants, can be relied upon.

37. In the case of Nazir Shehzad Vs. The State (2009 SCMR 1440), two accused persons were convicted and sentenced to death for having kidnapped and murdered an eighteen-year old student. The extra judicial confession made by the accused persons was discarded on the ground that after the recording of their confessional statements, their custody

was handed back to the police. Both the accused persons had been separately interrogated, and during the interrogation, they had informed the investigating officer about the place where they had thrown the deceased's dead body. The information furnished by the accused persons led to the discovery of the dead body from the place pointed out by them. The Hon'ble Supreme Court, while upholding their conviction, dismissed their appeals and held as follows:-

> ***"7. ....There is no doubt about it that prior to information furnished by the appellants the whereabout of dead body were not known to anyone. The information furnished by the appellants to the Investigating Officer can be used against them under Article 40 of Qanun-e-Shahadat Order, 1984. As in a case of circumstantial evidence where there has been discovery as a result of confession made under Article 40 of the Qanun-e-Shahadat Order, 1984, it is expected to find the discovery of something which can be associated with the deceased."***

38. In the case of Tariq Mehmood Paracha Vs. Danish Ahmed (2019 YLR 2246), three accused persons had been convicted and sentenced to death for kidnapping an eleven-year old boy. The extra judicial confession made by two of the accused persons led the police to the place where the deceased's body was recovered on their pointation. The said confession made by the two accused persons was held to have been corroborated by the disclosure of the place from where the dead body was recovered. It was held that *"logically speaking only the persons who kidnapped and/or murdered Uzeyfa could have known where the body was hidden."* The objection made by the defence counsel regarding the recovery of the dead body having been made by the joint pointation of the accused was spurned by the Division Bench of the Hon'ble High Court of Sindh by holding that plurality of information received before discovery shall not necessarily take any of this information out of Article 40 of the 1984 Order. Furthermore, it was held that discovery of the dead body on the pointation of the accused was admissible under Article 40 of the 1984 Order. In the said case, the death sentence awarded to the accused was converted to imprisonment for life.

39. Bearing in mind the law laid down by the Superior Courts regarding the applicability of Article 40 of the 1984 Order in a case where the statement of an accused made whilst in custody of the police leads to the recovery of the dead body on the pointation of the accused, we are of the view that the information given by Qayyum whilst in police custody as regards the deceased's murder stands corroborated by the pointation by

Qayyum of the well from where the deceased's body was recovered, and can therefore be relied upon in terms of Article 40 of the 1984 Order.

40. On 24.01.2009, Qayyum had also led to the recovery of a mobile phone set (Nokia N-95) which belonged to the deceased. This mobile phone set was recovered from Qayyum's house and so was the rope used in the commission of the offence. These articles were taken into possession by the I.O. vide memo (Exh.PV) which is also signed by the witnesses. The place from where these articles were recovered was within the exclusive knowledge of Qayyum. Therefore, the recovery of these articles on the pointation of Qayyum adds credence to the extra judicial confession made by him.

41. On 28.01.2009, Qayyum was taken once again to his house by the I.O. from where he led to the recovery of an iron chain (Exh.P/12) from under the seat of a sofa in his house. He also led to the recovery of a SIM jacket (Exh.P/13) containing four SIMs (Exh.P-14/1-4) and a SIM cover (Exh.P/15). These articles were taken into possession vide recovery memo (Exh.PH). All the articles recovered on the pointation of Qayyum had been identified by the complainant vide identification memo (Exh.PG) as those belonging to his deceased son. According to the I.O.'s testimony, Qayyum had also confirmed that the articles recovered from his house belong to the deceased.

42. The well where the deceased's body was thrown is near a non-functional brick kiln. No person would have ordinarily gone to search for the deceased's body in the well from which it was recovered on the initial pointation of Qayyum. The only plausible reason why the police went to the well to recover the deceased's body was that Qayyum had himself led the police to that place. In the case of Abdus Samad Vs. The State (PLD 1964 SC 165), a conviction for kidnapping and murder was upheld primarily on the ground that the deceased had been last seen in the company of the accused, who had exclusive knowledge of the place where the dead body was eventually found.

43. Qayyum's extra judicial confession as to the manner and place where the deceased was murdered is corroborated by factum of the recovery of the dead body on Qayyum's pointation as well as the recovery of the deceased's belongings from Qayyum's house. These recoveries show a chain of evidence pointing to Qayyum's guilt.

44. As regards the other appellants, namely Tanvir and Usman, they are also said to have made an extra judicial confession of murdering the deceased. The I.O. (PW-10), in his examination-in-chief, deposed that after arresting Tanvir and Usman, he had interrogated them and during interrogation, they *"made disclosures about the occurrence."* He further deposed that on 24.01.2009, the said accused persons disclosed that they could *"point out the place of occurrence."* The I.O. took the three appellants separately to the place of the occurrence and each of them made pointation to one and the same place where they committed the murder of Nadeem Arshad.

45. It is pertinent to bear in mind that by 24.01.2009, the place of the occurrence was known not just to the police but to all those in whose presence the deceased's body was recovered from the well on 21.01.2009. Therefore, it cannot be said that the disclosure as to the place of occurrence made by Tanvir and Usman on 24.01.2009 was the discovery of a fact which the police had not previously learnt from any other source or that the knowledge as to this fact was first derived from information given by them. In this view of the matter, we do not consider the pointation made by Tanvir and Usman as to the place of occurrence on 24.01.2009 to be worthy of consideration in terms of Article 40 of the 1984 Order.

46. What is worthy of consideration is the recovery of the deceased's belongings from Tanvir and Usman. As per the I.O.'s testimony, Usman led him to his house from where the deceased's mobile phone (Sony Ericsson W-850) (Exh.P/6) was recovered and secured vide recovery memo (Exh.PJ). Similarly, Tanvir also led the police to his house from where the deceased's wallet (Exh.P/7), identity card (Exh.P/8), copies of his educational testimonials (Exh.P/9) and (Exh.P/10) and cash amounting to Rs.3,500/- (Exh.P-16/1-5) were recovered. These articles were taken into possession by the I.O. vide recovery memo (Exh.PK). These recoveries were witnessed by Ansar Mehmood Abbasi (PW-5). The above-mentioned articles belonging to the deceased were recovered from Tanvir and Usman's houses on their pointation. The recovery of these articles corroborates the disclosure as to the occurrence made by them whilst in police custody.

CONFESSION BEFORE A MAGISTRATE:-

47. On 29.01.2009, the I.O. submitted an application before the District Magistrate seeking the recording of the appellants' confessional statements under Section 164 Cr.P.C. The said Section is reproduced in Schedule-A hereto.

48. In the said application, it was averred that during investigation, the appellants had confessed to the commission of the offence of which they were accused in case FIR No.30, under Sections 302 and 34 PPC. The said application was marked to Malik Farrukh Nadeem, Executive Magistrate (PW-6). On 29.01.2009, the appellants were produced before the Executive Magistrate who gave them two hours to think before making a confessional statement. During this period, no one was permitted to meet the appellants. After two hours, when the appellants appeared before the Executive Magistrate, it was made clear to them that they were present in the Court of the Executive Magistrate; that they were at liberty to make or not to make any statement; that their statement would be recorded only if they want to make it and not otherwise; that before making a statement, the appellants should carefully think about making the statement since any statement that they made could be used for and against them. The Executive Magistrate, after posing questions to the appellants and after satisfying himself that the appellants were not under any pressure to record their statements, proceeded to separately record their statements. As per the I.O.'s deposition, the appellants were produced separately before the Executive Magistrate for the recording of their statements, and that the appellants' relatives were present when they were produced before the Executive Magistrate.

49. Qayyum, in his statement (Exh.PQ), gave details as to how he along with Tanvir and Usman had murdered the deceased. He confessed to tying the deceased's legs and striking him on his head with an iron chain. He also implicated Tanvir and Usman by stating that Tanvir had strangled the deceased with the rope whereas Usman had tied the deceased's hands. He also confessed that he along with Tanvir and Usman had placed the deceased's body in a gunny bag; placed bricks in the gunny bag so that it drowns; and to have thrown it in the well. Before throwing the body in the well, the three appellants had distributed the deceased's belongings, including his two mobile telephone sets, between

themselves. He confessed that one of the deceased's mobile phones and three mobile phones SIMs were kept by him.

50. Tanvir, in his statement (Exh.PM), confessed to have strangled the deceased with a rope around his neck. He stated that in the face of pleas for mercy by the deceased, a collective decision was made by the three appellants to kill him so that he does not reveal the fact as to the snatching of the mobile telephone sets from him. Furthermore, he deposed that the deceased's hands were tied by Usman whereas his legs were tied by Qayyum; that after this, the deceased was taken to the brick kiln where Qayyum struck him with an iron chain and his body along with bricks was placed in a gunny bag and thrown into the well; and that one of the deceased's mobile phones (Nokia N95) was kept by Qayyum and the other one Sony Ericson (W-850) by Usman.

51. Usman, in his statement (Exh.PR) before the Executive Magistrate, deposed that the deceased had been called by Qayyum to the brick kiln for the sale of his mobile phone. He confessed to killing the deceased jointly with the other two appellants. He gave details as to how he tied the deceased's hands behind his back and how he held him while Tanvir put a rope around his neck and Qayyum tied his legs. He stated that at the brick kiln Qayyum struck the deceased on his head with an iron chain and thereafter the appellants placed his body in a gunny bag and threw it in the well.

52. Malik Farrukh Nadeem, Magistrate 1st Class, Islamabad appeared as PW-6 and deposed that he had recorded the appellants' confessional statements under Section 164 Cr.P.C. after ascertaining that the appellants were ready to make their statements voluntarily. The appellants' confessional statements were tendered in evidence by him. He deposed that he had forwarded the statements in a sealed envelope to the learned Sessions Judge, Islamabad. The appellants were sent to the judicial lock-up on the very same day on which they had recorded their confessional statements.

53. There is hardly any contradiction in the confessional statements of the three appellants. They gave graphic details of how the appellants in concert murdered the deceased and concealed his body by putting it in a gunny bag and throwing it into the well. These statements also elaborate the exact roles played by each of the appellants in putting the deceased

to death. The postmortem report dated 21.01.2009 is also consistent with the explicit description given by the appellants in their confessional statements as to the manner in which the deceased was murdered.

54. It is an admitted position that the appellants' confessional statements under Section 164 Cr.P.C. were recorded on oath. There is no requirement in Section 164 Cr.P.C. for the confessional statements to be recorded on oath. However, whether a Magistrate administers an oath to an accused before recording his confessional statement, this by itself would not vitiate the confession.

55. Qayyum was arrested on 21.01.2009 whereas Tanvir and Usman were arrested on 22.01.2009. The confessional statements of all the appellants were recorded on 29.01.2009, i.e. after they had remained in police custody for about a week. The delay in the recording of the confessional statements *per se* does not vitiate the confessions. In the cases of Khan Muhammad Vs. The State (1999 SCMR 1818) and Ahmad Hassan Vs. The State (2001 SCMR 505), it was held that the delay in the recording of the confession by itself cannot render the confession nugatory if otherwise it is proved on record that the same was made voluntarily.

56. All the appellants, in their statements under Section 342 Cr.P.C., stated that they had retracted their confessional statements since they had been coerced to confess to the commission of a crime which they did not commit. The appellants assert that they retracted their confessional statements in their application for post-arrest bail filed on 12.02.2009. We examined the record of the Trial Court and have found that in their application for bail after arrest, the appellants had pleaded *inter alia* that a pre-written confessional statement was obtained from the appellants at gun point, and that they were warned of dire consequences if they did not confess to having committed the offence that they were alleged to have committed. Be that as it may, since the appellants did not plead guilty to the charge of murder on 29.05.2009, they would be deemed to have retracted their confessional statements.

57. In the case at hand, the retraction of the confessional statement was made by the appellants in their application for post-arrest bail, which was filed on 12.02.2009, which is almost two weeks after their confessional statements were recorded by the Executive Magistrate. The

question whether mere retraction of a judicial confession would render the confession unreliable to sustain a conviction was recently examined by the Division Bench of this Court in the case of Shahid Azeem Vs. The State (2018 P.Cr.L.J. 1653), wherein it was held as follows:-

> ***"18. It is, therefore, obvious from the above precedent law that a retracted judicial confession could be legally taken into consideration if the Court is satisfied that it was true and recorded voluntarily i.e. not obtained by torture, coercion or inducement. However, though a retracted confession is sufficient to sustain even a conviction of capital punishment but the rule of prudence requires to consider the surrounding circumstances and that it should not be acted upon unless corroborated by other credible evidence in material particulars. Depending on the facts and circumstances in each case, delay in recording a confessional statement may or may not be fatal. The Recording Magistrate has essentially to observe the mandatory procedure highlighted by the august Supreme Court in the case of Azeem Khan and another v. Mujahid Khan and others supra.***

58. For a judicial confession, whether later retracted or not, to form the basis of a conviction, it must first be tested whether the confession is voluntary and truthful inculpating the accused in the commission of the crime. For a confession to be proved to have been made voluntarily, the Court has to satisfy itself that all the prerequisites under Section 164 Cr.P.C. had been fulfilled. Where such conditions are fulfilled, the mere fact that a confession is retracted by the accused would not *ipso facto* denude it of its evidentiary value.

59. The Rules and Orders of the Lahore High Court, which applicable in the Islamabad Capital Territory at the relevant time, prescribe the mode and manner in which the Magistrate is to record the confessional statement of an accused under Section 164 Cr.P.C. The Memorandum of the Inquiry by the Magistrate must show that it has been explained to the accused that he is not bound to make a confession, and that if he does so, it may be used as evidence against him. The Magistrate can also put such further questions to the accused as may be necessary to enable him to judge whether he is acting voluntarily. In arriving at his conclusion that the confession is being made voluntarily, the Magistrate is required to consider *inter alia* the period during which the accused has been in police custody. Furthermore, the Magistrate is required to make sure that the confession is not a result of any undue influence or ill treatment. The Magistrate is required to ask the accused whether he understands that he is not bound to make a confession; that his statement is being

recorded by a Magistrate and that if he makes a confession, it may be used as evidence against him; that he is making a statement voluntarily; and that after making a statement before the Magistrate, he will not be remanded to police custody but will be sent to judicial lock-up. The Magistrate is required to specifically ask the accused whether he is making a statement voluntarily, and his reasons for wishing to make a statement.

60. We have had the opportunity of going through the appellants' confessional statements as well as the evidence of the Executive Magistrate and find that procedure adopted for the recording of these statements complies with most of the requirements of Section 164 Cr.P.C. read with the Rules and Orders of the Lahore High Court. The significant omission in these statements and in the testimony of the Executive Magistrate is that they do not show that it was explained to the appellants that after making the statements, they will not be remanded in police custody but will be sent to the judicial lock-up. In his cross-examination, the Magistrate deposed *inter alia* that he did not tell the appellants that *"they will not be handed over to the police after their statements."* He also admitted to not having passed any judicial order for remanding the appellants in judicial custody after the recording of their confessional statements. Furthermore, it was deposed that the appellants were produced before him in police custody, and that after recording their statements they were handed over to the police for remand to judicial custody. The I.O. (PW-10), in his cross-examination, had deposed *inter alia* that he had not obtained an order from the Magistrate for remanding the appellants to judicial custody *"as the said order was already available."* However, an order for remanding the appellants to judicial custody after the recording of their confessional statements is not on the record.

61. The importance of the accused being made aware by the Magistrate that after the recording of their confessional statements, they would not be handed back to the police but would be remanded to judicial custody has been emphasized by the Hon'ble Supreme Court in the case of Azeem Khan Vs. Mujahid Khan (2016 SCMR 274) in the following terms:-

"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."

(Emphasis added)

62. In the said case, the Magistrate, who had recorded the confessional statements of the accused persons, had handed them over to the police officer who had produced them in the Court in handcuffs. The Hon'ble Supreme Court, after admonishing the Magistrate for his carelessness and scant knowledge of the law, held that the confessions recorded were inadmissible and could not be relied upon.

63. The learned Trial Court appears to have been cognizant of the lapses and irregularities in the procedure adopted by the Executive Magistrate while recording the appellants' judicial confessions. However, it formed the view that these irregularities do not vitiate the entire proceedings conducted by the Executive Magistrate. The learned Trial Court gave evidentiary value to the judicial confession by holding

that there was nothing on the record to show that the statements were obtained under coercion.

64. Although the judicial confession made by the appellants synchronize with facts such as the recoveries of the deceased's belongings from the appellants; the pointation of the deceased's body by Qayyum on 21.01.2009; and the pointation of the crime scene by the other two appellants on 22.01.2009, but since the requirement to explain to the accused that after making confessional statements they would not be handed over back to the police but sent to judicial lock-up has been variously held by the Hon'ble Supreme Court to be mandatory, the unpardonable lapse by the Executive Magistrate in this case not to have discharged the said mandatory requirement would render the appellants' confessional statements inadmissible. It has consistently been held that where the custody of the accused making a confessional statement before a Magistrate is handed over back to the police, such statement cannot be held to be voluntary in nature. Reference in this regard may be made to the following case law:-

65. In the case of Azeem Khan Vs. Mujahid Khan (2016 SCMR 274), the Magistrate was held to have committed an illegality by handing over the accused after recording his confessional statement to the same police officer who had produced him in the Court in handcuffs. Such confession was held to be of no legal worth and was excluded from consideration. The Magistrate was also held to have compromised his judicial obligations by not complying with the prescribed procedure for the recording of judicial confession.

66. In the case of Nazir Shehzad Vs. The State (2009 SCMR 1440), the Hon'ble Supreme Court held that the retracted judicial confessions made by the accused were inadmissible in evidence and could not be used against the accused for the reasons that the Judicial Magistrate had admitted that after recording the statements of the accused he handed over the custody of accused back to the police, and that the confessional statement showed that before the recording of statement, the accused was not informed that he would not be handed over back to police whether he confessed or not.

67. In the case of Ghulam Rasool Vs. The State (1977 PCrLJ 985), the Division Bench of the Hon'ble Lahore High Court excluded the

confessional statement of the accused recorded by the Magistrate from the prosecution evidence on the ground that after the recording of the statement, the custody of the accused was delivered back to the same police officer who had produced him before the Magistrate.

68. It is noted with utter dismay that but for the lapse on the part of the Executive Magistrate in this case, the appellants' confessional statements would have been admissible. The Magistrate who recorded the appellants' confessional statements was an Executive Magistrate and not a law graduate. If the requirements of Section 164 Cr.P.C. and the procedure laid for the recording of confessional statements in the Rules and Orders of the Hon'ble Lahore High Court are not strictly adhered to by the Magistrates while recording confessional statements of the accused, it may lead to a serious miscarriage of justice. In this case, the responsibility to record the confessional statements of the appellants was entrusted to the Executive Magistrate by the District Magistrate. The District Magistrate ought not to entrust such essential responsibilities to the Magistrates who are not well versed with the requirements of the law on the subject.

COMMON INTENTION:-

69. The charge against the appellants had also been framed under Section 34 of the P.P.C., which reads thus:-

> ***"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."***

70. Section 34 P.P.C. does not create a distinct offence but lays down the principle of joint criminal liability. The necessary conditions for the application of Section 34 P.P.C. are common intention to commit an offence and participation by all the accused in doing an act or acts in furtherance of that common intention. If these two ingredients are established, all the accused would be liable for the offence. That is to say, if two or more persons had common intention to commit murder and they had participated in the acts done by them in furtherance of that common intention, all of them would be guilty of murder. It is well established that common intention presupposes prior concert. It requires a pre-arranged plan because before a person can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of all of them. The plan need not be

elaborate nor is a long interval of time required. It could arise and be formed suddenly. There must have been a prior meeting of minds. Reference in this regard may be made to the following case law:-

i) In the case of Muhammad Abid Vs. The State (2011 SCMR 1148), it was held as follows:-

> ***"10. Once it is found that the accused persons had common intention to commit the crime, it is immaterial as to what part was played by whom as law as to vicarious liability is that those who stand together, must fall together. The question what injuries were inflicted by a particular accused in cases to which section 34, P.P.C. applies is immaterial, the principle underlying the section being that where two or more persons acted with a common intention each is liable for the act committed as if it had been done by him alone."***

ii) In the case of Muhammad Yaqoob Vs. The State (PLD 2001 SC 378), it was held as follows:-

> ***"In so far as section 34, P.P.C. is concerned it deals with the acts done by several persons in furtherance of common intention. It is neither a punitive section nor does enact a rule of evidence but mainly relates to the concept of joint liability, it simply means that if two or more persons intentionally commit an offence jointly which amounts to as if each of them had committed it individually and they will have to share the consequences jointly subject to the condition that at the time of commission of offence each of them remained present (a mere presence at the spot would not be ipso facto sufficient to hold a person vicariously liable and sufficient evidence should be available to prove the factum of intention) and the offence was committed with common intention which presupposes prior concert. It must be proved that the offence was committed in concert pursuant to the prearranged plan. It was held a few decades earlier by this Court which still holds. the fields that "it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all. The inference of common intention should never be reached unless it is a necessary inference deducible from the circumstances of the case. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference or the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis". (1955) SCR 1083, (1955) Cr.LI 572).***
>
> ***It is also well-entrenched legal position that "the section is intended to meet a case in which it may be difficult to distinguish between the acts oil individual members of a party who act in furtherance of common intention of all or to prove exactly what part was played by each of them. The principle which the section embodies is participation in some action with the common intention of committing a crime; once such participation is established. section 34 is at once attracted PLD 1969 SC 158, AIR 1960 SC 889, AIR 1956 All. 341 (DB)."***

iii) In the case of Muhammad Arshad Vs. The State (PLD 1996 SC 122), it was held as follows:-

> ***"Section 34 P.P.C. which embodies the rule of vicarious liability contemplates an act done in furtherance of common intention of all. The essence of liability envisaged under this section lies in the existence of a common intention and to attract the application of this provision, it has to be shown that the criminal act complained of was done by one of the accused in furtherance of common intention of all. Now the intention is a state of mind which is not susceptible of direct proof and can only be inferred from the attendant circumstances of the crime. A prior the existence of common intention which usually consists of motive, pre-content and pre-arrangement cannot always be proved by direct evidence. In some cases, direct evidence such as confessions or testimony of approver may be available to prove the common intention but in most of the cases, it has to be gathered from the facts disclosed in evidence and surrounding circumstances of the case."***

iv) In the case of Pandurang Vs. The State of Hyderabad (PLD 1956 SC (India) 176), it was held as follows:-

> ***"Now in the case of section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, 'the act must have' been done in furtherance of the common intention of them all Mahbub Shah v. King-Emperor ((1945). L R 72 I A 148, 153, 154). Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case Barendra Kumar Ghosh v. King-Emperor ((1924) L R 52 I A 40, 49) and Mahbub Shah v. King-Emperor (supra). As their Lordships say in the latter case, "the partition which divides their bonds is often very thin nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".***
>
> ***The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly, as for example, when one man calls on by standers to help him kill a given individual and they, either by their words or their acts, indicate their assent to him and join him in the assault. There is then the necessary meeting of the minds. There s a pre arranged plan however hastily formed and rudely conceived. But pre-arrangement there must be and premeditated concert. It is not enough, as in the latter Privy Council case, to have the same intention independently of each other, e.g., the intention to rescue another and, if necessary, to kill those who oppose."***

71. In the case of Mahbub Shah Vs. King Emperor (AIR 1945 PC 118), it was held that *"the inference of common intention within the meaning of the term in Section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case."*

72. The learned Trial Court convicted the appellants for having a common murderous intention. Existence or otherwise of common intention depends upon facts and circumstances of each case. Not making any reference to the appellants' judicial confessions, we note that Qayyum, while in police custody, had confessed that he along with Tanveer and Usman had murdered the deceased. The manner in which the deceased was murdered and his body concealed was most certainly not a one-man job. Although the pointation by Tanveer and Usman of the place where the deceased was murdered and his body disposed of had been held by us not be of any evidential value, what is of significant importance is the deceased having been last seen alive by Tassawar Hussain (PW-2) in the company of all three appellants, and in the recovery of the deceased's belongings from their houses. The last seen evidence of Tariq Mehmood (PW-1) and Tasawwar Hussain (PW-2) in conjunction with the pointation by Qayyum as to the place where the deceased was murdered and his body disposed of as well as the implication of Tanvir and Usman by Qayyum and the recovery of the deceased's belongings from each of the appellants is sufficient for us to conclude that the appellants had a common intention and the necessary meeting of the minds to murder the deceased.

73. Although the last seen evidence in this case is circumstantial in nature but when seen with the factum of the recovery of the deceased's body on the pointation of Qayyum; the recovery of the deceased's phones SIMs (Exh.P-14/1-4) and his mobile phone Nokia N95 (Exh.P/5) from Qayyum/appellant No.1; the recovery of mobile phone W-850 Sony Ericson (Exh.P/6) from Usman / appellant No.2; and the recovery of the deceased's wallet (Exh.P/7), identity card (Exh.P/8) and his two educational testimonials (Exh.P/9 and Exh.P/10) from Tanvir/appellant No.3 are in our view circumstances incompatible with the innocence of the appellants. Learned counsel for the appellants could not point out any evidence or material on the record which would lead to our

hypothesis consistent with the innocence of the appellants. Therefore, the conviction must be upheld.

74. In view of the above, we are of the opinion that the instant case does not present special features warranting interference in the appellants' conviction. However, since we have held that the judicial confessions made by the appellants could not be relied upon, and since the appellants have remained incarcerated since January, 2009 i.e., more than twelve and a half years, we reduce the appellants' sentence from imprisonment for life to the term already undergone/served by them. Hence, criminal appeal No.142/2010 is partly allowed. Since we have been given no reason to enhance the sentences awarded to the appellants, criminal revision No.71/2010 is dismissed.

(CHIEF JUSTICE) **(MIANGUL HASSAN AURANGZEB)**
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2021

(CHIEF JUSTICE) **(JUDGE)**

APPROVED FOR REPORTING

Qamar Khan*

Schedule –A

"164. Power to record statements and confessions: *(1) Any Magistrate of the First Class and any Magistrate of the Second Class specially empowered in this behalf by the Provincial Government may, if he is not a police officer, record any statement or confession made to him in the course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.*

(1-A) Any such statement may be recorded by such Magistrate in the presence of the accused, and the accused given an opportunity of cross-examining the witness making the statement.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case: Such confessions shall be recorded and signed in the manner provided in Section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) A Magistrate shall, before recording any such confessions explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and when he records any confession, he shall make a memorandum at the foot of such record to the following effect:--

> *"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him-*

(Signed) A.B. Magistrate.

Explanation: It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having Jurisdiction in the case."

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