

ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Jail Appeal No.47/2009

Meharban Nadeem
Versus
The State

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	30.05.2017	Ms. Saira Khalid Rajput, Advocate for appellant Hafiz Kousar Hussain Gondal, Advocate for complainant. Mr. Yasir Barkat Ch., State Counsel

Vide our judgment of even date in Criminal Appeal No. 286/2009 titled Muhammad Arshad Kiani vs. The State, etc., the instant jail appeal is disposed of in the following manner:-

".....this Court allows the Criminal Appeal No.283/2009 (Muhammad Arshad Kiani vs. The State, etc.) and Jail Appeal No.47/2009 (Meharban Nadeem vs. The State, etc.) and the conviction awarded to appellants is hereby set-aside and appellants are acquitted from the charges of murder and dacoity and they be released forthwith, if not required in any other case, therefore, answers in NEGATIVE the Murder Reference No.50-RWP/2009 (The State vs. Muhammad Arshad Kiani & another) and death sentence awarded to the appellants is NOT CONFIRMED."

(ATHAR MINALLAH) (MOHSIN AKHTAR KAKANI)
JUDGE JUDGE

Announced in open Court on: 19th June, 2017.

JUDGE

JUDGE /

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD. **JUDICIAL DEPARTMENT.**

Criminal Appeal No.286/2009
(*Muhammad Arshad Kiani vs. The State, etc.*)

Jail Appeal No.47/2009
(*Meharban Nadeem vs. The State, etc.*)

Murder Reference No.50-RWP/2009
(*The State vs. Muhammad Arshad Kiani & another*)

Appellants by: Mr. Haider Mehmood Mirza, Advocate for
appellant (Muhammad Arshad Kiani)

Ch. Muhammad Junaid Akhtar, Advocate for
appellant (Meharban Nadeem)

Ms. Saira Khalid Rajput, Advocate for appellant
(Meharban Nadeem) at State expenses

Complainant by: Hafiz Kousar Hussain Gondal, Advocate.

State by: Mr. Yasir Barkat Ch., State Counsel

Date of Hearing: 30.05.2017.

JUDGMENT

MOHSIN AKHTAR KAYANI, J:- Through this common judgment, we intend to decide Criminal Appeal No.286/2009 (Muhammad Arshad Kiani vs. The State, etc.), Jail Appeal No.47/2009 (Meharban Nadeem vs. The State, etc.) and Murder Reference No.50-RWP/2009 (The State vs. Muhammad Arshad Kiani & another).

2. The appellants through the criminal appeal and jail appeal have assailed the judgment dated 23.06.2009, whereby the appellants were convicted under section 302(b)/34 PPC and sentenced to death as Tazir along with sum of Rs.200,000/- each to be paid to the legal heirs of deceased Muhammad Zahid as compensation as envisaged under section 544-A Cr.P.C., failing which they shall further undergo six (06) months S.I. each

and the said sum of compensation shall be recovered from them as arrears of Land Revenue. Both the appellants were also convicted under section 392/34 PPC and sentenced to 10 years R.I. each along with fine of Rs.25,000/- each, in case of default in payment of fine, they shall further undergo S.I. for one month, while learned Trial Court through Murder Reference No.50-RWP/2009 sought confirmation of death penalty awarded to the appellants or otherwise.

3. Brief facts of the instant case as referred in the complaint (Exh.PA/1) are that complainant/Muhammad Ijaz PW-13 lodged a criminal case that his nephew Muhammad Zahid s/o Ghulam Shabbir, aged about 18 years, who used to drive taxi bearing registration No.JMB-89 of make and model Suzuki Mehran 1989, left for his work on 10.05.2008 and when he did not come back, he started searching for him whereupon he met one Asif Mehmood, who told him that he was near Motorway Chowk and police informed him that a dead body of a young man was lying near Kashmir Housing Society, Sector G-15, Islamabad. On this note, Muhammad Ijaz/complainant and Asif Mehmood reached at the said place at about 12 o'clock in the noon, where they found and identified the dead body as of his nephew, Muhammad Zahid deceased, whose neck was found cut through a *Churri* and a white color waistband was tightened around his neck. The dead body was lying in an open place under the trees. On his complaint, FIR No.109 dated 12.05.2008, under sections 302, 392, 411/34 PPC, P.S. Tarnol, Islamabad was registered, referred on record as Exh.PA. Initially, the investigation was conducted by PW-19 Bashir Ahmad Noon/DSP-CIA, who arrested the appellants Muhammad Arshad Kiani and Meharban Nadeem along with the lady co-accused, Mst. Shamim Akhtar, thereafter, the investigation was entrusted to PW-18 Allah Bakhsh/IO, who *Challaned* the appellants and submitted his report under section 173 Cr.P.C.

4. After submission of report under section 173 Cr.P.C., the learned Trial Court framed the charge under sections 302, 392, 411/34 PPC against accused Muhammad Arshad Kiani, Meharban Nadeem, Mst. Shamim Akhtar and Mehar Wahab vide order dated 19.02.2009. Thereafter, the prosecution, in order to substantiate the case, produced 20 witnesses, including the witnesses of recovery, last seen and identification parade along with Dr. Farrukh Kamal/CMO, who conducted the postmortem of the deceased. Where after, the learned Trial Court after completion of the trial, got recorded the statements of accused under section 342 Cr.P.C. and convicted the appellants Muhammad Arshad Kiani and Meharban Nadeem and sentenced them to death under section 302(b)/34 PPC as well as convicted them under section 392 PPC and sentenced them for 10 years R.I. through the impugned judgment, whereas co-accused, Mst. Shamim Akhtar and Mehar Wahab, had been acquitted, as the charge against them was not proved.

5. Learned counsel for appellants contended that there is no direct evidence available against the appellants as the entire case is based upon circumstantial evidence; that the recovery witnesses did not clearly prove the recovery of mobile as well as crime weapon, *Churri*, in accordance with law and there are major discrepancies in the statements of PWs; that the entire case is based upon recoveries, whereby the Investigation Officer connected the appellants with the alleged crime, whereas the evidence of last seen is the weakest type of evidence and even the identification parade was not conducted as per settled rules; that the witnesses of identification parade are not consistent regarding the identification of accused, even PW-20 Muhammad Liaqat Abbasi/Magistrate, while conducting identification parade did not proceed in accordance with the requirements referred by the Apex Court in different judgments; that the entire case is silent qua the motive and even the Investigation Officer failed to connect

the appellants with the alleged crime, as the motive is shrouded in mystery, therefore, the case is not believable and the conviction awarded to the appellants is based upon misreading and non-reading of entire evidence.

6. Conversely, learned counsel for the complainant as well as the State, argued that both the appellants are directly connected with the alleged crime by way of recovery of mobile phone belonging to deceased from Muhammad Arshad Kiani on his disclosure as well as recovery of crime weapon, bloodstained Churri, from Meharban Nadeem on his pointation, which was sent to Chemical Examiner and the same was declared as stained with human blood through Exh.PZ. They further contended that appellants failed to substantiate their case through their answers against the question put to them in their statements under section 342 Cr.P.C. as to why this case is registered against them and that the recovery is fully substantiated, connected with the commission of crime and proved against the appellants.

7. Arguments heard, record perused.

8. From the perusal of record, it has been observed that Muhammad Zahid/deceased, aged about 18 years, was a taxi driver who used to drive a taxi bearing registration number JMB-89 of make and model Suzuki Mehran 1989, was missing from 10.05.2008 and never come back, whereupon his real uncle, PW-13 Muhammad Ijaz/Complainant lodged a complaint Exh.PA/1, which reads as follow:

"میرا بھتیجا محمد زاہد ولد غلام شبیر بممر قریب 18 سال اپنی ٹیکسی نمبر JMB-89 مہران NTS کلر ماڈل 1989 چلاتا تھا جو مورخہ 10.05.2008 کو بوقت قریب 10 بجیدن گھر سے اپنی گاڑی پر مزدوری کے لیے نکلا اور رات کو جب گھر واپس نہ آیا تو ہمیں اس کی فکر لاحق ہوئی تو ہم نے اس کی وگاڑی کی تلاش شروع کر دی جو امر و ز تلاش بسیار کے دوران معہ آصف محمود موٹر وے چوک کے نزدیک موجود تھا کو بذریعہ پولس اطلاع موصول ہوئی کہ ایک نوجوان شخص کی نعش کشمیر ہاؤسنگ سوسائٹی سیکٹر 15-G اسلام آباد میں پڑی ہوئی ملی ہے تو اس اطلاع پر میں معہ آصف محمود بوقت قریب 12 بجیدن موقع پر پہنچے تو بھتیجا ایم زاہد کی نعش جس کی گردن سامنے سے تیز دار چھری سے کٹی ہوئی ہے اور گردن کے گرد سفید رنگ کا ازار بند لپٹا ہوا ہے کیکر کے درختوں کے نزدیک خالی زمین پر شمالاً جنوباً پڑی ہوئی ہے۔ میرے سمجھنے کو نامعلوم ملزمان نے ناحق قتل کر کے بڑی زیادتی کی ہے۔"

9. On the complaint (Exh.PA/1), FIR No.109 dated 12.05.2008, under sections 302/34 PPC, P.S. Tarnol, Islamabad, referred as Exh.PA, was registered by Muhammad Nawaz/SI, who appeared as PW-1 and stated before the Court that he was on duty on 12.05.2008, when he received a complaint through Sarfraz/Constable No.3227, upon which he lodged the FIR Exh.PA. After the registration of the said FIR, police official namely Muhammad Aijaz/ASI, P.S. Tarnol, took the dead body to the hospital and an application for postmortem (Exh.PS) was submitted by Muhammad Nawaz/S.I, whereupon PW-14 Dr. Farrukh Kamal/CMO conducted the postmortem and prepared his report Exh.PM/1. PW-14 Dr. Farrukh Kamal/CMO got recorded his statement before the Court whereby he stated that he conducted the postmortem of deceased Muhammad Zahid son of Shabir, caste Awan, aged 18/19 years, resident of House No.10, Street No.87, Sector G-6/3, Islamabad and permanent resident of Soak, P.S. Fateh Jang, District Attock. The postmortem report (Exh.PM) was duly signed by him. His signatures are (Exh.PM/1). During postmortem, he observed as under:

“EXTERNAL APPEARANCE

A dead body of young boy, length 5 feet 8 inches, lying right lateral position, wearing white shalwar Qameez heavily blood stained. Right iliac fossae greenish tinch.

Injury No.1. Cut throat, 10x3 inches in size just above thyroid eminence, cutting all underline muscles, vessels, Esophagus, tracheae, down deep to the survical vertebrae.

Azarband was also found around the neck and it is tightened skin deep.

Skin slip on the lower abdomen and feet.

Eyes and mouth semi opened.

INTERNAL EXAMINATION

All organs and visceras were healthy except neck vessels were ruptured and cut.

ABDOMEN.

All visceras healthy.

OPINION

In my opinion, deceased died due to throat cut which causes rupture of tracheae, esophagus, neck vessels, muscles and nerves. All injuries are antemortem in nature and sufficient to cause death in ordinary course of life. Time between injury and death is one to two or few minutes and between death and postmortem, more than 36 hours approximately."

However, during the course of cross-examination, he admitted before the Court that there was no need to mention rigor mortis as after the elapse of 24 to 36 hours, same diminishes and develops stage i.e. peeling of skin.

10. The prosecution has produced Alamgir Khan/Moharrar-ASI, P.S. Golra Sharif, Islamabad as PW-2, who only received bloodstained earth in sealed parcel in the Malkhana and the same was handed over to Muhammad Shafique/HC.

11. Muhammad Shafique/HC, appeared as PW-3 and only confirmed that he received sealed parcel of bloodstained earth for onward transmission to the office of Chemical Examiner, Lahore.

12. Muhammad Ijaz/ASI posted at P.S. Tarnol, appeared as PW-4 and stated that he was on patrolling duty along with Muhammad Nawaz/S.I., Muhammad Amir/HC, Sarfraz/HC on official vehicle, bearing registration No.IDP-1326, driven by Sajid Mehmood/Constable, upon reaching the link road of Kashmir Housing Society, Sector G-15, Islamabad at about 11:40/11:45 am, a dead body was seen from some distance near *Keekar* trees. He further stated before the Court that when they reached near the dead body, there was a slit on the throat of the dead body and a string (*Azarband*) was also wrapped around the throat of the dead body. PW-4 informed the Police Station from where mobile number of the heirs of deceased was received and he contacted one Muhammad Ijaz/Complainant, real uncle of deceased, who subsequently reached at spot and identified the dead body.

13. The prosecution produced PW-5 Shujaatullah/Constable, who is a wireless operator and stated before the Court that he had received a wireless message regarding missing of Zahid/driver, who was driving a taxi bearing registration No. JMB-89, whereupon he entered the message into his log book, though during the course of cross-examination, he admitted that he had not brought the log book before the Court.

14. The prosecution has produced PW-6 Muhammad Riaz/Constable posted at CIA on 20.10.2008, who stated before the Court that Moharrar of CIA handed over to him one sealed parcel, containing *Churri*, for onward transmission to the office of Chemical Examiner, Lahore and he deposited the same on the very same day while he collected the parcel again on 25.10.2008 and returned it back to Moharrar.

15. Besides these witnesses, the entire prosecution case is based upon the witnesses of recoveries, last seen evidence as well as identification parade, therefore, in order to justify these details, the set of last seen witnesses is discussed at the first instance.

16. The prosecution has produced the last seen witnesses, PW-11 Ghulam Farid, PW-13 Muhammad Ijaz/Complainant and PW-16 Ghulam Shabir, therefore, the testimony of PW-11 is discussed at the first instance.

17. PW-11 Ghulam Farid s/o Manzoor Ahmad, caste Awan, aged 49 years, Driver, resident of Mohallah Mulana Bokhari, Bokhari Street, Fateh Jang, District Attock, stated before the Court that on 10.05.2008, at about 8:00/8:15pm, he, Asif and deceased Zahid and all taxi drivers, were standing in Aabpara Market, where two men, a woman along with a minor girl, aged about 3/4 years, came and had conversation with Muhammad Zahid deceased, where after deceased informed PW-11 that he is leaving for Chungi No.26 along with aforesaid passengers and also told him that they will take the dinner jointly on his return. PW-11 stated before the Court that

Muhammad Zahid/deceased did not come back and on the next day, Zahid's father, PW-16 Ghulam Shabbir inquired about his son and he told him that Muhammad Zahid left with passengers for Chungi No.26. He further stated that he subsequently came to know that Muhammad Zahid was done to death. PW-11 Ghulam Farid is also a witness of identification parade and joined the identification proceedings on 19.06.2008 at Adyala Jail, along with Asif Mehmood/Taxi Driver, where he categorically stated that initially the latter went inside the jail for the purposes of identification, thereafter he was called where he identified the lady accused, Mst. Shamim Akhtar, before the Magistrate, after that, he joined the identification parade of male accused, where he identified Muhammad Arshad Kiani and Meharban Nadeem, appellants/accused. However during the course of cross-examination, he admitted before the Court that he had not approached the police station on the very day when deceased's father came to inquire about his missing son and he joined the proceedings when police called him.

18. Ghulam Shabbir (father of deceased) appeared as PW-16 and stated that he is gardener by profession and his son, Muhammad Zahid, occasionally used to drive a taxi, bearing registration No. JMB-89 and on 10.05.2008, his son Muhammad Zahid/deceased did not come back to home and on the next day, he visited Aapbara stop, where he met PW-11 Ghulam Farid and Asif Mehmood/Taxi Driver, who told him that his son Muhammad Zahid went along with two males and a female to Chungi No.26. However, later on, he identified the last worn clothes of deceased and categorically stated before the Court that his deceased son was having mobile at the time of recovery of dead body while cash as well as aforementioned taxi, were missing, though upon recovery of the said taxi in later stage, he joined the investigation and identified the aforesaid taxi in

the courtyard of CIA through identification Memo Exh.PC. However, he had not seen the deceased along with the appellants, therefore, his evidence being a last seen witness has no legal worth. However, he conceded one thing that Asif Mehmood and Ghulam Farid belongs to same area, where they are permanently residing. Even, he has not stated the exact details, which were given by other witnesses PW-11 Ghulam Farid and Asif Mehmood/Taxi Driver regarding two males and a female along with a minor girl.

19. The third witness, who claimed to be a last seen witness is Muhammad Ijaz/Complainant, real uncle of deceased, who appeared as PW-13 and stated before the Court that on 10.05.2008, his nephew Muhammad Zahid left house in his taxi at about 10:00 am and did not come back till evening, therefore, he was searched for and on 12.05.2008 police official of P.S. Tarnol informed him that dead body of an unknown person is found, whereupon he along with Asif Mehmood, for the purpose of identification of the dead body, went to the place where the dead body was lying, i.e. Kashmir Housing Society, Islamabad and identified the same as of his nephew, Muhammad Zahid. On his complaint (Exh.PA/1) an FIR (Exh.PA) was got lodged. He also recorded his supplementary statement before the Investigation Officer on 13/14.05.2008, wherein he alleged that the accused persons after causing death of Muhammad Zahid, took away his vehicle and mobile. He also identified the mobile (Exh.P1) on 03.07.2008, which was recovered from the accused and the taxi bearing registration No.JMB-89 (Exh.P2) on 04.10.2008 in the courtyard of CIA, he duly signed the recovery memo Ex.PB and Ex.PC in this regard, respectively. However, during the course of cross-examination, he admitted that Asif Mehmood is his co-villager and Ghazan Khan is also a resident of the same area. He also admitted that, he had not produced any license before Investigation Officer. Moreover, he stated in his examination-in-chief that he had not mentioned

the fact of visiting Asif Mehmood and PW-11 Ghulam Farid on 10.05.2008 in his complaint (Exh.PA/1). However, during the course of cross-examination, he admitted that mobile Exh.P-1 is similar to the mobiles of same model, which are easily available in the market. Altogether, his entire testimony is silent qua the evidence of last seen and he did not fall within the category of last seen witness of a deceased, in fact, he just identified the dead body of deceased and nothing more, therefore, there is nothing incriminating in his testimony against the appellants. In view of above, all the tentative last seen witnesses i.e. PW-13 Muhammad Ijaz/Complainant, PW-11 Ghulam Farid and PW-16 Ghulam Shabbir, father of deceased, have never stated a single word against the appellants nor even justified the requirements of the last seen, therefore, their testimonies are not plausible to award capital punishment to the appellants. The evidence of last seen can only be considered to the extent of last seen evidence and not beyond. In essence, status of last seen evidence has been explained in 2017 PCr.L] 586 [Lah] (Kaleem Ullah alias Bhola vs. State), 2016 YLR 1291 [Pesh] (Kabir Shah vs. The State), 2016 PCr.L] Note 126 [Lah] (Asif Shah vs. State), 2016 PCr.L] 1754 [Kar] (Abdul Ghafoor vs. State), 2017 PCr.L] 400 [Lah] (Imran Ishaque and others vs. The State), and 2010 SCMR 939 (Zafar Abbas vs. The State), whereas in the latter judgment, it is held that:-

“Even otherwise, the evidence of last seen without corroboration is a weak piece of circumstantial evidence to base conviction. Reference in this regard is invited to “Naqibullah v. State (PLD 1978 SC 21) and Karamat Hussain v. State (1972 SCMR 15)”.

20. The other most important piece of evidence, to prove the conviction, is the witnesses of recoveries, therefore, the prosecution in order to prove its case, produced PW-9 Rab Nawaz, the witness of recovery, who is a taxi driver by profession and recorded his statement before the Court that on 03.07.2008, he was in front of Kohinoor Mills at about 4:30/04:45 pm in his

taxi bearing registration number RIM-1337, when Azhar/ASI along with 2/3 police officials and accused Muhammad Arshad Kiani, asked him to associate the recovery proceedings of the mobile, however, he admitted that Muhammad Arshad Kiani in his presence, never disclosed the recovery of the mobile, Nokia 1110, which was allegedly snatched by him from the deceased. He stated that, Muhammad Arshad Kiani/accused led them to the office of plaza, situated at 1st floor, whereupon accused opened the door of the room, where an *almirah* was lying, which was unbolted by him and got recovered a bag, whereupon he opened up the bag and got recovered the mobile, which was produced before Azhar Mehmood/ASI, the mobile was referred as Ex.P1, which was taken into possession vide recovery memo Exh.PE, duly attested by him and Azhar Mehmood/ASI. During the course of cross-examination, he admitted that he did not remember the total number of floors of the plaza from where the alleged recovery was effected, however he admitted before the Court that the door of the room was not locked and no one was present in the said room at the time of recovery and the *almirah*, from where mobile was recovered, was also not locked. However, he also admitted that, *"I was called by police party near the official vehicle where accused made the disclosure."* While he denied the specific disclosure details in his examination-in-chief, therefore, this portion of the statement is not believable.

21. PW-17 Azhar Mehmood/ASI is the other recovery witness, who appeared before the Court and recorded his statement that he joined the investigation of the case on 01.06.2008 at the time of arrest of accused Meharban Nadeem, Muhammad Arshad Kiani, Mst. Shahmim Akhtar w/o of Meharban Nadeem. During the personal search, different articles were recovered from accused, however nothing was recovered to connect the appellants with the alleged crime. Though, on the disclosure of Meharban Nadeem/accused, he got recovered the weapon of offence, *Churri* Ex.P3,

from a place near Kashmir Housing Society, Islamabad on 30.06.2008 at which point recovery memo Exh.PK was prepared and the same was duly attested by him and Rab Nawaz. Similarly, he stated before the Court that, during interrogation on 03.07.2008, Muhammad Arshad Kiani/accused made disclosure and led police party to Koh-e-Noor Rent-a-Car/shop No.22, known as Qasim Plaza, Rawalpindi, from where he got recovered one mobile phone Ex.P1 from an almirah, which was taken into possession by the Investigation Officer vide memo recovery Ex.PE, attested by him and Rab Nawaz. He also stated before the Court that during interrogation on 30.09.2008, Mehar Wahab (acquitted accused) made a disclosure that he purchased Suzuki Mehran bearing registration number JMB-89 from accused persons, namely Muhammad Arshad Kiani, Meharban Nadeem and Mst. Shamim Akhtar. However, during the course of cross-examination, he admitted that the date of recovery referred by him is based upon clerical error regarding the *Churri*, however learned counsel for Muhammad Arshad Kiani/accused cross-examined him, whereupon he stated that he cannot tell the number of SIM, which was recovered on personal search of accused and place of recovery is situated in a plaza and few shops also exist there and there were five (05) police officials along with the accused at the time of recovery. He also admitted that there were number of people available near the market/alleged place of recovery and the accused led the police party to the shop from where alleged recoveries were effected. However, he admitted that the place of recovery was opened and nobody was present there and the accused himself picked up the key underneath the bag, which was lying on the said almirah and opened the lock of almirah. Accused himself picked the mobile from the said almirah and he conceded that Nokia mobile 1110, is easily available in the market and Investigation Officer has not called any person from the locality to join

the recovery proceedings, even he did not remember as to whether Investigation Officer recorded IMEI number of the recovered mobile or not.

22. The third recovery witness to the extent of recovery of mobile, is the Investigation Officer, who appeared as PW-18 Allah Bakhsh/Inspector and stated that on 28.06.2008, he was posted at CIA Center, Islamabad and on the same day, investigation of the present case was marked to him. During the physical remand of Meharban Nadeem/accused, he disclosed that he can led to the place of recovery of *Churri*, which was got recovered in front of Kashmir Housing Society, Islamabad, where one Ghazan was also standing, who also joined the recovery proceedings of the *Churri* Exh.P3, which was wrapped in a polythene paper and recovered underneath two stones. The same was taken into possession vide recovery memo Exh.PK and attested by the PWs. He also stated that during the investigation on 30.07.2008, Muhammad Arshad Kiani/accused also made disclosure that he can led to the recovery of mobile stashed from deceased and on the said date, they reached to Peshawar Road, in front of Saim Plaza, where the accused led to the place of recovery, i.e. Office No.22, situated at the first floor in Saim Plaza, whereupon accused in presence of police, entered in the said office, took the key which was lying underneath a bag placed on an iron almirah and accused himself opened the lock of the bag with the key and got recovered Nokia mobile 1110 Ex.P1, the same was taken into possession vide recovery memo Ex.PE, attested by the said PWs. The said mobile was also identified through identification memo Exh.PB. He further stated that Mehar Wahab (acquitted accused) disclosed on 30.10.2008 that, he can led to the recovery of vehicle bearing registration number JMB-89, which was allegedly snatched from the deceased and claimed to be sold by the accused persons. The friend of Mehar Wahab namely Risal Bahadur, produced the vehicle, which was taken into possession by him vide

recovery memo Ex.PV, duly attested by the PWs and the said vehicle was also identified by the PWs. However, during the course of cross-examination of the Investigation Officer, he admitted before the Court that, when they were heading towards the place of recovery of the mobile, they never stopped their vehicle except in front of the Saim Plaza. However, he admitted that there were 2 persons present in the office No.22, where accused met with only one and he also admitted that both these persons are not the recovery witnesses of the mobile. Furthermore, he admitted that he did not note the IMEI number of the mobile Exh.P1 and also conceded that whenever SIM is loaded in a mobile, IMEI number of a mobile as well as record of incoming/outgoing calls came on record in the concerned company while in this aspect, he did not try to collect IMEI number from the concerned company whereas no receipt of purchase of the said mobile was produced by the complainant to establish the ownership of deceased with the said mobile. Moreover, he stated that the place of recovery i.e. office No.22, was maintained by Asif, who was doing business of car dealing, however he neither placed the name of owner of the office in the column of witnesses nor even recorded his statement under section 161 Cr.P.C. Even he did not take any document from the owner through which it could be established that Muhammad Arshad Kiani/accused was working in the said office.

23. In above referred evidence of three recovery witnesses of mobile (Nokia 1110), following discrepancies have been noted:

- (i) The place of recovery is Saim Plaza, where two persons were sitting but they were not made witnesses.
- (ii) The mobile Exh.P1 was not identified through IMEI number.
- (iii) The Investigation Officer has not obtained any document to connect the recovered mobile with Muhammad Arshad Kiani/appellant.

- (iv) No receipt of purchase of mobile was ever taken into custody.
- (v) The office owner was not made witness of recovery, nor his statement under section 161 Cr.P.C. was recorded.
- (vi) The date of recovery is 30.07.2008, wherein the other witness PW-9 Rab Nawaz, private witness, referred the place of office situated at 1st floor, where he stated that accused opened the door of the room, where an almirah was lying and he unbolted the almirah and recovered a bag. Muhammad Arshad Kiani/accused opened the bag, where a mobile was lying, whereas the other witnesses have not stated these facts in their examination-in-chief.
- (vii) PW-9 stated that no one was present in the room.
- (viii) PW-17 declared the place of recovery as Qasim Plaza, whereas the other witnesses declared the plaza as Saim Plaza. The said witness stated that, shop was opened and nobody was present and accused himself opened the lock of the almirah and picked the key from underneath a bag, which was lying on the said almirah.
- (ix) Mobile Nokia 1110 is easily available in the market.
- (x) Investigation Officer never called any person to join the recovery proceedings.

24. The above referred three recovery witnesses, clearly made serious discrepancies in the entire proceedings of the recovery and there are material contradictions in the name and place of the recovery, even the place of recovery was open as stated by two witnesses, whereas Investigation Officer stated that, two persons were available in the place of recovery but they were not produced as recovery witnesses, hence the entire recovery proceedings seem to be artificial and unpersuasive. Whereas, the recovered mobile, Nokia 1110, is commonly available in the

market and not a specific item that belongs to deceased, even otherwise the Investigation Officer took no pain to identify the IMEI number of the recovered mobile in order to connect it with deceased, hence it can safely be concluded that the recovered mobile is of an ordinary nature, which is easily available in the market and the same was not identified with reference to its IMEI number by the Investigation Officer. Therefore, it can safely be concluded that, Investigation Officer has withheld the best available evidence in terms of Article 129(g) of the Qanun-e-Shahadat Order, 1984 whereby the presumptions might go against the prosecution case if IMEI number comes on record, hence, the entire recovery regarding mobile has no bearing in the case and same is therefore disbelieved.

25. The other important piece of evidence produced by the prosecution against Meharban Nadeem/appellant is the recovery of *Churri*, which was identified and recovered with the help of three witnesses, PW-12 Ghazan Khan, PW-17 Azhar Mehmood/ASI and PW-18 Allah Bakhsh/Investigation Officer, therefore, the aforementioned witnesses have to be pored over separately regarding the recovery proceedings of *Churri* in order to test its reliability.

26. Firstly, PW-12 Ghazan Khan was produced by the prosecution, who stated that on 30.06.2008, he was standing slightly ahead of Chungi No.26, near Kashmir Housing Society, Islamabad, and meanwhile police vehicle came, which was stopped by him and stated that he has to go to Kashmir Housing Society, therefore, he accompanied the police. After some time, the vehicle was got stopped by Meharban Nadeem/accused near the board of Kashmir Housing Society and subsequently pointed out the place of recovery and got recovered the *Churri* Exh.P3, which was lying underneath the stones and the same was stained with blood. The *Churri* was sealed into parcel and taken into possession vide recovery memo Ex.PK, duly attested by PW-17 Azhar Mehmood/ASI, who also prepared rough site plan of the

place of recovery. However, he admitted before the Court during the course of cross-examination that, he has no relationship with deceased but he admitted that he belongs to the same area of Fateh Jang, District Attock and he visited the house of deceased for the purpose of condolence and that he condoned with the whole family of the deceased, regarding the murder of Muhammad Zahid. He stated that *Churri* was in polythene paper, probably of white color and he signed the recovery proceedings. He admitted that recovered *Churri* Exh.P3 is easily available in the market and he stated that recovery memo contains the date of recovery as 30.08.2008.

27. The other witness of the recovery proceedings is PW-17 Azhar Mehmood/ ASI, who stated that during interrogation of Meharban Nadeem on 30.06.2008, he made a disclosure and led the police party to Kashmir Housing Society, Islamabad from where he got recovered weapon of offence i.e. bloodstained *Churri* Exh.P3, underneath the stones, which was taken into possession vide recovery memo Ex.PK, duly attested by him and PW-12 Ghazan Khan. However, during the course of cross-examination, he admitted that PW-12 Ghazan Khan met them in front of Kashmir Housing Society, Islamabad which is at distance of about 1/2 km from the place of recovery and the recovery memo bears the date as 30.08.2008. Whereas, the most important statement got recorded by him is, *"It is correct that place of recovery of Churri is not owned by the accused and is accessible to general public."*

28. The third witness of recovery, PW-18 Allah Bakhsh/Investigation Officer, who stated before the Court that Meharban Nadeem/accused during his physical remand on 30.06.2008 made disclosure that he can led to the recovery of *Churri* and during their way to Kashmir Housing Society, Islamabad, they met one Ghazan standing on the road, who requested him that he has to go at some distance on the same side, however he stated that the accused led to the recovery of bloodstained *Churri*, which was recovered

underneath two stones and the same was wrapped in polythene paper and the recovery memo was prepared as Exh.PK. However, during the course of cross-examination, he admitted that no security staff was available at the gate of Kashmir Housing Society, Islamabad.

29. By poring over the statements of the three recovery witnesses, following discrepancies have been opened up regarding recovery of *Churri*:

- (i) Place of recovery is an open place and not owned by the Meharban Nadeem/accused.
- (ii) The place of recovery is situated in the Kashmir Housing Society, Islamabad where no security staff was available at the gate during the recovery proceedings of *Churri*.
- (iii) PW-12 Ghazan Khan was not known to the Investigation Officers even not related to the entire proceedings, though he was boarded on the vehicle in respect of lift while later on, during the course of cross-examination, he admitted that he belongs to the same area and went to the deceased house for condolence with the entire family.
- (iv) The *Churri* was recovered from polythene bag, which was neither taken into possession nor produced before the Court.
- (v) Recovered *Churri* Exh.P3 is easily available in the market.
- (vi) Recovery date in the recovery memo is 30.08.2008 while statements of recovery witnesses reflect the same as 30.06.2008.

30. Besides the above mentioned major defects, the third limb of the entire prosecution case, which was taken into consideration by the learned Trial Court for the purposes of conviction, is the identification parade of the accused. In order to verify the proceedings of identification parade, it is necessary to take into account the statement of PW-11 Ghulam Farid, who also appeared as witness of last seen in the trial, whereas his additional role

referred in the evidence is regarding his participation in identification parade proceedings on 19.06.2008, whereby he stated that he identified the lady passenger as Mst. Shamim Akhtar before the Magistrate and also identified Muhammad Arshad Kiani and Meharban Nadeem, however in order to verify the requirements of the identification parade, the principles on the subject in different judgments passed by Apex Court are reproduced as under:

"2011 SCMR 769 (Muhammad Ayaz and others vs. The State)

"28. Part 'C' of the Chapter '11' of Volume III of the Rules and Orders of the Lahore High Court carries some commandments in the matter of identification parades which are in the following terms:--

"(1) List of all persons included in the parade should be prepared.--- The Magistrate incharge of an identification parade should prepare a list of all persons, including the accused, who form part of the parade. This list should contain the parentage, address and occupation of each member of the parade.

(2) Note about identification by witnesses.---When any witness identifies a member of the parade, the Magistrate should note in what connection he is identified.

(3) Objection or statements by accused or identification witnesses to be recorded and power of Magistrate to decide objections.---Should the accused make any complaint or statement it should be recorded by the Magistrate. If from his personal knowledge the Magistrate is able to decide beyond doubt that the complaint is false or futile, a note to this effect should be made.

(4) Duty of Magistrate to record precautions taken and to note other points.--

(a)

(b) whether the person to be identified is handcuffed or is wearing fetters; and if so, whether or not other persons taking part in the parade are handcuffed or are wearing fetters, and also whether or not they are inmates of the Jail.

(5) 1.

2.

3. As an identification parade is a test of the identifying witness's ability to recognise the culprit by what he appeared to be at the time of the commission of the offence, it is fair both to the prosecution and the accused that the members of the parade should be presented in a normal state and, if possible, the dress of the parade should have resemblance to the accused as he appeared to the witness at the time of the commission of the offence. It should, therefore, be impressed upon the Magistrates in all districts to ensure, while conducting identification parades, that the members of the parade including the accused are not allowed "make up", are

presented in a normal state and if possible the parade be dressed as the accused was reported to be by the witness at the time of the commission of the offence.

Likewise the absence of complete description of the dummies at the test identification parade without their addresses, their occupation and without any clue whether they were fellow prisoners or outsiders; the admitted dissimilarities in height, physique, features, complexion, appearance and dress of the dummies and the accused persons; the absence of any information whether the accused persons and the dummies were similar in the matters of beards or being clean-shaven; the absence of disclosure by the prosecution about the actual date of arrest of the three accused persons."

1985 SCMR 721 (Khadim Hussain vs. The State)

"The mere fact that a witness is able to pick out an accused person from amongst a crowd does not prove that he has identified that accused person as having taken part in the crime which is being investigated. It merely means that the witness happens to know that accused person. The principal evidence of identification is the evidence of a witness given in a Court as to how and under what circumstances he came to pick out a particular accused person and the details of the part which that accused took in the crime in question. The statement made by such a witness at an identification parade might be used to corroborate his evidence given in Court, but otherwise the evidence of identification furnished by an identification parade can only be hearsay except as to the simple fact that a witness was in a position to show that he knew a certain accused person by sight."

1988 SCMR 557 (Ghulam Rasul and 3 Others vs. The State)

"Role of accused at time of commission of offence not described by witness--Inherent defect--Evidence of witness identifying accused in such identification parade lost its efficacy and not relied upon."

The above referred judgments of the Apex Court, give detailed descriptions of the identification parade and its procedures, whereas PW-11 Ghulam Farid had not given the description of woman who came to Aapbara Market on 10.05.2008, as he stated in his statement that:

"two male persons, a woman along with a minor girl, aged 3/4 years, came and conversated with Zahid deceased."

31. The above referred statement does not reveal any identity, feature of the woman as well as the males, nor even their ages, getup or any salient feature of their personality, in order to confirm the same during the course

of identification parade, similarly, PW-11 has stated in his cross-examination that:

- (i) The persons who were sitting in the rows were ranging from 25-45 years.
- (ii) There was no aged person.
- (iii) At the time of identification parade, accused persons were not shaved and were having beards.
- (iv) The shave of the accused persons was about 15/20 days old.
- (v) The under part of face was not visible due to grown shave.
- (vi) I did not state about the role of the accused persons before the Magistrate at the time of identification parade.
- (vii) I did not inform that which of the accused person was sitting along with deceased on front seat of the taxi and I did not explain that which of the accused was on the rear seat.
- (viii) The ladies who were sitting in the rows were ranging to 25-45 years.
- (ix) I cannot give the serial number at which accused was sitting.
- (x) I do not remember the color of the cloth of Mst. Shamim/accused.

32. Similarly, PW-20 Muhammad Liaqat Abbasi/Magistrate Saddar Islamabad put appearance, who conducted the identification parade in the instant case on 19.06.2008, the same was tendered in evidence as Exh.PY, however, during the course of cross-examination, he admitted that:

- (i) *It is correct that I have not mention specifically that jail staff who were present at the time of identification parade was not in a position to have conversation with the witnesses of the identification parade.*
- (ii) *It is correct that in my report Exh.PY, I did not mention the name of dummies and their parentage, age and other features.*

The above referred statement gives rise to a situation that PW-20 had not followed the judgments of the Apex Court in its true perspective while conducting identification parade, hence, the basic principles settled by the Apex Court regarding name, parentage and descriptions of the dummies in identification parade, have not been given, except one line was referred in Exh.PY, which is as under:

"تو گواہ ہڈانے دونوں قطاروں میں بیٹھی 8 خواتین میں سے ملزمان کو مقدمہ ہڈا میں جو کو قطار نمبر 1 سیریل نمبر 2 پر بیٹھی ہوئی ہے اس کو ہاتھ کی انگلی کے عشارے سے شناخت کر لیا ہے۔"

Similarly, the Magistrate has given the descriptions of the other two accused in his report Exh.PY in the following words:

"گواہ ہڈانے فوری طور پر ہر دو قطاروں میں جا کر ہاتھ کی انگلی کے عشارے سے اچھی طرح سے قطار نمبر 1 میں ارشد کیانی ولد غلام مرتضیٰ ملزم ترتیب وار نشست نمبر 5۔ قطار نمبر 2 میں مہربان ندیم ولد محمد آزاد خان سلسلہ وار نشست نمبر 3 ملزم کو اچھی طرح سے شناخت کر لیا۔"

However, the above referred identification parade proceedings referred by the PW-20 in Exh.PY, demonstrate that the lady accused and the two appellants have been identified by PW-11 Ghulam Farid, but fact remains the same that PW-11 never revealed the features of identity, age, heights, color complexion, nature and dialect of their language and even otherwise, Magistrate has not prepared any list of dummies with their parentage and occupation etc., hence, the entire proceedings of identification parade are just an exercise in futility.

33. Considering above referred abstract thoughts and argumentation, following discrepancies have emerged on surface:

- (i) There is no direct evidence in the entire case.
- (ii) The entire murder case is based upon circumstantial evidence.
- (iii) PW-11 Ghulam Farid, witness of last seen evidence has not given any descriptions of accused/appellants in his statement

i.e. feature, age, color of clothes, face complexion, through which accused can be identified.

- (iv) The recovery of mobile from Muhammad Arshad Kiani/accused is not believable as the place of recovery was open, whereas Investigation Officer stated that, two witnesses were present but they were not cited as witnesses, nor joined the proceedings.
- (v) No evidence was collected by Investigation Officer that the place of recovery of mobile, Nokia 1110, is the place where Muhammad Arshad Kiani/accused was working.
- (vi) The place of recovery as stated by one of the witness is Qasim Plaza whereas others referred the same as Saim Plaza.
- (vii) The recovered mobile is of common model and easily available in the market.
- (viii) The Investigation Officer has not identified the recovered mobile through its IMEI number neither obtained any technical data or evidence from any quarter.
- (ix) The recovery of *Churri* is from an open place and of common pattern, which is easily available in the market.
- (x) The mobile was recovered from a bag, which was neither taken into possession nor even produced.
- (xi) PW-12 Ghazan Khan, who had no concern with the instant case and was looking for lift, whereupon he was facilitated by police in this regard, however, later on he joined the recovery proceedings of *Churri* and during the course of cross examination he admitted that he knew the deceased and paid his condolence to deceased's family at their native village, this story evidently creates a serious doubt.

- (xii) The *Churri* was bloodstained and sent to Chemical Examiner, who confirmed the blood but the origin of the blood was not confirmed, which is the requirement as referred in 2017 SCMR 486 (Muhammad Asif vs. The State) wherein it is held that:

"Mere sending of blood stained crime weapons to the Chemical Examiner and Serologist would not serve the purpose of the prosecution nor would it provide any evidence to inter link different articles---Unless the blood-stained earth or cotton and blood-stained clothes of the victim were sent with the crime weapon for opinion of Serologist it could not be conclusively opined that it was human blood on the crime weapon, and that it was of the same group which was available on the clothes of the victim and the blood-stained earth/cotton---Failure to follow such practice would make the opinion of Chemical Examiner inconclusive, which could not be used as piece of corroboratory evidence."

- (xiii) No incriminating articles belonging to deceased were directly recovered from the appellants.
- (xiv) The vehicle JMB-89 was produced by one Risal Bahadur, but he was given up by the prosecution and not produced, therefore, the connection of the said vehicle could not be linked with the appellants. No document of sale/purchase of the vehicle was recorded by the Investigation Officer nor brought on record.
- (xv) There is no proof regarding sale agreement of the said vehicle available on record through which it can be established that appellants sold the same to the acquitted accused Mehar Wahab.
- (xvi) The identification of mobile has not been given or proved on record.
- (xvii) The identification parade has not been conducted in a manner provided under the law and the details of the dummies have not been given.

(xviii) The co-accused namely Mst. Shamim Akhtar was acquitted on the same set of evidence.

(xix) The motive has not been alleged, neither proved nor remotely been suggested.

(xx) The reasons of the murder have never been brought on record by any of the witness.

34. In consideration of above referred argumentation and discrepancies, we are of the definite view that the entire case of the prosecution stands upon the recovery of *Churri* and mobile only, however the same were neither proved in accordance with law nor even believable, therefore, the recoveries are not taken into account by this Court and the entire edifice developed by the prosecution on the said pieces of evidence, has been crumbled down, especially when the witnesses are not consistent and their statements have been managed only to fill in the gaps and lacunas of the case. Moreover, the statement of PW-12 Ghazan Khan, could not be consumed by this Court that as to how he had joined the recovery proceedings of the *Churri* despite the fact that he was only looking for a lift but later on, it was disclosed by him that he knew the deceased and went to his native village for his condolence. In spite of that, all private witnesses belong to same area of the deceased, even PW-11 Ghulam Farid has not given the detailed description of the appellants in his first statement through which he could identify the same during the identification parade, referred in Exh.PY, while the other witness of the identification parade, Muhammad Asif, was given up by the prosecution, similarly, the person who brought the vehicle, which was being driven by deceased at the day of incident, was not produced in the proceedings, even there is not an iota of evidence regarding sale/purchase of the said vehicle by the appellants to Mehar Wahab (acquitted co-accused).

35. Hence, it is very much evident that the entire case is based upon circumstantial evidences and the same is not linked with the appellants in any manner, while it is settled principle of law that one tainted piece of evidence is not connected with other piece of tainted evidence and the same cannot be used to convict an accused, especially in the cases pertaining to murder and dacoity. Besides, the identification parade and recoveries of *Churri*, mobile phone and taxi are not believable by any stretch of imagination and the prosecution has also failed to produce even a single witness or evidence regarding the offence under section 392 PPC, therefore, the offence under section 392/34 PPC is not maintainable.

36. For what has been descanted above, this Court allows the Criminal Appeal No.283/2009 (Muhammad Arshad Kiani vs. The State, etc.) and Jail Appeal No.47/2009 (Meharban Nadeem vs. The State, etc.) and the conviction awarded to appellants is hereby set-aside and appellants are acquitted from the charges of murder and dacoity and they be released forthwith, if not required in any other case, therefore, answers in NEGATIVE the Murder Reference No.50-RWP/2009 (The State vs. Muhammad Arshad Kiani & another) and death sentence awarded to the appellants is NOT CONFIRMED.

37. Before parting with this judgment, we are constrained to observe that this case is a worst example of poor investigation by the Investigation Officer. There is nothing available on record on the basis of which it could be assessed that how the Investigation Officer arrested the accused persons and at the same time nothing is available on record, which would reflect the role of each accused in the commission of offence under sections 302/392/411/34 PPC. The Investigation Officer has brought nothing on record regarding recovery of snatched vehicle No.JMB-89 of deceased Muhammad Zahid S/O Ghulam Shabbir. Police

investigation is quite silent that how the said vehicle was recovered and who had snatched the said vehicle from the deceased and how it reached to the last person, who was in possession at the time of its production. Investigation Officer has not bothered to link the events of crime and there is no chain of events, which took place starting from the commission of heinous offence, recovery of dead body of deceased Muhammad Zahid S/O Ghulam Shabir and ending on the arrest of accused persons leading to recovery of snatched vehicle No.JMB-89 of deceased Muhammad Zahid. The whole prosecution record speaks volume about the conduct of Investigation Officer of this case. Therefore, a copy of this judgment be sent to the Inspector General of Police, Islamabad for his perusal and for appropriate action against the delinquent

(ATHAR MINALLAH)
JUDGE

(MOHSIN AKHTAR/KAYANI)
JUDGE

Announced in open Court on: 19th June, 2017

JUDGE

JUDGE

Approved for reporting.

Khalid Z.