

2013 P Cr. L J 1346

[Lahore]

Before Manzoor Ahmad Malik and Malik Shahzad Ahmad Khan, JJ

MUHAMMAD ASHRAF alias KALA and another---Appellants

Versus

The STATE---Respondent

Criminal Appeal No.2085 of 2005 and Murder Reference No.342, heard on 28th February, 2012.

(a) Penal Code (XLV of 1860)---

---S. 302(b)/34---Qatl-e-amd, common intention---Appreciation of evidence---Benefit of doubt---No eye-witness of incident was available and prosecution case was based on circumstantial evidence, which consisted of Wajtakkar; dying declaration; motive; extra-judicial confession; recovery of pistol and positive report of Forensic Science Laboratory---Sole evidence of Wajtakkar, was recorded five days after occurrence and no explanation of said delay had been given---Presence of said witness having not been shown in the site plan, evidence of said witness/Wajtakkar was not worthy of reliance---Alleged dying declaration was not made in presence of the doctor or any staff member of hospital and was not recorded by any Police Officials---Alleged dying declaration before the prosecution witnesses, who were real brothers of the deceased, could hardly be termed as dying declaration---Evidence of prosecution in respect of dying declaration, was not reliable in circumstances---Witness of alleged extra-judicial confession, in his statement had not given the date or time of alleged extra judicial confession---Statement of said witness was recorded by the Police after about 26 days of the occurrence; without any plausible explanation for such inordinate delay---Said prosecution witness, neither

was holding any important post/office, nor was a person in authority or had any influence over the complainant party to affect a compromise between accused persons and the complainant---Prosecution evidence of extra-judicial confession, in circumstances, was not worthy of reliance---Motive as alleged by the prosecution, had not been established in the case---Pistol was allegedly recovered from possession of accused after 8 days of his arrest---Empty was also sent to the office of Forensic Science Laboratory with considerable delay---Evidence of recovery, being only of corroborative in nature, conviction of accused persons could not be sustained merely on the basis of recovery and positive report of Laboratory---Prosecution having failed to prove its case against accused persons beyond any shadow of doubt, conviction and sentence awarded to accused persons by the Trial Court, were set aside extending them benefit of doubt and were released.

Muhammad Sultan v. Muhammad Aslam and another 1988 SCMR 857 and Ghulam Hussain alias Hussain Bakhsh v. The State and another PLD 1994 SC 31 ref.

Sajid Mumtaz and others v. Basharat and others 2006 SCMR 231; Tahir Javed v. The State 2009 SCMR 166; Muhammad Afzal alias Abdullah and others v. The State and others 2009 SCMR 436; Abdul Mateen v. Sahib Khan and others PLD 2006 SC 538; Muhammad Yaqub v. The State 1971 SCMR 756 and Nek Muhammad and another v. The State PLD 1995 SC 516 rel.

(b) Penal Code (XLV of 1860)---

---S. 302(b)---Qatl-e-amd---Appreciation of evidence---Circumstantial evidence---Where case was based on circumstantial evidence, chain link should be so interconnected with each other that its one end touched the dead body, while the other end would go around the neck of accused---If any chain link was missing, then its benefit should be given to accused.

The State v. Manzoor Ahmad PLD 1966 SC 664; Asadullah and another v. State and another 1999 SCMR 1034; Ch. Barkat Ali v. Major Karam Elahi Zia and another

1992 SCMR 1047; Sarfraz Khan v. The State 1996 SCMR 188; Altaf Hussain v. Fakhar Hussain and another 2008 SCMR 1103; Ibrahim and others v. The State 2009 SCMR 407 and Muhammad Hussain v. The State 2011 SCMR 1127 rel.

(c) Qanun-e-Shahadat (10 of 1984)---

----Arts. 46 & 133---Dying declaration---Credibility of evidence---Dying declaration or the statement of a person, without the test of cross-examination, was a weak kind of evidence; and its credibility, would depend upon the authenticity of the witnesses, and the circumstances under which it was alleged to have been made.

Mst. Zahida Bibi v. The State PLD 2006 SC 255 rel.

Shoaib Zafar for Appellants.

Chaudhry Muhammad Mustafa, Deputy Prosecutor-General for the State.

Naseer-ud-Din Khan Nayyar for the Complainant.

Date of hearing: 28th February, 2012.

JUDGMENT

MALIK SHAHZAD AHMAD KHAN, J.---This judgment shall dispose of Criminal Appeal No.2085 of 2005 (Muhammad Ashraf alias Kala and another v. The State) and Murder Reference No.342 of 2006, sent by the learned trial Court, for confirmation or otherwise, of the sentence of death awarded to Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti appellants, as both these matters have arisen out of the same judgment dated 23-12-2005, passed by the learned Additional Sessions Judge, Sheikhpura, whereby, Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti appellants were convicted under section 302(b) of P.P.C. for committing the murder of Muhammad Ramzan and were sentenced to death each with a direction to

pay the compensation amount of Rs.1,00,000 (Rupees one hundred thousand) each to the legal heirs of deceased and in default thereof to suffer rigorous imprisonment for six months each.

2. Brief facts of the case as given by Muhammad Awais (P.W.2) in his Fard Biyan (Exh.PA) on the basis of which formal F.I.R. (Exh.PA/1) was chalked out, are that on 16-1-2004, at 21:30 hours (9-30 p.m.), Riaz Cabin Man informed him (Muhammad Awais (P.W.2) that a person named, Muhammad Ramzan, was lying near the West Cabin FRQD in serious injured condition, who had received firearm injury by some one. The injured Muhammad Ramzan was employee of Pakistan Railway. The police was informed, who visited the spot and recorded the statement of Muhammad Awais (P.W.2). The appellants were not named in the F.I.R. (Exh.PA/1), as the same was lodged against unknown accused. They were implicated in this case on the basis of the statements of the brothers of deceased namely, Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3). Sultan Ahmad (P.W.3) in his statement (Exh.DB) has stated that on the day of occurrence i.e. 16-1-2004, at about 8-30 p.m., he and Muhammad Ramzan (deceased), after performing their duties alighted from the train at Farooqabad Railway Station. His bicycle was lying in the railway quarters, whereas, the bicycle of the deceased Muhammad Ramzan was lying in the cabin of Railway Station. He has further stated that after taking their bicycles, they used to reassemble at 'Phatek' No.47. On the day of occurrence, he was waiting for his brother Muhammad Ramzan at the specified place. After some time, a white coloured car bearing Registration No.706 came from cabin side and went towards the soaling side, after crossing railway 'Phatek' No.47. He has further stated that the said car was being driven by Tariq Mehmood (appellant), who was accompanied by Muhammad Ashraf (appellant). After some time, he (Sultan Ahmad (P.W.3)) went to the cabin to know the situation as to why his brother Muhammad Ramzan (deceased) had not yet come. When he reached near the cabin, he heard the hue and cry of his brother Muhammad Ramzan (deceased). He has further stated that he started weeping, when Riaz came at the spot and consoled him. After a short while, his brother Nazir Ahmad (P.W.1) and one Yousaf reached at the spot. According to the said witness, Muhammad Ramzan (deceased) was shifted to the Civil Hospital, Sheikhupura in a car for his

medical treatment. On the way, Muhammad Ramzan (deceased) stated that he was fired upon and injured by Muhammad Ashraf appellant, whereas, Tariq Mehmood co-accused caught hold of him.

Motive for the occurrence, as stated by the prosecution, was that a quarrel took place between Asif, younger brother of the appellant Ashraf alias Kala, and the son of the deceased namely, Adnan, about 2/3 months prior to the occurrence. A compromise was effected between the parties. However, the accused Ashraf and Tariq nourished the said grudge and thereafter they committed the murder of Muhammad Ramzan (deceased).

3. The appellant Muhammad Ashraf alias Kala was arrested in this case on 8-2-2004 by Muhammad Bakhsh, SI (P.W.15). During the course of investigation, on 8-2-2004, a pistol (P4) along with magazine, was taken into possession through recovery memo (Exh.PE) on the pointation of the appellant Muhammad Ashraf alias Kala, whereas, on 12-12-2004, the appellant Tariq Mehmood alias Ghanti was arrested and car bearing Registration No.706/FDB was secured from his possession vide recovery memo (Exh.PN). After completion of investigation, the challan was prepared and submitted before the trial Court. The learned trial Court, after observing all legal formalities, as envisaged under the Code of Criminal Procedure, 1898, framed a charge against Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti appellants on 21-6-2004 under sections 302/324/34 of P.P.C., to which they pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution produced fifteen witnesses, during the trial.

The medical evidence was furnished by Dr. Muhammad Afzal (P.W.10) and Dr. Humayun Siddique (P.W.11), as well as, Dr. Muhammad Ashraf Javed (P.W.12). Muhammad Awais Assistant Station-Master (P.W.2) is the complainant of this case, Muhammad Riaz Draftsman (P.W.7), Iqbal Ahmad (P.W.8), Muhammad Kashif (P.W.13), Muhammad Latif (P.W.14), are the formal witnesses.

Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) are the witnesses of Wajtakkar, motive and dying declaration of the deceased Muhammad Ramzan, Zulfiqar Ali Head Constable (P.W.4) is a witness of blood-stained earth and empty cartridges. Muhammad Akram (P.W.5) is a witness of conspiracy. Abdul Majeed (P.W.6) is the recovery witness of pistol .30 bore (P.4). Khurshid Ahmad (P.W.9) is the witness of extra-judicial-confession, whereas, Muhammad Bakhsh (P.W.15) is the Investigating Officer of this case. Before closing its case, the prosecution also produced documentary evidence in the shape of complaint (Exh.PA), F.I.R. (Exh.PA/1), blood-stained earth (Exh.PB), empty cartridge (Exh.PC), Chadar/shoes, etc. (Exh.PD), pistol .30 bore (Exh.PE), postmortem report (Exh.PG), death report (Exh.PH), application from police to doctor and report (Exh.PJ), application to M.S. Mayo Hospital and report (Exh.PI&PK), Medico-legal Report (Exh.PL), sealed envelope (Exh.PM), personal search (Exh.PN) and (Exh.PO), possession of car (Exh.PQ), report of Chemical Examiner (Exh.PS), report of Serologist (Exh.PT), and report of FSL (Exh.PU).

The statements of both the appellants under section 342 of Cr.P.C. were recorded. They refuted the allegations levelled against them and professed their innocence. While answering to a question "Why this case against you and why the P.Ws. have deposed against you" the appellant Muhammad Ashraf alias Kala replied as under:--

"I had no motive whatsoever to commit the murder of the deceased. The occurrence is shrouded in mystery. Some unknown persons injured the deceased. Riaz Cabin Man has been withdrawn by the prosecution who could disclose the real circumstances. The injured was taken by the police to the hospital and was unconscious throughout and was not able to utter a single word. Sultan and Nazir Ahmad P.Ws. out of malice and all to all have fabricated the evidence of so-called statement of the deceased, Wajtakkar, the evidence of motive and extra-judicial confession after many days of the occurrence."

The appellant Tariq Mehmod alias Ghanti also denied the allegations of the prosecution levelled against him and claimed his innocence, in his statement recorded

under section 342 of Cr.P.C. In answer to the question, why this case against you and why the P.Ws. have deposed against you, the appellant Muhammad Asghar replied as under:--

"I had no motive whatsoever to commit the murder of the deceased. The occurrence is shrouded in mystery. Some unknown persons injured the deceased. It is night murder case, Riaz Cabin Man has been withdrawn by the prosecution who could disclose the real circumstances. The injured was taken by the police to the hospital and was unconscious throughout and was not able to utter a single word. Sultan and Nazir Ahmad P.Ws. out of malice and all to all have fabricated the evidence of so-called statement of the deceased, Wajtakkar, the evidence of motive and extra-judicial confession after many days of the occurrence."

Neither the appellants made statements under section 340(2) of Cr.P.C. nor they produced any evidence in their defence. The trial culminated into conviction and sentence of the appellant as mentioned earlier.

5. The learned counsel for the appellants, in support of this appeal, contends that in fact it was an unseen occurrence, which took place at around 9-30 p.m., in winter season, and no source of light is mentioned in the F.I.R. (Exh.PA/ 1); that the statement of the complainant is based on the information provided by one Riaz Cabin Man of Railway Station, Farooqabad, but the said Riaz did not appear before the learned trial Court; that the prosecution case is based on circumstantial evidence; that it is the case of Nazir Ahmad (P.W.1) that the information regarding the death of Muhammad Ramzan was provided by one Munir Ahmad to his wife, but neither the said Munir Ahmad nor the wife of Nazir Ahmad (P.W.1) appeared before the learned trial Court; that so far as the dying declaration of Muhammad Ramzan (deceased), allegedly made before Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) is concerned, the learned counsel for the appellants contends that Muhammad Ramzan (deceased) was not even in a position to speak, because of the injuries sustained by him were on his neck, and this fact is confirmed by Dr. Muhammad Afzal (P.W.10) and Dr. Humayun Siddique (P.W.11); that the statements of Nazir Ahmad (P.W.1) and

Sultan Ahmad (P.W.3) are belied from the other circumstances of the case, as their statements were recorded on 17-1-2004 and 21-1-2004, respectively, but the inquest report (Exh.PH), which was prepared on 18-1-2004 contains the same facts as are mentioned in the F.I.R. (Exh.PA/1) in the column of 'Mukhtasir Halat Muqadima' (brief history of the case) and even the site plan (Exh.PF), which was prepared by Muhammad Riaz Draftsman (P.W.7) on 23-1-2004, does not contain the name of any of the appellants; that it is the case of Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) that the deceased Muhammad Ramzan informed them that it was Muhammad Ashraf alias Kala appellant, who fired at him and Tariq Mahmood alias Ghanti appellant took him into his 'Japha', but their statements are belied from the documentary evidence, produced by the prosecution itself, as the deceased Muhammad Ramzan was firstly taken in an injured condition to the DHQ Hospital, Sheikhupura, wherefrom he was referred to Mayo Hospital, Lahore, and he was medically examined by Dr. Humayun Siddique (P.W.11), who prepared his operation notes (Exh.PK), but in the said MLR (Exh.PL), all the material columns such as, name of the relative of the injured, time of examination etc., have been left blank. So far as the evidence of Wajtakkar furnished by Sultan Ahmad (P.W.3) is concerned, the learned counsel for the appellants contends that the same is not confidence-inspiring, because at the relevant time of incident, both the appellants were allegedly present in a white coloured car, which was allegedly driven by Tariq Mahmood appellant, but he has not stated anything that any of the appellants was carrying anything in his hand and moreover the place of alleged Wajtakkar is far away from the place of occurrence and even otherwise in the foggy night of winter season, it was not possible to identify the appellants; that so far as the evidence of extra-judicial-confession is

concerned, the learned counsel for the appellants contends that there is nothing on the record to show that what prompted the appellants for making confession before Khurshid Ahmad (P.W.9), as he was not having any social status. Moreover, his statement was recorded on 11-1-2005, i.e. after the arrest of the appellants in this case, and he has himself admitted that his statement was recorded by the police after 25/26 days of the occurrence. As far as the recovery of pistol (P.4), allegedly recovered at the instance of the appellant Muhammad Ashraf alias Kala and positive report of FSL (Exh.PU) are concerned, the learned counsel for the appellants contends that the same

is not helpful for prosecution, as it has come on the record through the statement of Zulfiqar Ali Head Constable (P.W.4), that he took crime empty and deposited the same in the office of FSL on 9-2-2004, whereas, it is the case of the prosecution that the appellant Muhammad Ashraf alias Kala was arrested on 8-2-2004 by Muhammad Bakhsh SI-(P.W.15); that there is no evidence that the crime empty was deposited in the 'Malkhana', as the relevant column of register No.19 was blank; that even otherwise, this evidence is only of corroborative in nature, and it is relevant and material if the other prosecution evidence is accepted; that there is no evidence to prove the motive as alleged by the prosecution, therefore, this appeal may be accepted and the appellants may be acquitted from the charges;

6. Conversely, the learned Deputy Prosecutor-General, for the State, assisted by the learned counsel for the complainant opposes this appeal on the grounds that had there been any enmity or malice on the part of the complainant and the other witnesses, the appellants could have easily been named in the F.I.R. (Exh.PA./1), as they are closely related to the deceased (Muhammad Ramzan), Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) and it has also come on the record that the deceased Muhammad Ramzan was helping the appellant Muhammad Ashraf alias Kala, because he was a pious man; that the prosecution has fully proved its case on the basis of evidence available on the record. So far as the dying declaration of Muhammad Ramzan (deceased) is concerned, the learned counsel for the complainant contends that the injured Muhammad Ramzan, received firearm injury on his neck and as such, was not expected to describe all the details of the incident, however he has categorically stated before Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) that it was the appellant Muhammad Ashraf alias Kala, who caused firearm injury, which hit at his neck, whereas, the other appellant Tariq Mahmood alias Ghanti took him in his 'Japha'; that both Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) are truthful witnesses, and they did not exaggerate their statements; that it has also come on the record through the statement of Muhammad Latif, Head Constable (P.W.14) that Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) came at the spot and took the deceased Muhammad Ramzan to DHQ Hospital, Sheikhpura in an injured condition; that the dying declaration of Muhammad Ramzan (deceased) made before Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) is also

corroborated by the evidence of Wajtakkar furnished by Sultan Ahmad (P.W.3) and evidence of extra-judicial confession provided by Khurshid Ahmad (P.W.9), who is an independent witness; that the recovery of weapon of offence i.e. pistol (P.4) from appellant Muhammad Ashraf alias Kala and positive report of FSL (Exh.PU) fully connect the appellant namely Muhammad Ashraf alias Kala with the commission of crime. As far as motive is concerned, the learned counsel for the complainant contends that it has duly been proved through the statements of Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3), therefore, appeal of the appellants may be dismissed and murder reference be answered in the affirmative.

7. We have heard the arguments of the learned counsel for the appellants, and the learned counsel for the complainant, as well as, learned Deputy Prosecutor-General, and have also gone through the evidence available on the record, with their able assistance.

8. The occurrence in this case as per F.I.R. (Exh.PA/1) took place on 16-1-2004, at 21-30 p.m., at West Cabin Railway Station Farooqabad. The matter was reported to the police through application (Exh.PA) on the same day at 11-00 p.m., whereas, the formal F.I.R. (Exh.PA/1) was chalked out on 17-1-2004, at 8-20 p.m., by Muhammad Latif (P.W.14). The Police Station, Railway Police, Faisalabad, District Sheikhpura, was situated at a distance of 87 kilometers from the place of occurrence. Admittedly, there is no eye-witness of this incident and the prosecution case is based on circumstantial evidence, which consists of (1)-Wajtakkar, (2)-dying declaration, (3)-motive, (4)-extra-judicial confession, and (5)-recovery of pistol (P.4) allegedly from the possession of Muhammad Ashraf alias Kala appellant, and positive report of FSL (Exh.PU).

Since the prosecution case is based on the circumstantial evidence, therefore, utmost care and caution is required for reaching at the just decision of the case. By now, it is settled that in such like cases, the chain link should be so inter-connected with each other that its one end touches the dead body while the other end goes around the neck of the accused and if any chain link is missing then its benefit should be given to the accused. In this regard, guidance has been sought from the judgments of the learned apex Court of the country reported as THE STATE v. MANZOOR AHMAD (PLD 1966

Supreme Court 664), ASADULLAH and another v. STATE and another 1999 SCMR 1034, CH. BARKAT ALI v. MAJOR KARAM ELAHI ZIA AND ANOTHER (1992 SCMR 1047), SARFRAZ KHAN v. THE STATE (1996 SCMR 188), ALTAF HUSSAIN v. FAKHAR HUSSAIN AND ANOTHER (2008 SCMR 1103), IBRAHIM AND OTHERS v. THE STATE (2009 SCMR 407) and MUHAMMAD HUSSAIN v. THE STATE (2011 SCMR 1127).

9. Keeping in view the parameters, laid down in the above-mentioned judgments, we will discuss each part of the prosecution evidence, separately.

(1)-WAJTAKKAR.

10. The evidence of Wajtakkar has been furnished by Sultan Ahmad (P.W.3). The said witness is real brother of Muhammad Ramzan (deceased). According to his statement, on the day of occurrence i.e. 16-1-2004, at about 8-30 p.m., he and Muhammad Ramzan (deceased), after performing their duties alighted from the train at Farooqabad Railway Station. His bicycle was lying in the railway quarters, whereas, the bicycle of the deceased Muhammad Ramzan was lying in the cabin of Railway Station. He has further stated that after taking their bicycles, they used to reassemble at 'Phatek' No.47. On the day of occurrence, he was waiting for his brother Muhammad Ramzan at the specified place. After some time, a white coloured car bearing Registration No.706 came from cabin side and went towards the soiling side, after crossing railway 'Phatek' No.47. He has next stated that the said car was being driven by Tariq Mehmood appellant, who was accompanied by Muhammad Ashraf appellant. After some time, he (Sultan Ahmad (P.W.3)) went to the cabin to know the situation as to why his brother Muhammad Ramzan (deceased) had not yet come. When he reached near the cabin, he heard the hue and cry of his brother Muhammad Ramzan (deceased). He has further stated that he started weeping, when Riaz came at the spot and consoled him. After a short while, his brother Nazir Ahmad (P.W.1) and Yousaf reached at the spot. According to the said witness, Muhammad Ramzan (deceased) was shifted to the Civil Hospital, Sheikhpura in a car for his medical treatment. On the way, Muhammad Ramzan (deceased) stated before them that he was shot by Muhammad

Ashraf appellant, whereas, Tariq Mehmood co-accused caught hold of him; Sultan Ahmad (P.W.3), who is real brother of Muhammad Ramzan (deceased), is the sole witness of Wajtakkar. The occurrence in this case took place on 16-1-2004 at 21-30 p.m. (9-30 p.m.), whereas, the matter was reported to the police through application (Exh.PA), at 23-00 (11-00 p.m.), but neither the name of Sultan Ahmad (P.W.3) nor the name of any accused is mentioned in it, rather it is mentioned in application (Exh.PA) that Muhammad Ramzan (deceased) was injured at the hands of some unknown accused. Sultan Ahmad (P.W.3) has claimed that Riaz Cabin Man came at the spot, when he was already present near his brother Muhammad Ramzan (deceased). Had he been present at the spot, then the application (Exh.PA) should have been moved on his behalf, or at least his name and the name of accused should have been mentioned in it. His statement to the police (Exh.DB) was recorded on 21-1-2004 i.e. five days after the occurrence. No explanation whatsoever for the above-mentioned delay has been given in his statement (Exh.DB). Moreover, the presence of this witness has not been shown in the site plan (Exh.PF), which was prepared by Muhammad Riaz (P.W.7) on 23-1-2004, on the pointation of the complainant and the prosecution witnesses. Similarly, the name of any accused has also not been mentioned in the above-mentioned documentary evidence of the prosecution. All the recovery memos, i.e., recovery memo of blood-stained earth (Exh.PB), recovery memo of empty (Exh.PC), and recovery memo of Chadar/Shoes, etc. (Exh.PD), are attested by Muhammad Ashraf Constable, Police Post, Railway Police, Farooqabad, Riaz Ahmad Cabin Man of Railway Station Farooqabad, and Muhammad Awais, Station Master, Railway Station, Farooqabad. Neither Sultan Ahmad (P.W.3) nor Nazir Ahmad (P.W.1) has been cited as a witness in the above-mentioned recovery memos. The name of Sultan Ahmad (P.W.3) or Nazir Ahmad (P.W.1) has not been mentioned in the relevant column of Medico-legal Report (Exh.PL) of Muhammad Ramzan (deceased). The column of name of the relative or friend, who had brought Muhammad Ramzan (deceased) to the Hospital has been left blank in the above-mentioned document, which indicates that Sultan Ahmad (P.W.3) or Nazir Ahmad (P.W.1) were not present at the time of occurrence, and that's why, their names were not mentioned in the above-mentioned documents. Similarly, in the column of 'Mukhtasir Halat Muqadima' (brief history of the case), of the inquest report (Exh.PH), the name of Sultan Ahmad (P.W.3) and Nazir Ahmad (P.W.1) were not

mentioned in any context. Moreover, it is mentioned in the said document (Exh.PH) that Muhammad Ramzan (deceased) was injured by some unknown accused. The Inquest Report (Exh.PH) was prepared on 18-1-2004, and the names of above-mentioned prosecution witnesses have not been mentioned in it. According to the evidence of Sultan Ahmad (P.W.3), he reached at the spot before the arrival of Riaz Cabin Man of Railway Station, Farooqabad, but said Riaz was never produced before the learned trial court to corroborate the said version of Sultan Ahmad (P.W.3). It is the case of the prosecution that said Riaz provided the information of death of Muhammad Ramzan to the complainant Muhammad Awais (P.W.2), who reported the matter to the police thereafter. The said Riaz was a very natural witness as it was he, who informed the complainant that Muhammad Ramzan was injured by the firing of some unknown, but his evidence was withheld by the prosecution, therefore, presumption as envisaged under Article 129(g) of the Qanun-e-Shahadat Order, 1984, can be drawn against the prosecution, and it is presumed that had he been produced by the prosecution, he would have not supported the prosecution version put-forth by Sultan Ahmad (P.W.3). In the light of above discussion, the prosecution evidence of Wajtakkar is not worthy of reliance.

(2)-DYING DECLARATION AND MEDICAL EVIDENCE.

11. This evidence of dying declaration has been produced through Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3). The evidence of Wajtakkar produced by Sultan Ahmad (P.W.3) has already been discussed earlier. Nazir Ahmad (P.W.1) is also real brother of Muhammad Ramzan (deceased). He has stated before the learned trial Court that on 16-1-2004, he was present at his Dera, where he got the information that Muhammad Ramzan (deceased) has been injured and thereafter, reached at the place of occurrence and took Muhammad Ramzan (deceased) in an injured condition to DHQ, Hospital, Sheikhpura. The Doctor referred Muhammad Ramzan (deceased) to Mayo Hospital, Lahore, and on the way from Sheikhpura to Mayo Hospital, Lahore, Muhammad Ramzan stated that he received injury due to the fire shot of Muhammad Ashraf alias Kala appellant, whereas he was taken into 'Japha' by Tariq co-accused. Admittedly, Muhammad Ramzan (deceased) received firearm injuries on his neck. The

prosecution produced medical evidence through three prosecution witnesses namely, Dr. Muhammad Afzal (P.W.10), Dr. Humayun Siddique (P.W.11), and Dr. Muhammad Ashraf Javed (P.W.12). The statements of the above-mentioned witnesses regarding the condition of injured Muhammad Ramzan (deceased) for making a dying declaration, are contradictory. Dr. Muhammad Ashraf Javed (P.W.12) has stated during his cross-examination that the injured Muhammad Ramzan was in a position to utter each and every word from his mouth. He volunteered that he asked the injured person of his problem, who replied that first of all his pain trouble be removed. This witness has noticed only one injury on the person of Muhammad Ramzan (deceased), whereas, according to the statements of Dr. Muhammad Afzal (P.W.10) and Dr. Humayun Siddique (P.W.11), there were three injuries (two entry and one exit) on the person of Muhammad Ramzan (deceased). In the MLR (Exh.PL), all the material columns such as name of the relative of the injured, time of examination, have been left blank by the above-mentioned witness (Dr. Muhammad Ashraf Javed P.W.12). Dr. Humayun Siddique (P.W.11) has stated during his cross-examination that when the larynx is injured due to odema of larynx and when the tracheostomy, it is not possible to produce understandable voice with ease. Dr. Muhammad Afzal (P.W.10), who conducted the post-mortem examination on the dead body of Muhammad Ramzan (deceased) has stated, during his cross-examination, that it is not possible to produce any understandable human voice when the left internal jugular vein and trachea and the major blood vessels of the neck were damaged and blood clots were also present in the neck.

In this case, regarding the condition of Muhammad Ramzan (deceased), the most important evidence is that of Muhammad Latif Head Constable (P.W.14). Fard Biyan (Exh.PA) was prepared by this prosecution witness. His name is also mentioned in Column No.2 of the F.I.R. (Exh.PA/1). He has stated that on 14-1-2004, he was posted as Incharge Railway Police Post, Farooqabad. On 16-1-2004, when he received information that Muhammad Ramzan (deceased) received a firearm injury and was lying near the Railway Cabin, he reached at the spot. According to his statement, the Station Master sent the complaint (Exh.PA). He recorded Karvaee police on it. He reached at DHQ, Hospital, Sheikhpura, and wrote an application (Exh.PJ) for

recording the statement of injured Muhammad Ramzan, but the Doctor gave his opinion on it that the patient (Muhammad Ramzan deceased) was not fit for statement. The application (Exh.PJ) is also available on the record. Muhammad Latif Head-Constable (P.W.14) has been produced by the prosecution itself. He was not declared hostile by the prosecution.

This is an admitted fact that the statement of the deceased Muhammad Ramzan was not recorded either in DHQ Hospital, Sheikhpura, or in Mayo Hospital, Lahore. The alleged dying declaration was not made in the presence of the Doctor or any staff member of the above-mentioned hospitals. It was not recorded by any police official; therefore, the alleged dying declaration of Muhammad Ramzan (deceased) before the prosecution witnesses Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3), who are real brothers of the deceased could hardly be termed as dying declaration. It is by now a well-settled law that a dying declaration or the statement of a person without the test of cross-examination is a weak kind of evidence and its credibility depends upon the authenticity of the witnesses and the circumstances under which it was alleged to have been made. Reference in this context may be made to the case of *Mst. ZAHIDA BIBI v. THE STATE* (PLD 2006 Supreme Court 255), wherein at page 262, the Hon'ble Supreme Court of Pakistan has held as under:--

"This is an admitted fact that the statement of the deceased was not recorded by the Sub-Inspector of police in hospital in presence of the doctor and further neither any member of the hospital staff was associated at the time of recording the statement nor it was got verified by any official of the hospital that the statement was actually made by the deceased. Be that as it may, the status of such a statement would be hardly a statement under section 161, Cr.P.C., and not a dying declaration of the deceased. This may be seen that the dying declaration or a statement of a person without the test of cross-examination is a weak kind of evidence and its credibility certainly depends upon the authenticity of the record and the circumstances under which it is recorded, therefore, believing or disbelieving the evidence of dying declaration is a matter of judgment but it is dangerous to accept such statement without careful scrutiny of the evidence and the surrounding circumstances, to draw a correct conclusion regarding its

truthfulness. The rule of criminal administration of justice is that the dying declaration like the statement of an interested witness requires close scrutiny and is not to be believed merely for the reason that dying person is not expected to tell lie. This is a matter of common knowledge that in such circumstances in preference to any other person, a doctor is most trustworthy, and reliable person for a patient to depose confidence in him with the expectation of sympathy and better treatment to disclose the true facts".

According to the above-mentioned prosecution evidence, there are two possibilities about the condition of the deceased Muhammad Ramzan to make dying declaration. It is by now a well-settled law that when a fact is capable of two interpretations/possibilities, then one favourable to the accused is to be accepted. Reference in this context may be made to the case of MUHAMMAD SULTAN v. MUHAMMAD ASLAM and another (1988 SCMR 857) and GHULAM HUSSAIN alias HUSSAIN BAKHSH v. THE STATE and another (PLD 1994 Supreme Court 31). Even otherwise, the presence w of Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) at the time of occurrence, or soon thereafter has not been established in this case, because as discussed earlier, none of the above-mentioned witnesses are either named in the application (Exh.PA), nor they have been cited as witnesses in any 1 of the recovery memos i.e. (Exh.PB), (Exh.PC), and (Exh.PD). Their names were also not mentioned in the Medico-legal Report (Exh.PL) of Muhammad Ramzan (deceased). The said deceased Muhammad Ramzan was medically examined during his life time by Dr. Humayun Siddique (P.W.11) and Dr. Muhammad Ashraf Javed (P.W.12). None of the above-mentioned witnesses have uttered a single word about the dying declaration of Muhammad Ramzan (deceased). Therefore, we are of the view that the evidence of prosecution in respect of dying declaration is not reliable.

(3)-EXTRA-JUDICIAL-CONFESSION

12. Khurshid Ahmad (P.W.9) is a witness of alleged extra-judicial confession. He has stated before the learned trial Court that after some days of the murder of Muhammad Ramzan (deceased), the appellant Muhammad Ashraf alias Kala came to his Dera and

told him that he was much worried, because the police had conducted a raid at his house. The appellant allegedly further told him that he (Muhammad Ashraf appellant) and his co-accused Tariq alias Ghanti had committed the murder of Muhammad Ramzan (deceased) after due consultation. Khurshid Ahmad (P.W.9) in his statement (Exh.DF) has not given the date or time of the alleged extra-judicial-confession. He has simply stated that after some days of the murder of Ramzan (deceased), the extra-judicial confession was made before him by Muhammad Ashraf alias Kala appellant. The occurrence in this case took place on 16-1-2004, whereas, statement (Exh.DF) of Khurshid Ahmad was recorded by the police on 11-2-2004. This witness has given no plausible explanation for such a long silence. He has not given any reason for the delay in making his statement before the police. Similarly, no date of alleged extra-judicial confession was mentioned in his statement before the Court. He is a cultivator by profession. It has not been established by the prosecution that he was holding any important post/office, or he was a person in authority, or he had any influence over the complainant party to effect a compromise between the appellants and the complainant.

The evidentiary value of the extra-judicial confession (joint or otherwise) came up for consideration before the august Supreme Court of Pakistan in the case reported as SAJID MUMTAZ AND OTHERS v. BASHARAT AND OTHERS (2006 SCMR 231), wherein, at page 238, the apex Court of Pakistan has been pleased to lay emphasis as under:--

"(17) This Court and its predecessor Courts (Federal Court) have elaborately laid down the law regarding extra-judicial confession starting from Ahmad v. The Crown (PLD 1961 FC 103-107) upto the latest. Extra-judicial-confession has always been taken with a pinch of salt. In Ahmad v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial confession, the Court must inquire into all material points and surrounding circumstances to 'satisfy' itself fully that the confession cannot but be true'. As, an extra-

judicial confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

(18) It has been further held that the status of the person before whom the extra-judicial confession is made must be kept in view, that joint confession cannot be used against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule of prescribed by this Court.

(19) It is but a natural curiosity to ask as to why a person of sane mind should at all confess. No doubt the phenomenon of confession is not altogether unknown but being a human conduct, it had to be visualized, appreciated and consequented upon purely in the background of a human conduct.

(20) Why a person guilty of offence, entailing capital punishment should at all confess. There could be a few motivating factors like: (i) to boast off, (ii) to ventilate the suffocating conscience and (iii) to seek help when actually trapped by investigation. Boasting off is very rare in such-like heinous offences where fear dominates and is always done before an extreme confident as well as the one who shares close secrets. To make confession in order to give vent to ones pressure on mind and conscience is another aspect of the same psyche. One gives vent to ones feelings and one removes catharses only before a strong and close confident. In the instant case the position of the witness before whom extra-judicial confession is made is such that they are neither the close confident of the accused nor in any manner said to be sharing any habit or association with the accused. Both the possibilities of boasting and ventilating in the circumstances are excluded from consideration.

Another most important and natural purpose of making extra-judicial confession is to seek help from a third person. Help is sought, firstly, when a person is sufficiently trapped and, secondly, from one who is authoritative, socially or officially.

As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra-judicial confession have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confession. Such confessions by now have become the signs of incompetent investigation. A judicial mind, before relaying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all, is the position or authority held by the witness". (emphasis supplied)

The above view has been reiterated in the case reported as *TAHIR TAVED v. THE STATE* (2009 SCMR 166), wherein, at page 170, the learned august Supreme Court of Pakistan, has been pleased to observe as under:--

"It may be noted here that since extra-judicial confession is easy to procure as it can be cultivated at any time, therefore, normally, it is considered as a weak piece of evidence and Court would expect sufficient and reliable corroboration for such type of evidence. The extra-judicial confession therefore must be considered with over all context of the prosecution case and the evidence on record. Right from the case of *Ahmed v. The Crown* PLD 1951 FC 107 it has been time and again laid down by this Court that extra-judicial confession can be used against the accused only when it comes from unimpeachable sources and trustworthy evidence is available to corroborate it. Reference in this regard may usefully be made to the following reported judgments:-

(1) *Sajid Mumtaz and others v. Basharat and others* 2006 SCMR 231, (2) *Ziaul Rehman v. The State* 2001 SCMR 1405, (3) *Tayyab Hussain Shah v. The State* 2000 SCMR 683 and (4) *Sarfraz Khan v. The State and others* (1996 SCMR 188)".

In light of the above discussion, we are of the view that the prosecution evidence of extra-judicial confession in the instant case is also not worthy of reliance.

(4) MOTIVE.

13. Nazir Ahmad (P.W.1) and Sultan Ahmad (P.W.3) have given the evidence of motive. It was alleged by the above-mentioned witnesses that motive behind the occurrence was that about 2/3 months prior to the occurrence, a quarrel took place between Asif, the younger brother of appellant Muhammad Ashraf alias Kala and Adnan the son of Muhammad Ramzan (deceased).

There is nothing on the record to establish that the matter was reported to the police or any other authority regarding the alleged quarrel, which took place between the above-mentioned Asif and Adnan. No reason of the alleged quarrel has been given by Nazir Ahmad (P.W.1), or Sultan Ahmad (P.W.3). According to the above-mentioned witnesses, the quarrel allegedly took place 2/3 months prior to the occurrence and a compromise was also effected after the said quarrel. Therefore in the circumstances, we are of the view that the motive, as alleged by the prosecution, has not been established in this case.

(5)-RECOVERY

14. According to the prosecution case, pistol (P.4) was recovered at the instance of Muhammad Ashraf alias Kala appellant during his physical remand. The appellant Muhammad Ashraf alias Kala was arrested in this case on 8-2-2004, and pistol (P.4) was recovered from his possession on 16-2-2004. The report of FSL (Exh.PU) is positive. Although, Muhammad Latif Head-Constable (P.W.14) has stated before the learned trial Court that he handed over the parcel containing empty to Muhammad Kashif Constable (P.W.13) on 8-2-2004, for its onward transmission to the office of FSL, Lahore, but his statement is not helpful to the appellant, because Muhammad Kashif Constable (P.W.13) has stated before the learned trial Court that the parcel of empty

cartridge was handed over to him, and he deposited the same in the office of FSL, Lahore, on 1-2-2004. Similarly, it is evident from the report of FSL (Exh.PU) that the empty was received in the office of FSL on 1-2-2004, whereas, the parcel, of pistol (P.4) was received on 17-2-2004. Therefore, the above objection regarding the delay in sending the empty to the office of FSL, after the arrest of the appellant Muhammad Ashraf alias Kala, is of no avail to the appellant. Anyhow, the evidence of recovery is only of corroborative in nature and conviction of the appellants cannot be sustained merely on the basis of recovery of pistol (P.4) and positive report of FSL (Exh.PU).

In the case of MUHAMMAD AFZAL alias ABDULLAH and others v. THE STATE and others (2009 SCMR 436), the Hon'ble Supreme Court of Pakistan at pages 443 and 444 has held as under:--

"After taking out from consideration the ocular evidence, the evidence of identification and the medical evidence, we are left with the evidence of recoveries only, which being purely corroboratory in nature, in our view, alone is not capable to bring home charge against the appellant in the absence of any direct evidence because it is well-settled that unless direct or substantive evidence is available conviction cannot be recorded on the basis of any other type of evidence howsoever, convincing it may be".

Similarly, in the case of ABDUL MATEEN v. SAHIB KHAN and others (PLD 2006 Supreme Court 538), at page 543, the following dictum was laid down by the Hon'ble Supreme Court of Pakistan:--

"It is a settled law that, even if recovery is believed, it is only corroborative. When there is no evidence on record to be relied upon, then there is nothing which can be corroborated by the recovery as law laid down by this Court in Saifullah's case 1985 SCMR 410".

Similar view was taken by the Hon'ble Supreme Court of Pakistan in the cases of MUHAMMAD YAQUB v. THE STATE (1971 SCMR 756) and NEK MUHAMMAD and another v. THE STATE (PLD 1995 Supreme Court 516).

15. The prosecution also produced another circumstantial evidence against the appellants in the shape of Muhammad Akram (P.W.5), who has stated that five days prior to the murder of Muhammad Ramzan (deceased), he was coming from his 'Dera' and when he reached 'Such Khand', Ashraf and Tariq appellants while armed with 'sotas' were sitting and stated before him that they wanted to murder Muhammad Ramzan (deceased). He forbade them but they insisted for killing Muhammad Ramzan (deceased). His statement before the police (Exh.DC) is available on the record. He has nowhere mentioned in his statement before the police (Exh.DC) that the appellants told him that they wanted to commit the murder of Muhammad Ramzan (deceased). Although this witness has claimed that five days prior to the occurrence, he came to know about the intention of the appellants, but he never informed the police regarding the plan of the appellants till the of occurrence. The occurrence in this case took place on 16-1-2004, whereas, he appeared before the police for the first time and made his statement (Exh.DC) on 27-1-2004. No reason has been given by this witness as to why the appellants have told him regarding their intention to kill Muhammad Ramzan (deceased). In the light of above discussion, we are of the view that the evidence of Muhammad Akram (P.W.5) is not reliable and trustworthy.

16. We have already disbelieved the circumstantial evidence of the prosecution, which was produced in the shape of Wajtakkar, dying declaration, extra-judicial - confession, and motive, therefore, we are of the view that the prosecution has failed to prove its case against the appellants namely, Muhammad Ashraf alias Kala, and Tariq Mehmood alias Ghanti, beyond the shadow of doubt, therefore, by extending the benefit of doubt, we accept this appeal, and set aside the conviction and sentence awarded to the appellants, namely, Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti. The appellants Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti are in jail. They shall be released forthwith if not required to be detained in any other case.

Death sentence awarded to the appellants Muhammad Ashraf alias Kala and Tariq Mehmood alias Ghanti is not CONFIRMED and Murder Reference is answered in the NEGATIVE.

HBT/M-127/L

Appeal accepted.