JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

Cr.A No. 21-M/2014

1) ***Muhammadullah***
2) ***Hanifullah sons of Tazeer, residents of Degan Lakhar, Tehsil Khwaza Khela, Swat.***

(Appellants)

Versus

1) ***The State through Additional Advocate General.***
2) ***Sahib Zada son of Mian Dost, resident of Lakhar, Tehsil Khwaza Khela, District Swat.*** ***(Respondents)***

Present: ***Mr. Sher Muhammad Khan, Advocate for appellant.***

Sahibzada Bahauddin, Advocate for State.

Mr. Fazli Ghafoor, Advocate for Respondent No.2.

Date of hearing: **19.02.2018**
Date of announcement: **20.02.2018**

JUDGMENT

ISHTIAQ IBRAHIM, J.- Appellants in this case namely Muhammadullah and Hanifullah, brothers inter se, were tried by learned Additional Sessions Judge/Izafi Zilla Qazi-VI, Swat for the double murders of Lal Muhammad and Mst. Bacha Zulbakht; vide judgment dated 22.01.2014 they were convicted under Section 302(b)/34 P.P.C and sentenced to life imprisonment. They were also burdened under Section 544-A, Cr.P.C and directed that each convict shall pay Rs.200,000/- to LRs of deceased Mst. Bachazul Bakht and Rs.200,000/- to LRs of deceased Lal Muhammad or to further

undergo six months each in case of default thereof. They were extended the benefit of Section 382-B, Cr.P.C.

2. The occurrence relates to murders of Mst. Bachazul Bakht, sister-in-law of the appellants, and Lal Muhammad, her alleged paramour, who were reported to have been done to death by the appellants for their illicit relations after they were found together in a room at night time. According to the contents of the first information report, appellant Muhammadullah proceeded to Police Station Khurshid Khan Shaheed Khwaza Khela on 15.02.2012 and made a report at 06:00 hours to the effect that he was present in his house while his brother Sajid, husband of deceased Mst. Bachazul Bakht, had gone to Punjab for earning his livelihood whose house is situated over his house. It was further stated in the report that he had sensed long ago that his sister-in-law had illicit relations with his co-villager Lal Muhammad, so, he was watchful at that night when at 21:00 hours Lal Muhammad entered the house of his brother for committing Zina, so, he went behind him but found the door locked from inside and tried to open it but could not succeed. At

00:30 hours, he broke the door with axe and soon after entering the room, caused blows with axe and knife at head and body of his sister-in-law Mst. Bachazul Bakht due to which she fell on the ground. He found Lal Muhammad in a wooden box which was opened and thereafter caused blows to him with axe and knife as a result of which both died on the spot whose dead bodies were lying there. He next narrated that he left the axe and knife on the spot and came to police station for giving information of the occurrence after covering some distance on foot and the remaining in a vehicle.

3. S.H.O Muzakir Shah Khan (PW-8) chalked out F.I.R vide Serial No. 134 dated 15.02.2012 under Section 302 P.P.C and exhibited the same as Ex.PA during his statement before the Court. A copy of the F.I.R was handed to Tajbar Khan S.I (PW-6) who conducted investigation in the case. He formally arrested the informant. He secured the blood-stained garments and shoes of the informer vide Recovery Memo Ex.PW-6/3 and also took his photograph. Thereafter, he proceeded to spot alongwith the informer and other police

contingents. The detail of evidence collected during the course of investigation is as under:

a) Injury Sheet (Ex.PW-6/4) of deceased Mst. Bachazul Bakht and her Inquest Report (Ex.PW-6/5).

b) Injury Sheet (Ex.PW-6/6) of deceased Lal Muhammad and his Inquest Report (Ex.PW-7).

c) Site-plan Ex.PB prepared on pointation of appellant Muhammadullah.

d) Blood through cotton (Ex.PW-6/9-A) from the place where the deceased lady was lying was secured vide Recovery Memo Ex.PW-6/9.

e) Blood stained earth (Ex.PW-6/10-A) from the place where deceased Lal Muhammad was lying, was secured vide Recovery Memo Ex.PW-6/10.

f) One crime empty of 7.62 bore (Ex.PW-6/11-A) lifted from the spot was taken into possession vide Recovery Memo Ex.PW-6/11.

g) One axe (Ex.PW-3/1-A) and knife (Ex.PW-3/1-B) presented by appellant Hanifullah were secured vide Recovery Memo Ex.PW-3/1.

h) One 100 watts bulb (Ex.PW-6/12-A) from the room was secured vide Recovery Memo Ex.PW-6/12.

i) A piece of broken door (Ex.PW-6/13-A) was taken into possession vide Recovery Memo (Ex.PW-6/13).

4. The dead bodies were shifted to Khwaza Khela hospital. Dr. Muhammad Amin (PW-5) conducted post-mortem on the dead body of Lal Muhammad. His observations vide his report Ex.PW-5/1 are as under:

> Body brought by ASI Anwar-ul-Haq.
> Body identified by Hanifullah s/o Tazir.

Date and hour of examination: *01:00 P.M 15.02.2012.*

Specimen from penile urethra taken sealed sent for forensic lab in police custody.

EXTERNAL APPEARANCE:

Mark of ligature on neck and dissection etc: ***Cut mark seen on the neck (only skin).***

Condition of subject: ***stout, wearing shalwar qamees.***

Findings:

1) **Two lacerated large wounds on the head with dried blood on the face. One was on the vertex of head measuring upto seven inches in length, skin deep and fracture of underlying skull bone. Damaged brain.**
2) **Second one on the occiput width depressed fracture of skull bone, measuring upto 7 ½ inches in length. Incised wound on the left temporal region measuring upto 8 ½ inches in length.**
3) **Fire arm injury with entry wound on the right side of throat below mandible and a coinciding exit wound below the mandible (chin area) on the left side of throat.**
4) **A small upto 3 c.m incised wound seen on the left side of chin (in front) anteriorly.**
5) **Fire arm entry on the left buttock with entry wound on the lateral side of left buttock and coinciding exit wound on the middle side of the same buttock.**

REMARKS:

Body was dressed in shalwar qamees exposed and examined in good light.

- **Body was cold and rigit i.e rigor mortis fully developed.**
- **Lividity was fully established.**

CAUSE OF DEATH:

(1) Damage to brain.

(2) Blood loss shock.

PROBABLE TIME THAT ELAPSED:

(a) Between injury and death: Not known.

(b) Between death and post-mortem: 10-14 hours.

5. Post-mortem on the dead body of Mst. Bachazul Bakht was conducted by Lady Dr. Salma. Her report in Column No.5 of the Injury Sheet is Ex.PW-10/1 which is as under:-

Dead body received at 1:25 P.M. 15.02.2012 postmortem done.

Green printed shelwar and qamees etc. Tongue protruded, slight finger marks on neck (lateral side).

Large incised wound on the temporal region of head.

Skull bone depressed.

Two small incised wounds on the sides of the large wound but they are not so deep.

Rt index finger fractured.

Vaginal swab taken, sealed and sent to Forensic lab for investigation.

Rigor mortis fully developed.

Stick marks on the back.

Report of this PW on the printed post mortem form bears the above observations with addition to cause of death which was mentioned as ***Damage to brain (vital) organs.***

6. Swab of deceased Lal Muhammad was secured vide Recovery Memo Ex.PW-6/14 while his blood-stained garments (Ex.PW-6/15-A) were taken into possession vide Recovery Memo Ex.PW-6/15. Similarly the swab of deceased Mst. Bachazul Bakht was secured vide Recovery Memo Ex.PW-6/16 and her blood-stained garments (Ex.PW-6/17-A) were taken into possession vide Recovery Memo Ex.PW-6/17. The photographs (Ex.PW-4/1-A) taken during investigation were secured vide Recovery Memo Ex.PW-4/1. During interrogation, appellant Muhammadullah disclosed that he had handed over the crime weapon Kalashnikov (Ex.PW-6/22-A) to co-appellant Hanifullah who presented the same to police alongwith 10 rounds which was taken into possession vide Recovery Memo Ex.PW-6/22. Report of serologist qua the blood-stained garments of appellant Muhammadullah and both the deceased, the blood secured from the spot, and blood on the axe and knife, and swab of the deceased is available on record as Ex.PW-6/34 and is positive for human blood and semen. The positive F.S.L regarding Kalashnikov and crime empty is Ex.PW-6/35.

7. On 28.02.2012, Sahib Zada, father of deceased Lal Muhammad, and Ismail, brother of deceased Mst. Bachazul Bakht, recorded their 164, Cr.P.C statements and charged Muhammadullah alongwith his brother Hanifullah for committing murders of the deceased. The former introduced the last seen evidence by stating that appellant Hanifullah had invited his son at the night of occurrence who had gone with him to his house. He further stated that he had a dispute with the appellants over boundary of land and they had threatened him for dire consequences in furtherance of which the committed brutal murder of his son alongwith their sister-in-law on the pretext of honor. The latter disclosed in his statement that one year prior to the occurrence his deceased sister had come to his house and told his mother that the appellants had bad intentions towards her. In view of the above statements of the PWs, section 34 P.P.C was inserted in the case and appellant Hanifullah was also arrested on 28.02.2012.

8. After completion of investigation, complete challan was submitted in Court whereafter the appellants were tried in due course. Prosecution

examined ten PWs in all mentioned in the calendar of witnesses and therafter the appellants were examined under Section 342, Cr.P.C. They pleaded to be innocent and stated to have been falsely charged. Appellant Muhammadullah denied to have reported the matter; he alleged that he being illiterate, the F.I.R has wrongly been attributed to him. Appellant Muhammadullah recorded his statement on oath within the meaning of Section 340(2), Cr.P.C while appellant Hanifullah did not do so. They felt no need of producing evidence in their defence. The learned trial Court, after hearing the arguments, convicted and sentenced the appellants vide judgment dated 22.01.2014, the detail of sentences has already been mentioned. Hence, this appeal.

9. Learned counsel for the appellant, *inter alia*, contended that F.I.R is not a substantive piece of evidence and its contents could neither be used against an accused making it nor his co-accused unless same were proved in Court by its maker by subjecting him to the test of cross-examination; since, the F.I.R in the present case has not been proved through the alleged lodger thereof even he

has denied to have registered the same, therefore, conviction of the appellants on this ground is illegal. He further contended that the appellants have been charged in this case after 13/14 days of the occurrence and no plausible explanation has been given by prosecution in this regard, as such, the delay is fatal to prosecution case and credibility of the witnesses has become highly suspicious. He also argued that mere recovery of the dead bodies from the house of the appellant's brother is not a valid ground for their conviction most particularly when the prosecution case mainly depends upon weak type of circumstantial evidence. The learned counsel was of the opinion that recovery of crime weapon Kalashnikov on the alleged pointation of one of the appellant is doubtful. They added that there is disparity between medical report of deceased Lal Muhammad and the contents of F.I.R, which negates the prosecution version. It was further argued that the last seen evidence introduced by prosecution at a belated stage has no evidentiary value and the trial Court, while relying upon such evidence, has not considered the fundamental principles laid down by superior Courts; that the extra judicial confession is

not admissible in evidence, it can neither be proved in terms of Article 39 of Qanun-e-Shahadat Order nor it is sufficient for recording conviction unless it is strongly corroborated by tangible evidence coming from unimpeachable source which is not available in the present case. He next argued that the occurrence is unwitnessed and the prosecution case mainly rests on circumstantial evidence, so, the trial Court was duty bound to analyze it with due care and caution which has not been employed in the present case. He finally submitted that the impugned judgment is the result of wrong appreciation of the prosecution evidence, therefore, the same be set aside and the appellant be acquitted of the charge. He placed reliance on the following judgments.

1985 SCMR 1573
PLD 1965 Supreme Court 366
PLD 1956 Supreme Court 420
PLD 1956 Supreme Court 111
PLD 1961 (W.P) Lahore 146
1975 PCr.LJ 882 Karachi
2008 MLD 1007 Lahore
2016 YLR 787 Peshawar
2016 PCr.LJ 1319 Lahore
2017 PCr.LJ 1563 Lahore
Judgment dated 10.09.2014 in Cr.A No. 170/2013 titled Aurangzeb Vs. The State and another. (unreported judgment of the this Court)

10. As against that learned counsel for Respondent No. 2 contended that F.I.R, being a public document and relevant, is admissible in evidence without any further proof. He submitted that first information report made by accused as complainant is admissible in evidence against him and findings of the learned trial Court to this effect are in accordance with law and settled principles. Referring to the disparity between F.I.R and medical report, the learned counsel stressed that object of the F.I.R is to set the law into motion and each and every detail is not necessary to be given therein, therefore, the prosecution story given in the F.I.R is either to be believed or disbelieved but it cannot be accepted partly; since the contents of the F.I.R, more or less, stand proved in light of the strong circumstantial evidence, therefore, the same are to be taken as a whole against both the appellants, which has rightly been done by learned trial Court by outweighing the minor contradictions. He argued that F.I.R recorded in consequence of receipt of information has an evidentiary value; it may be used for the purpose of contradiction under Article 140 and for the purpose of corroboration under Article

153 the Qanun-e-Shahdat Order, 1984. The learned counsel added that common intention of the appellants can easily be inferred from facts and circumstances of the present case from which it is abundantly clear that both the appellants committed the double murders in furtherance of their common intention. He next argued that prosecution has proved its case against the appellants beyond reasonable doubt, the appellants should have been punished according to the nature and gravity of the offence committed. He further contended that appellant Muhammadullah has disclosed a strong motive behind the occurrence in the F.I.R and recovery of the dead bodies from the same place further strengthens the fact that the murders were committed by appellants on the pretext of honour, hence, their conviction by the trial Court is according to the evidence available on record. Learned counsel lastly submitted that in light of the contents of F.I.R, recovery of crime weapons i.e axe, knife and Kalashnikov, last seen evidence of PW-1, recovery of the dead bodies from the spot and medical reports of the deceased, being inter connected and consistent, duly establish the guilt of

both the appellants, therefore, this appeal be dismissed. Learned counsel representing the State supported the arguments of learned counsel for Respondent No.2. They placed reliance on the following judgments.

PLD 1975 Supreme Court 607

PLD 2005 Supreme Court 288

PLD 2008 Supreme Court 115

PLD 2017 Federal Shariat Court 1

2011 PCr.LJ 1870 Lahore

PLD 2006 Peshawar 5, 2011 YLR 2618 Quetta

2012 YLR 1386 Lahore, 2005 PCr.LJ 1638 Karachi

2008 YLR 580 Shariat Court (AJ&K)

2015 YLR 249 Peshawar

11. We have heard the arguments and gone through the record in light of the valuable of assistance of learned counsel for the parties.

12. The most debated point in the case is that as to whether F.I.R lodged by an accused can be taken into account against him or not. Case of the prosecution is that appellant Muhammadullah committed murders of his sister-in-law Mst. Bachazul Bakht and Lal Muhammad for the alleged

illicit relations between them and their union for the purpose of *zina* at that particular night; thereafter he went to police station and admitted his guilt by making report of the occurrence. Before making discussion on the point of admissibility of F.I.R as evidence or otherwise, first we would see as to whether or not the F.I.R can be attributed to appellant Muhammadullah in light of the prevailing circumstances of the case. The F.I.R was lodged on 15.02.2012. He was produced before Judicial Magistrate on 16.02.2012 and vide application Ex.PW-6/21 his custody for seven days was sought which was allowed and four days custody in favour appellant Muhammadullah was allowed on the same date. Question arises that when the appellant proceeded to police station of his own and lodged the report by admitting his guilt, as alleged by prosecution, then why the need for his further custody was sought instead of making a request to the Court for recording his judicial confession. Again when the appellant was produced before the Judicial Magistrate on 20.02.2012, he refused to confess his guilt. Prosecution has brought nothing on the record to show that the appellant was tutored by

his counsel or any other person for not recording his judicial confession. Keeping in view the absence of any such proof and the mode and manner of his production before the Judicial Magistrate coupled with his statement on oath, how can we hold that the F.I.R was lodged by appellant Muhammadullah by making a voluntary confession before the police.

13. Now coming to the point under consideration. It is well settled that F.I.R by itself is not a substantive piece of evidence unless its contents are affirmed on oath and the maker thereof is subjected to the test of cross-examination. Registration of F.I.R at the instance of accused is a confession before police which being extra-judicial in nature, is not admissible in evidence against him according to Article 38 of the Qanun-e-Shahadat Order, 1984 which reads as:-

> **"38. confession to police officer not to be proved.** No confession made to a police officer shall be proved as against a person accused of any offence".

In the present case, the learned trial Court has based conviction of the appellants mainly on the F.I.R lodged by one of them and the last seen evidence, the evidentiary value whereof will be

discussed later on in this judgment. In view of various provisions of the Qanun-e-Shahdat Order, the status of the F.I.R lodged by accused is that of his previous statement, therefore, cannot be made a basis for his conviction. Wisdom is derived from the judgment in the case titled *"Muhammad Saleh Vs. The State" (PLD 1965 Supreme Court 366)* wherein it has been held that:-

> **"Muhammad Saleh himself went to the Police Station to report the matter. What he said was recorded at 11-30 a.m. on the 26th February. That statement was inadmissible evidence on account of its inculpatory nature".**

The august Supreme Court while deciding the case of *"Muhammad Bakhsh Vs. The State" (PLD 1956 Supreme Court (Pak.) 420)* confirmed the observations of High Court whereby report made by accused was excluded from consideration. The Hon'ble apex Court held that:-

> **"Mr. Mehmud who has opposed the appeal admits that the report made by the appellant at the Police Station was rightly excluded by the High court but he contends that the judicial confession though on oath was admissible ....."**

First information report is a previous statement of accused in view of Articles 140 and 153 of the Qanun-e-Shahadat which can be used for contradicting its maker but unless it is proved in accordance with the above provisions of law, it cannot be given the status of evidence, as such, cannot be considered as a proof of its contents mentioned therein by its maker. In this regard we would refer the judgment of Supreme Court of India reported as *"Nasar Ali Vs. The State of Utarpardesh" (AIR 1957 S.C 366)* wherein it has been laid down that:

> **"A first information report is not a substantive piece of evidence and can only be used to corroborate the statement of the maker under s. I57 of the Evidence Act or to contradict it under S. 145 of that Act. It cannot be used as evidence against the maker at the trial if he himself becomes an accused, nor to corroborate or contradict other witnesses. It is a cardinal principle of criminal jurisprudence that the innocence of an accused person is presumed till otherwise proved. It is the duty of the prosecution to prove the guilt of the accused subject to any statutory exception".**

First Information Report basically covers the information regarding a cognizable

offence given to officer incharge of a police station the purpose of which is to set the law in motion for conducting investigation in the case. It is not a substantive piece of evidence unless the maker himself deposes in Court to confirm the contents of the F.I.R entered therein at his behest. Keeping in view the above status of the F.I.R, this document by itself cannot advance the prosecution case except it is recorded by a person who is near to die which is commonly known as dying declaration but that is also admissible in evidence under certain principles laid down by superior Courts. The august Supreme Court of Pakistan in its judgment in the case titled *"Ghaus Muhammad alias Ghausa and another Vs. the State" (1979 SCMR 155)* held that:-

> **"The maker of the F. I. R. has died. It cannot be used as corroboration of the testimony of another person, namely Nur Muhammad P. W. At best the prosecution can use it for showing that the name of Nur Muhammad is mentioned in the F. I. R. but that by itself would not advance the prosecution case".**

In light of various provisions of the Qanun-e-Shahadat Order, 1984 mentioned earlier and the above referred dicta of the Superior Courts, we reach to the conclusion that the F.I.R lodged by

the appellant Muhammadullah cannot be used against him as evidence in view of the prevailing circumstances of this case. The undue weight attributed to the F.I.R by the learned trial Court has no legal justification.

Learned counsel for the complainant during his arguments mainly relied on the judgment rendered in the case titled *"Muhammad Khan Vs. Dost Muhammad and 17 others"* ***(PLD 1975 Supreme Court 607)*** and contended that first information report can be used as an admission against a person on whole instance it was registered. We would not subscribe to the above submission of the learned counsel as the facts and circumstances forming background of the referred judgment of the Hon'ble apex Court are different from the present one. There was purportedly a cross version of that case the report of which had been lodged by the convict earlier in time, which is not the situation here in this case. Even the judgment of the Privy Council ***(AIR 1939 P.C 47)*** relied upon by counsel for the convict in that case was distinguished by the Hon'ble apex Court mainly on the ground that it was not a case of F.I.R registered in a cross case. It

would be proper to reproduce the observations recorded by the august Supreme Court in the case of Muhammad Khan *supra* to further elucidate our point of view.

> **"On the merits of the objection, the first limb of the argument is without substance. The Privy Council case proceeded on entirely different facts. It was not a case of an F. I. R. being registered in the cross-case. The short question, which in so far as it is relevant to this case, was whether the statement made before the Police, during the investigation of a case, by a person who had not till then joined the investigation as accused, can subsequently be proved by the prosecution against him as his admission, in the same case. The prosecution in that case sought to prove an admission by the accused on the plea that the expression, "the person" in section 162, Cr. P. C. refers to a person, other than an accused or a potential accused and that therefore any admission (as distinguished from downright confession of guilt) made by an accused or a potential accused is provable against him. The argument was rejected, and their Lordships came to the conclusion that such "statement is not admissible even when made by the person ultimately accuser".**

To sum up, the learned trial Court has illegally taken into account the F.I.R against appellant Muhammadullah who allegedly made the report. Next is the question that whether it can be used against the co-appellant Hanifullah or not.

Admittedly, he is not nominated in the F.I.R by co-accused Muhammadullah and was charged by relatives of both the deceased in their 164, Cr.P.C statements recorded at a belated stage, therefore, there arise no question of taking into account the F.I.R against the co-appellant Hanifullah.

14. Record transpires that the occurrence took place on 15.02.2012 while the appellants were charged on 28.02.2012. Sahib Zada (PW-1), father of the deceased Lal Muhammad introduced last seen evidence while recording his 164, Cr.P.C statement on 14th day of the occurrence wherein he stated that on the night of occurrence, he and his son Lal Muhammad had gone to mosque of Degan Lakhar for offering *Isha* prayers; after the prayers he came back to his house while deceased Lal Muhammad stayed there for recitation of the Holy Quran. When the deceased came to his house, he told him (his father) that Hanifullah had invited him for a feast; in the meanwhile Hanifullah called his son, in response whereof the deceased went with him. He further stated that on the next day he came to know that his son had been done to death. PW-2 Ismail, brother of deceased Bachazul Bakht also recorded his

statement and charged both the appellants for the murder of his sister. Before discussing credibility of the said witnesses, first we would discuss the delay caused in recording the statements of the PWs and its legal repercussions on the prosecution case. No plausible explanation has been given by prosecution as why the statements of PWs were recorded at such a belated stage which would definitely affect the credibility of the witnesses in the circumstances of the present case, hence, they could not be safely relied upon for conviction of the appellant. Wisdom is derived from the judgment in the case titled *"Rahat Ali Vs. The State" (2017 SCMR 584)* wherein it is held that:-

> **"9. The story narrated by P.W.2 that after the abduction he went to sleep in the house also does not seem to be true because in such a situation he could not have gone to sleep when his parents were abducted. His natural and immediate conduct would have been to go to his uncle or to his mother who was first wife of deceased to inform her about the incident. Thus there is inordinate delay of silence of P.W.2 which creates doubt about his veracity. Delay of 24 hours, 4 days and 15/20 days in reporting the matter to the police or recording the statement of witnesses by the police has been found adversely affecting the veracity of witnesses**

as held in the cases of Muhammad Sadiq v. The State PLD 1960 SC 223, Sahib Gul v. Ziarat Gul 1976 SCMR 236 and Muhammad Iqbal v. State 1984 SCMR 930, respectively. It has also been observed by this Court that delay in recording the statement without furnishing any plausible explanation is also fatal to the prosecution case and the statement of such witness was not relied upon in the case of Syed Muhammad Shah v. State 1993 SCMR 550. Therefore, the evidence of P.W.2 is coming within the scope of above rules laid down by this Court. Hence, his statement cannot be safely relied upon in the peculiar facts and circumstances of the present case".

In a recent judgment rendered in the case of *"Muhammad Asif Vs. The State" (2017 SCMR 486)* the Hon'ble apex Court held the same view by observing that:

".....Again there is another doubtful aspect of the case because Nazar Hussain (PW-9), the father of the deceased who according to the FIR was stated to be guarding the dead body, on arrival of the local police to the spot, however, in the very examination in chief at page/20 of the paper book he has squarely stated that he joined the investigation after one month and one day after the occurrence. There is a long line of authorities/precedents of this court and the High Courts that even one or two days unexplained delay in recording the statement of eye-witnesses would be fatal and testimony

of such witnesses cannot be safely relied upon".

In view of the principles laid down in the above referred judgments, the silence of the PWs for 13/14 days of the occurrence is a striking aspect of this case which has been overlooked by the learned trial Court while recording conviction of the appellants.

15. PW-1 Sahib Zada has introduced the last seen evidence in this case against co-appellant Hanifullah. While describing the motive in his statement, PW-1 stated that he had a dispute with the appellants over the boundary line of land and they had threatened him for dire consequences. The relevant portion of his statement is as under:-

> وقوعہ سے قبل میرے اور ملزمان مقدمہ ہٰذا کے مابین حد برد کا تنازعہ تھا اور ملزمان نے مجھے دھمکی دے رکھی تھی کہ ہم یعنی ملزمان تمھارے لیے ایسی مشکلات پیدا کرینگے کہ عمر بھر یاد رکھوگے اور یہی وجہ تھی کہ ملزمان نے غلط اور جھوٹے الزام کی بنیاد پر میرے بیٹے لعل محمد اور مقتول باچہ زولبخت کو قتل کر ڈالا۔

When the appellants had allegedly threatened him for dire consequences as stated by PW-1, departure of the deceased at night time with appellant Hanifullah seems to be very strange and ridiculous. It appears that PW-1 introduced another

story of invitation of the deceased by appellant Hanifullah which neither stands to reason nor properly fits in the story set up by prosecution. The fact that statement of PW-1 was recorded with a considerable delay without any explanation, we do not find ourselves in the position to believe it in utter disregard of the well-recognized principles for appreciation of evidence. While deciding the case of *"Fayyaz Ahmad Vs. The State" (2017 SCMR 2026)*, the august Supreme Court laid down certain fundamental principles for guidance of the Courts while deciding cases based on the last seen evidence. Some of the principles befitting the circumstances of this case are reproduced below.

> **"(vi) Quick reporting of the matter without any undue delay was essential, otherwise the prosecution story would become doubtful for the reason that the last seen evidence was tailored or designed falsely to involve the accused person.**
>
> **(vii) Last seen evidence must be corroborated by independent evidence, coming from an unimpeachable source because uncorroborated last seen evidence was a weak type of evidence in cases involving capital punishment.**

In the present case, neither the last seen evidence has been reported in time nor it gets corroboration from an unimpeachable and

independent source; therefore, the same is of no avail to prosecution.

16. In addition to above, the story set up in the F.I.R does not stand to reason. It is mentioned therein that deceased Lal Muhammad entered the house of Mst. Bachazul Bakht at 21:00 hours while appellant Muhammadullah was watching him; he tried to open the door but it was locked from inside and thereafter broke the door with axe at 00:30 hours. Question arises that for what purpose the appellant waited for three and half hours in the intense cold at night time when finally his intention was to break the door with axe. This infirmity in the F.I.R has not been explained by prosecution. In addition to above, there is also inconsistency between post-mortem report of deceased Lal Muhammad and contents of the F.I.R. There is no mention in the F.I.R regarding use of fire arms in the occurrence but the doctor found fire arm injuries of the dead body of deceased Lal Muhammad. This is another glaring contradiction in the prosecution case which pricks our judicial mind qua the guilt of appellants independently as well as under their alleged common intention.

17. It is also the version of prosecution that when appellant Muhammadullah came to police station his dress and boots were stained with blood. Although, the F.S.L report regarding the said articles is positive for human blood but it has not been clarified that the group thereof matched with the group of both of the deceased or not. In other words prosecution has not established that the dress and shoes of appellant Muhammadullah were stained with the blood of deceased. This clarification was utmost necessary in view of the peculiar facts and circumstances of the occurrence which has not been done. If we presume that his dress was stained with the blood of deceased even then this may happen by lifting the dead bodies after the occurrence without his involvement in the murders. In the view of this Court, the mere fact that dress and shoes of the appellant were stained with human blood is not sufficient to prove that he committed the murders of the deceased.

18. Admittedly, the occurrence is unwitnessed one and the prosecution case mainly depends upon the last seen evidence which has been disbelieved by this Court vide the discussion in the

preceding paras. Next is the circumstantial evidence of the case but the same is also not sufficient to prove the appellants guilty of the charge. Prosecution was duty bound to establish its case against the appellant by providing all links in unbroken chain, which are not available in the present case. Mere the fact that the dead bodies were recovered from the house of Sajid, brother of the appellants, cannot be considered enough for holding the appellants responsible for the murders they are charged with. So is the recovery of axe, knife and Kalashnikov, which were allegedly presented by co-appellant Hanifullah but on the alleged pointation of appellant Muhammadullah. When we look into the contents of the F.I.R in light of the last seen evidence, the prosecution case appears to be quite doubtful and ambiguous. Record also shows that all the marginal witnesses to the recovery memos are police officials and no private witness has been associated with the investigation. How was it possible that a single independent witness was not available at the time of investigation though other houses are situated near the place of occurrence nor the police bothered to record statements of the other

inmates of the house including the children of deceased lady. We are conscious of the fact that people normally refrain from indulging in the matters of Courts and police stations but still no signs appear in the case to show that the investigating agency tried its level best but could not succeed. It appears that police handled the case quite in a mechanical manner and looking into the matter in view of the mode of investigation conducted in the case, it may be inferred that the F.I.R was attributed to appellant Muhammadullah against his will or taking advantage of his illiteracy. Thus, it is held that the prosecution case rests on very weak circumstantial evidence which cannot be considered randomly for conviction of the appellant. In this regard we would again refer the case of Fayyaz Ahmad *supra* ***(2017 SCMR 2026)*** wherein it has been held that:-

> **5. To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.**

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without any missing link, otherwise at random reliance on such evidence would result in failure of justice.

Undoubtedly, the F.I.R is based on the alleged statement of appellant Muhammadullah before the police tending to incriminate him for the murders, which is inadmissible under Article 38 of the Qanun-e-Shahadat Order, 1984 which has already been reproduced herein above. The use of

firearms in the occurrence but non-mentioning thereof in the F.I.R coupled with recovery of Kalashnikov on the alleged pointation of appellant Muhammadullah from the co-appellant, non-association of independent and natural witnesses with the investigation and the last seen evidence are the factors in this case which do not form a link to connect the appellants with the offences they are charged with. In this regard we would refer the judgment of this Court in the case titled ***"Muhammadullah Vs. The State" (PLD 2001 Peshawar 132"*** wherein it has been held that:-

> **"Appreciation of evidence ---F.I.R. was based on the statement made by the accused before the police tending to incriminate him with the offence charged with, which was inadmissible in evidence by virtue of Art. 38 of Qanun-e-Shahadat, 1984-- Discovery of the house at the instance of the accused where the dead body was found could prove nothing but his knowledge about the place of occurrence--- Recovery of shot gun from the possession of accused and empties from the spot as well as positive report of the Ballistic Expert might, at their best prove the use of the shot gun in the commission of the crime, but in no manner could prove that the same had been used by the accused in the commission of the offence--- Even otherwise, Ballistic report had no value as the shot gun and the empties had been despatched to the Ballistic Expert after a delay of one month---Necessary witnesses having not been examined in the case either during the investigation or in the Court, tile story about the motive for the occurrence appeared to be false and fictional---Neither any direct evidence was forthcoming to connect the accused with the crime, nor any circumstantial evidence incompatible with his**

innocence was available on record---Accused was acquitted on benefit of doubt in circumstances".

19. No doubt, dead bodies of both the deceased have been recovered from the house of brother of appellants which is situated adjacent to their house, but this fact is not sufficient to establish that the murders were committed by them either under their common intention or by any one of them as their independent roles have not been proved through solid evidence. Wisdom is derived from the judgment in the case titled *"Muhammad Jamshed and another Vs. The State and others" (2016 SCMR 1019)* wherein it has been held that:-

> **"3. According to the prosecution Mirza Yaqoob deceased was settled in the United Kingdom and had married a number of times including with a lady who was a sister of the present appellant but admittedly the said marriage had resulted in a separation and at the relevant time, while on a visit to Pakistan, the deceased was staying in a Guest House but his deadbody had been found in the house of the appellant which house was inhabited by many other members of the appellant's family. It is not disputed that the murder in issue had remained unwitnessed. The motive set up by the prosecution had been disbelieved and ruled out of consideration by the trial court and the only circumstance relied upon by the prosecution was that the deadbody of the deceased had been found inside the house**

of the appellant and, hence, it was concluded by the courts below that it must be none other than the present appellant who had done the deceased to death. We have found such an approach adopted by the courts below to be nothing but speculative. It is trite that suspicion howsoever grave or strong can never be a proper substitute for proof beyond treasonable doubt required in a criminal case. The house in issue was admittedly inhabited by many other members of the appellant's family. The role played by the appellant in the incident in issue had never become available on the record and it had never been disclosed or alleged by the prosecution as to under what circumstances the deceased had been done to death. It has, thus, surprised us to learn that not only the trial court but also the High Court had concluded that the prosecution had proved its case against the appellant beyond reasonable doubt. We expect the courts below to do better in future".

20. Notwithstanding with the fact whether it is a case of honour killing or simple murder, it is the duty of prosecution to establish the case beyond shadow of doubt against the accused by adducing unimpeachable evidence otherwise the Court is left with no other option but to extend the benefit of doubt to him. The mere fact that it was the occurrence of honour killing and the case was of higher intensity should not be the considerations for Courts for convicting an accused rather the material

on record are needed to be properly appraised according to settled principles. In other words, the rule for appraisal of evidence in ordinary cases and the cases of honour killing should be one and the same and appreciation of evidence with a different yardstick on the ground that it is a case of honour killing, would not be just and fair. The Courts are required to appraise the evidence according to the settled principles for arriving at a just and fair conclusion.

21. As a sequel of our above discussion, this appeal is allowed, the impugned judgment is set aside and the appellants are acquitted of the charge leveled against them. They be released forthwith from jail if not required in any other case.

22. Above are the reasons of our short order of the even date.

Announced.
Dt: 20.02.2018

JUDGE

JUDGE