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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

(JUDICIAL DEPARTMENT)

Criminal Appeal No.58520-J of 2020

Muhammad Umar etc. Vs. The State, etc.

Criminal Revision No. No.49773 of 2020

Mirza Munawwar Hussain Baig Vs. The State, etc.

J U D G M E N T

Date of hearing	**14.05.2024**
Appellants by	Ch. Muhammad Yaqoob Advocate (for Muhammad Umer appellant No.1) and Mr. Usman Sarwar and Miss Samra Malik, Advocates (for Muhammad Asim appellant No.2)
State by	Miss Asmat Parveen, DDPP
Complainant by	Rai Usman Ahmad and Adil Noor Ahmad Advocates.

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MUHAMMAD AMJAD RAFIQ, J: Appellants, Muhammad Umer and Muhammad Asim were tried by the learned Additional Sessions Judge, Lahore in case FIR No.314 dated 22.04.2014 under sections 302, 460 & 411 PPC Police Station Township District Lahore and on conclusion of trial, vide judgment dated 12.09.2020, they were convicted and sentenced as under:-

(i) Imprisonment for life under section 302(b)/34 PPC as 'Tazir' each on two counts along with compensation Rs.3,00,000/- each under section 544-A Cr.P.C payable to the legal heirs of each deceased recoverable as arrears of land revenue and in default thereof to further undergo six months S.I each.

(ii) Ten years RI each under section 460 PPC.

(iii) Three years RI each under section 411 PPC with fine of Rs.50,000/- each and in default thereof to further undergo two months S.I each.

Sentences of the appellants were ordered to run concurrently with benefit of section 382-B of Cr.P.C.

2. Case opens up by Mirza Javed Anwar Baig complainant (died during the trial), through written application (Exh.PB), formalized later into FIR (Exh.PB/2) about the death of his step daughter Kanwal Javaid and granddaughter Tayyaba in his house in circumstances leading to culpable homicide. According to his narration, husband of Kanawal had gone to Jeddah and she along with her daughter

Tayyaba was residing with him at 412/A-1 Johar Town Lahore for his care as an ailing family member. On 21.04.2014 he went to reside with his son Mirza Munawar Hussain Baig (PW-5) at Government Punjab Society, as he usually did. On the next day i.e. 22.04.2014 at about 12:00 noon, he along with his driver returned; knocked at the door, finding no response from inside he rang her daughter on cell phone which was not attended, so he went to Hair Salon; returned again at about 01:45 p.m., repeated the knock and phone but while facing similar situation, he went to his in-laws at Rehmanpura. After another failed attempt at 3:00 pm, thinking she might have gone to her in-laws he decided to visit again. At 9.00 p.m. he returned with his son (PW-5) but situation remained same, no body opened the door. Suspecting some foul play he asked his son to access the house from the neighbour side who along with one Ahmad scaled over the wall of the house and found Kanwal was lying dead on a bed with marks of violence on her face and neck while in other room his maternal grand-daughter Tayyaba was also found dead on carpet whose hands and feet were tied having violence marks on her face too. FIR was registered against unknown accused persons. Subsequently complainant got recorded his supplementary statement mentioning that some household articles were also missing from the house.

3. Situation, empty and blank with no lead whatsoever, was given to investigator who visited the crime scene same night i.e., 22.04.2014; inquest of dead bodies was formalized through injury statements and the inquest reports; PFSA crime scene unit was summoned who collected the articles, suspected to have biological stains, for DNA and also finger prints. An exhibit sheet showing collection of 22 articles from the crime scene was prepared by crime scene unit which they later deposited in the PFSA for analysis. Autopsy was done on the next morning. Police allegedly recorded statement of two witnesses on the same night (22.04.2014) who stated to have seen two unknown persons in the morning of

22.04.2014 at about 7.00 a.m. while leaving the house of occurrence on motor cycle with some articles wrapped in a cloth, like bale with LCD and they had a dialogue with unknown accused to know the presence of their landlord namely Masood Akbar Warraich, in the house of occurrence. Another set of witnesses namely Imran Yasin & Javid Iqbal recorded later who had seen Muhammad Umar and Muhammad Asim (accused/appellants) at the homestead of place of occurrence while ringing the doorbell at about 11.00 p.m. on 21.04.2014. on arrest of accused/appellant, they were put to successful test identification parade, later number of stolen articles were also shown recovered from them. A SIM collected from the place of occurrence was found to be in the name of wife of Muhammad Asim, accused/appellant. PFSA report was returned with matching of some biological stains and finger prints with both the accused/appellants. They were accordingly challaned; disclosure of prosecution evidence was made to them and on the basis of information they denied the formal charge and claimed the trial.

4. At the trial, prosecution examined as many as 17 witnesses; Muhammad Munir (PW.1), Ahmad Raza (PW.2), Imran Yasin (PW.3), Javed Iqbal (PW.4) Mirza Munawar Hussain Baig (PW.5), Amjad Ali constable (PW-6), Muhammad Yahya S.I (PW-7), Ch. Zia-ud-Din Chishti draftsman (PW-8), Muhammad Waqas constable (PW-9), Muhammad Sarwar ASI (PW-10), Muhammad Boota Constable (PW-11), Dr. Faiza Munir Qazi (PW-12), Dr. Shazia Manzoor (PW-13), Khalid Hussain 1374/L ASI (PW-14), Mundassar Hassan Magistrate (PW-15), Muhammad Azeem Junior Forensic Scientist (PW-16) and Zulfiqar Ahmad Inspector (PW-17). Statements of accused/appellants under Section 342 Cr.P.C were recorded wherein they denied the prosecution version with the Claim that they have falsely been involved in this case. While responding to question No. 4, Muhammad Umar accused/appellant stated that he has been involved by Masood Akbar Warraich, his Khalo (husband of maternal aunt) however, both did not opt to record their statement

under Section 340(2) Cr.P.C. After conclusion of trial, they were convicted and sentenced forecited.

5. In response to claim of appellants' counsel that no direct evidence is available in this case, learned counsel for the complainant stated that DNA & finger prints evidence is sufficient to sustain the conviction and sentence of the accused/appellants and placed reliance on case reported as "*MUHAMMAD SOHAIL alias SAMMA and others Versus The STATE"* **(2019 P Cr. L.J 1652)**. Learned Deputy District Public Prosecutor submitted that circumstantial evidence in this case has a big support to forensic evidence and hypothesis of innocence stands far away from the accused/appellants who are in tight clutches of prosecution evidence. She, finally supported the impugned judgment of conviction and sentence.

6. Proponents' say in the light of available evidence put the Court at guard to minutely examine the march of prosecution to catch the alleged culpability of accused/appellants.

7. According to prosecution's own showing, it was an unseen occurrence, hinges upon the circumstantial evidence which usually flows from the artefacts of death with sequence of articles lying near or around the dead body, examination whereof with naked eye by the police or expert is required to be done only in prescribed manner, procedural mandate is mentioned in Rule. 25.33 of Police Rules, 1934, reproduced below:-

> **25.33. Investigating Officer - action of at scene of death.** - On arrival at the place where the body of a deceased person is lying, the police officer making the investigation shall act as follows:-
>
> (1) He shall prevent the destruction of evidence as to the cause of death.
>
> (2) He shall prevent crowding round the body and the obliteration of foot-steps.
>
> (3) He shall prevent unnecessary access to the body until the investigation is concluded.
>
> (4) He shall cover up footprints with suitable vessels so long as may be necessary.
>
> (5) He shall draw a correct plan of the scene of death including all features necessary to a right understanding of the case.

> (6) If no surgeon or other officer arrives, he shall, together with the other persons conducting the investigation, carefully examine the body and note all abnormal appearance.
>
> (7) He shall remove, mark with a seal, and seal up all clothing not adhering to, or required as a covering for, the body, all ornaments, anything which may have caused or been concerned in the death of the deceased and shall make an inventory thereof.
>
> In the inventory shall be described the position in which each thing was found and any blood-stain, mark, rent, injury or other noticeable fact in connection with such thing. The number and dimension of such stains, marks, rents, injuries, etc., shall also be given in the inventory.
>
> A counterpart of the mark and seal attached to such thing or to the parcel in which it has been enclosed shall be entered in, or attached to, the inventory.
>
> Such inventory shall form part of the inquest report.
>
> (8) He shall take the finger prints of the deceased person if the body is unidentified.
>
> (9) The photographing of the body in situ and of the scene of the occurrence may prove of great evidential value.

8. Under the command of above Rule, investigating officer can seek technical assistance from the experts as per Rule 25.14 of Police Rules, 1934:-

> **25.14. Technical assistance in investigation.** –
> (1) Investigating officers are expected to take steps to secure expert technical assistance and advice, whenever such appears desirable in the course of an investigation for purposes of evidence or for demonstration in court.
>
> (2) The Criminal Investigation Department is able to obtain expert technical assistance on many subjects and should be freely consulted in that connection by investigating officers through their Superintendents of Police. When such assistance is required, a full report shall be sent to the Assistant Inspector General, Crime and Criminal Tribes, so that he may be in a position to decide whether it is essential to send an expert to the scene of the crime or whether the material to be dealt with should be sent to the expert. In making such reports use should be made of telegraphic and telephonic facilities.
>
> (3) The Criminal Investigation Department, in conjunction with the Finger Print Bureau, undertakes photographic and some other varieties of technical work. In addition, it is in contact with technical experts on may subjects, whose services can frequently be obtained for work in connection with criminal investigation. In respect of the examination of handwriting, investigating officers can obtain the services of the Examiner of Questioned Documents with the Government of India, through the Criminal Investigation Department. That department is also the channel for obtaining the services of the Inspector of Explosives for Northern India who, as well as advising on explosives generally, can give expert opinion as to whether a weapon has been recently fired, whether certain

> matter is gunpowder or not, and all questions generally savouring of chemical analysis.

Rule 25.14 in all covers calling in aid of PFSA teams for the purpose of preservation, collection, sampling and packaging of articles, biological stains and securing the finger prints followed by handing over the parcels to the police for its dispatch to PFSA analysis. Investigator is required to stamp such parcels with seal of police station by mentioning the particulars of case as required by Rule 25.33 cited above, its entry into register No. 19 of police station and then after obtaining docket/permission from the senior police officer of the district ensure safe dispatch and deposit of parcels to PFSA. **Rules-25.41** of Police Rules, 1934 relates to channel of communication with Chemical Examiner which mandates as under:-

> "Superintendents of Police are authorised to correspond with and submit articles for analysis to the Chemical Examiner direct in all cases other than human poisoning cases….."

Further requirement of Rule 25.41, has also been observed by this Court in case reported as "*Meer Nawaz alias Meero Vs The State"* **(PLJ 2022 Cr. C 955 Lahore)**.

9. In no case, an expert can take the samples direct to PFSA for analysis because it is the investigator to decide what sort of analysis he is seeking in that particular case. Rule-25.41 (2) impliedly prohibits such practice which is mentioned in said Rule in the form of Notes: - (2) as under:-

> "(2) In no case should the Medical Officer attempt to apply tests for himself. Any such procedure is liable to vitiate the subsequent investigation of the case in the laboratory of the Chemical Examiner"

Juxtaposing of above rule with mandate of PFSA is essential to see if any power is available to PFSA experts to take a lead on crime scene independent of investigators. As per section-4 of the Punjab Forensic Science Agency Act, 2007, functions of PFSA are as under:-

> **4. Functions of the Agency:** The Agency shall:
> a) undertake examination of forensic material;
> b) render expert opinion with regard to examination of forensic material conducted by it;

c) procure, operate and maintain scientific instruments for examination of forensic material;
d) propose advancement in forensic techniques and suggest use of suitable scientific instruments for examination of forensic material;
e) seek clarification from the person involved in collection or handling of forensic material in the prescribed manner;
f) recommend the procedure for the collection, preservation and handling of forensic material;
g) subject to the direction of the Government, collect forensic material that requires special expertise or scientific methods for collection and preservation;
h) maintain record for examination of forensic material, including record pertaining to the identity of a person connected with or accused of an offence, in the prescribed manner;
i) promote general awareness on matters relating to forensics; and
j) perform any other function connected with or ancillary to the above functions.

As per above mandate, PFSA can seek clarification from the person who has collected or handled the forensic material in prescribed manner or subject to direction of government collect forensic material that requires special expertise or scientific methods for collection and preservation. Thus, in no case PFSA, at its own can visit the crime scene except summoned by the investigator which he must do if essential. Similarly, experts of PFSA also cannot dispatch material directly to PFSA.

10. Further introducing an expert in chain of safe custody of parceled articles would amount to compromise the process because it is the legal duty of police to dispatch such articles to PFSA and not the expert and if the custody protocols are breached, then police can be held responsible and not the experts. Such breach amounts to disobeying the direction of law or defective investigation which is culpable under sections 166 & 186 (2) of PPC, however, if at the crime scene any expert in connivance destroys or manipulates evidence can be bracketed for offences under sections 166 or 217 of PPC but not otherwise because their function is to conduct test or analysis of forensic material, therefore, are held responsible only if tender false opinion as mentioned in section 13 of Punjab Forensic Science Agency Act, 2007 as under:-

> "**13. Offence:** - (1) If an expert or official of the Agency knowingly or negligently renders false, incorrect or misleading opinion before a Court, tribunal or authority, he shall be punished with imprisonment which may extend to six months or with fine which may extend to fifty thousand rupees or with both"

11. Admittedly, there was no direct evidence in the matter and the prosecution evidence was based upon circumstantial evidence in the form of '*Wajtakar*'. 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 as unbroken, where one end of the same touches the dead body and the other the neck of the accused. In a case reported as *"MUHAMMAD TAYAB and another The STATE and others"* **(2023 YLR 2207)**, the Division Bench of this Court while citing and relying on following case law:-

> Gul Muhammad and others v. The State" (2021 SCMR 381); "NAVEED ASGHAR and 2 others Versus The STATE" (PLD 2021 Supreme Court 600); "MUHAMMAD ISMAIL and others Versus THE STATE" (2017 SCMR 898), "AZEEM KHAN and another Versus MUJAHID KHAN and others" (2016 SCMR 274);"NIAZ AHMED Versus HASRAT MAHMOOD" (PLD 2016 Supreme Court 70); "MUHAMMAD SALEEM Versus SHABBIR AHMED and others" (2016 SCMR 1605); "MUHAMMAD HUSSAIN Versus THE STATE" (2011 SCMR 1127); "ZAFAR ABBAS Versus THE STATE" (2010 SCMR 939 "TAHIR JAVED Versus THE STATE" (2009 SCMR 166); "IBRAHIM and others Versus THE STATE" (2009 SCMR 407); "ALTAF HUSSAIN Versus FAKHAR HUSSAIN and another" (2008 SCMR 1103); "AKBAR ALI Versus THE STATE" (2007 SCMR 486); "LIAQAT ALI Versus THE STATE" (2007 SCMR 1307); "ABDUL MATEEN Versus SAHIB KHAN and others" (PLD 2006 Supreme Court 538); "MUNAWAR SHAH versus LIAQUAT HUSSAIN and others" (2002 SCMR 713); "MUNIR AHMAD DAR Versus IMRAN and others" (2001 SCMR 1773); "AZIM Versus THE STATE" (PLD 1965 Supreme Court 44) "SIRAJ Versus THE CROWN" (PLD 1956 Federal Court 123).

Including "*LEJZOR TEPER versus THE QUEEN*" **(PLD 1952 Privy Council 119)** & others, dilated upon the strands of circumstantial evidence like motive, plans and preparatory acts, capacity, opportunity, identity, continuance, failure to give evidence and failure to provide evidence, and held that circumstantial evidence must be conclusive.

12. Keeping in view the above standards of evidence and protocols/precautions, let the prosecution evidence be examined. Prosecution produced Mirza Munawar Hussain Baig PW-5 son of the complainant that he with the help of neighbour Ahmad Hassan Zaidi while scaling over to the place of occurrence had viewed the deadbody of Kanwal lying on the bed and that of Tayyaba in other room on the carpet with tied hands and feet and associated injuries on their bodies as mentioned in FIR. Ahmad Hassan Zaidi did not appear as a witness in the dock and investigating office Zulfiqar Ahmad PW-17 in his deposition did not mention presence of Mirza Munawar Hussain Baig PW-5 at the crime scene when he first visited the place of occurrence. Though stated that he recorded the statement of many people including Munawar Baig at the spot but presence of this witness is doubtful in the sense that he has not been cited as attesting witness on any memo of spot recoveries. Non-appearance of Ahmad Hassan Zaidi and due to death of complainant his single testimony in the form of res gestae could not be corroborated. Thus, first relevant fact becomes rust putting a blur lens on rest of the evidence of prosecution.

13. Next set produced by prosecution was the witnesses of *wajtakar* namely Muhammad Munir PW-1 and Ahmad Raza PW-2, who claimed their arrival at 6.00 a.m. on 22.04.2014 at 36-N, Model Town, Lahore in order to meet Masood Akbar Warraich, landlord of their village but were informed of his presence at 412/A-1, Johar Town, Lahore (Place of occurrence), leading them immediately to said house and when they reached at the place of occurrence at about 7:00 a.m., they saw two persons coming out of said house on a motorcycle along with some household articles which were tied in a cloth in the form of a bale along with L.C.D. Both the witnesses PW-1 and PW-2 also claimed that they had a dialog with said two persons and asked from them about Masood Akbar Warraich who responded that neither they know Masood nor he had come to this house, and both the said persons thereafter went away in their presence. The presence of these

two witnesses is not proved at the relevant date and time due to the reason that they have not stated the reason of their meeting with Masood Akbar Warraich and also did not tell the link of Masood Akbar Warraich with the house of occurrence. Further they did not explain features of two persons whom they met nor stated that in their presence both two accused have also locked the house and then went away. (Because according to prosecution, house was locked from inside). Further their story of moving from Model Town to Johar Town on foot and reaching there within half an hour is also not believable because both the places are at a quite distance. The fact of their relation with Masood Akbar Warraich is also a missing link due to non-appearance of Masood Akbar Warraich as witness. They conceded that they could not produce any proof regarding their visit to see Masood Akbar Warraich on the day of occurrence. Both the PWs during their cross-examination conceded the fact that they never pointed out the house of occurrence or the house of Masood Akbar Warraich to the I.O of the case. These PWs have not mentioned any weapon (Danda) etc. carried by accused/persons of this case while leaving the house of occurrence because prosecution did not claim availability of crime weapon at the place of occurrence on first inspection. Their statements are also not of worth because they did not see the accused/appellants in a situation when they were allegedly committing the murders.

Claim of these PWs of their appearance before the police on the same night i.e., 22.04.2014 after registration of FIR also does not appeal to the reason because no supplementary statement of the complainant was available of said date and Ch. Zia-ud-din Draftsman conceded during cross examination that on Ex. PC (site plan), the I.O. has written in red notes that accused were not known till 28.04.2014. Further when these two witnesses appeared during identification parade, they might have given some statements but identification parade with complete proceedings was not produced in the evidence, therefore, it could not help the prosecution to use such identification

parade as explanatory evidence. Defence claimed these two PWs as stock witnesses being gunmen of Masood Akbar Warraich, Khalo of Muhammad Umar accused/appellant and PW-17 during cross examination stated for such fact as under:-

> "During my investigation from 08.05.2014 to onward, the complainant party did not produce any evidence to controvert that Muhammad Munir and Ahmad Raza were not gunmen of Khalu of accused."

Investigating officer further conceded during cross-examination that neither he obtained CDR of these PWs nor collected any ticket etc. of their bus travelling to Lahore on the fateful day. Thus, presence of PW-1 & PW-2 could not be established as claimed by them.

14. 2nd set of two witnesses namely Imran Yasin PW-3 & Javid Iqbal PW-4 deposed to the effect that on 21.04.2014 at 11.00 p.m. they both saw the appellants while ringing the doorbell at house of occurrence. Imran Yousaf PW-3 claimed himself as an employee at Paan & cigarette shop of Khalid Hussain, father-in-law of Kanwal deceased while Javid Iqbal, PW-4 as Humzulf (husband of wife's sister) of Khalid Hussain. According to their statement, they were proceeding to main bazar Johar Town on a motor cycle when saw the accused at the door of house of occurrence, and thereafter both these witnesses went to Rawalpindi who after their return came to know about the occurrence. PW-3 being permanent resident of Arifwala, Pakpatan was working at the rented shop of Khalid Hussain at Muslim Town Morr and Javid Iqbal was running his business of flower shop at Litton Road, Chowk Jinnah and Shahdara. Both being not of same age nor resident of Johar Town are not expected to be present at the place of occurrence at the relevant time; therefore, being chance witness, they could not justify their presence. It has further been observed that neither they submit the proof of their commutation to Rawalpindi, nor Khalid Hussain appeared as a witness to establish his relation with the witnesses as claimed by them. They both made statement before the investigating officer on 09.05.2014 as per deposition of PW-17. This delay of 18 days since 21.04.2014 could not be justified by them.

Thus, there testimony is of not a value to accept as a support to prosecution case.

15. Identification parade was deficient to be read into the evidence because when Magistrate appeared before the trial Court to record his statement as PW-15 stated as under:-

> "It is correct that the original report and proceedings of identification parade recorded by me are not present before me."

A photo copy of identification parade was produced that too with one page missing wherein only the proceedings to the extent of PW-1 is mentioned. Mudassar Hassan, Magistrate (PW-15) while appearing before the trial Court has also not narrated the whole proceedings of identification parade, however, during cross examination claimed that PWs have stated the roles of accused but conceded that neither he recorded features of dummies nor mentioned that PWs have identified the accused with features, further conceded that he did not verify the objection raised by accused of their taking of pictures in the police station; therefore, fact of identification of accused remained unsatiated and was not proved. However, perusal of record shows that original report of identification parade is available in the file but could not be exhibited in evidence. It has further been observed that it was a joint identification parade which cannot be read against the accused/ appellants because it opposes to dictum laid down by Supreme Court of Pakistan in many cases like **PLD 2019 Supreme Court 488** wherein notice was given to Kanwar Anwar Ali, Special Judicial Magistrate for his dereliction of duty and lack of sufficient legal knowledge on conducting defective identification parade, and *"Mian SOHAIL AHMED and others Versus The STATE and others"* **(2019 SCMR 1956)**.

16. As far as the recovery of certain articles belonging to the deceased are concerned, it is sufficient to mention complainant has not given any details of said articles during registration of FIR rather through his supplementary statement claimed that household articles

which includes mobile phone, LCD, gold ornaments, passport etc. were allegedly stolen by the accused/appellants. Such supplementary statement dated 22.04.2014 in the form of written application is available in the record but has not been exhibited as opposed to dictum laid down by Supreme Court of Pakistan in a case reported as *"THE STATE and others Versus Abdul Khaliq and others"* **(PLD 2011 Supreme Court 554)**, followed in case reported as *"YASIR IMRAN alias YASIR ARAFAT Versus MUHAMMAD ASHRAF and another"* **(2014 MLD 337)**. Non-exhibition of such supplementary statement (in written form) seemed result of malafide because in such application names of Muhammad Asim and Muhammad Umar were mentioned as accused persons despite the fact source of their nomination was not available with the prosecution, as by then PW-1 or PW-2 did not name any of the accused persons. It was a worst case of tunnel vision wherein investigation was fully directed and under the lead of influential who wanted to book the offenders at every cost. This malafide of prosecution could be arrested, had the complainant alive and appeared in the dock who did not care for whole day to check the house why it was locked with no response from inside, rather preferred to roam around different places without any tension or depression, and also did not inquire or seek help from the neighbours or relatives of her step daughter. All that shows that complainant was hiding something unpleasant against his own near and dear due to which his affinity with his step daughter fell short of. Thus, details of articles which were stolen could not be brought on record except in the form of recovery, later shown from the accused/appellants. I am conscious that PW-1 and PW-2 though have stated to have seen the accused/appellants with LCD and house hold articles but PW-1 explained in examination in chief that household articles were in a cloth in the form of a bale. Similarly, PW-2 has also not stated the details of household articles that was the reason they were confronted with their statement under section 161 Cr.P.C. against the fact of carrying LCD. After recovery such articles were allegedly identified by the complainant, his son Munawar Hussain Baig PW-5 & mother

of Kanwal deceased. Complainant did not appear as witness as being dead, mother of Kanwal deceased was not produced, whereas PW-5 neither narrated in his statement about the details of all articles nor he was the resident of house of occurrence so as to correctly identify such articles. Even otherwise process of identification of an article is also required to be conducted by the Magistrate in the same fashion as he does for identification of a suspect. This has been explained in law in terms that evidentiary value of identification parade as being relevant fact in the form of explanatory evidence is regulated under Article 22 of Qanun-e-Shahadat Order, 1984, relevant part may be read as under:-

> **22. Facts necessary to explain or introduce relevant facts:** Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, **or which establish the identity of anything or person whose identity is relevant,** or fix the time or place at which any fact in issue, or relevant fact happened, or Which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.
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> **(Emphasis supplied)**

The words 'identity of anything or person' in the above Article makes no difference of process for both. I am also mindful of the fact that identification of articles in the manner as has been done in this case, is least permissible in law. The most essential requirement is that the witnesses should not have had an opportunity of seeing the property after its recovery and before its identification before the Magistrate. For that purpose, it is necessary to seal the property as soon as it is recovered and to keep it in a sealed condition till it is produced before the Magistrate. If the police officers who take the sealed bundles to the police station after recovery and who take it to the Magistrate for identification proceedings should be examined to prove that the sealed bundles were not tampered in the way. The sealed bundles should be opened in the presence of the Magistrate conducting the identification proceedings and he should depose about it. The property to be mixed with the property to be identified should also be sealed some days before witnesses are called and the bundle containing it should also be

opened in the presence of the Magistrate who should testify about it in Court. Further the result of identification should be entered in the memorandum by the Magistrate in his own hand. Reliance is placed on a judgment from Indian jurisdiction reported as *"State of Vindhya Pradeshs v. Sarua Munni Dhimar and others*" (**AIR 1954 V.P 42 (Vol. 41 C.N.15)** and reliance is also on decision by Federal Shariat Court in cases reported as *"NOOR ULLAH and 2 others versus THE STATE and another"* **(2012 YLR 2618)** and "*The STATE versus ZAR MUHAMMAD and 3 others"* **(2019 YLR 1663).** On the touchstone of above referred citations, I have no doubt to hold that in the instant case the identification of recovered items has not been properly conducted, rendering the entire recovery a nullity in the eyes of law, therefore, it cannot be said with certainty that the recovered articles were the same which were allegedly stolen. The recovered jewelry, the alleged stolen property, has been attempted to be proved as belongings of the deceased but no receipt etc., was produced by the prosecution before the I.O in support of their stance. Similar is the position with the identification of mobile phones and other alleged stolen articles. The I.O neither got forensic audit of the said mobiles from the expert concerned who may have retrieved data therefrom including the person who were in use of these mobile phones. Such failure on the part of investigator makes the recovery of these articles doubtful. Supreme Court of Pakistan has held that in cases of circumstantial evidence, there is every chance of fabricating the evidence, which can easily be procured; therefore, Courts are required to take extra care and caution to narrowly examine such evidence with pure judicial approach to satisfy itself, about its intrinsic worth and reliability, also ensuring that no dishonesty was committed during the course of collecting such evidence by the investigators. If there are apparent indications of designs on part of the investigating agency in the preparation of a case resting on circumstantial evidence, the Court must be on guard against the trap of being deliberately misled into a false inference. Reliance is placed on case titled "*Hashim Qasim and another Vs. The State"* (**2017 SCMR 986**).

17. SIM P-64 recovered from the place of occurrence by Zulfiqar Ahmad, investigator (PW-17) was claimed to be found in the name of wife of Asim accused/appellant. Muhammad Waqas 23386/C PW-9 appeared as recovery witness of such SIM but conceded that he cannot tell the surroundings of place of occurrence, i.e., east, west, south and north despite the fact he visited that place thereafter 2/3 times. Investigator PW-17 conceded that he had not recorded the statement of any official of mobile company in this respect. Further conceded that neither he took into possession the mobile phones of accused Muhammad Umar and Muhammad Asim nor collected their CDR. Thus, this evidence is also not useful for prosecution.

18. In this case, main stay of prosecution was of DNA profile matching and matching of finger prints. According to report of PFSA Ex.PAA, DNA profile obtained from Tape role, Right hand nail scraping of Tayyaba and swabs taken from glass (items; 2, 5 & 9.1) stood matched with DNA profile of Muhammad Asim accused/appellant whereas DNA profile generated from 'Right hand nail scraping of Kanwal Bibi'(item-3) stood matched with DNA profile of Muhammad Umar accused/appellant. Similarly, as per Report EX.PBB, finger prints on 'an empty used ceramic cup of tea' were found to be identical with Muhammad Asim accused/appellant. It was shown that samples for DNA and LFP were collected by the crime scene unit of PFSA. PW-16 Muhammad Azeem Junior forensic scientist stated that he collected 22 exhibits from the place of occurrence mentioned in exhibit sheet Ex. PT and deposited the same before ERU (evidence receiving unit) of PFSA on 23.04.2014. First anomaly as observed was of direct depositing of samples by the expert which was not the mandate of PFSA as held in preceding paragraphs No. 8 & 9. Neither such samples were recorded in register No.19 of police station for their custody and then dispatch to PFSA nor PFSA report Ex. PAA mentions the name of any scientist who deposited such samples except the expression 'received from crime scene unit'. PFSA has also not mentioned the nature of seal over such samples.

Some of the samples were also deposited by Muhammad Boota 14412/C firstly on 28.04.2014 and then on 5th May, 2014 as mentioned in the PFSA report without specifying the nature of samples in the report. If Boota was the man who deposited the samples and that too on 5th May, 2014, then prosecution case becomes zero because by then accused have already been arrested on 29.04.2014. Thus, sampling is in serious doubts. No seminal material was detected on the vaginal swabs of victims/deceased ladies which indicates a different story, if the victims were at the mercy of accused for whole night. No drug or poison was detected from the water rinse bottles which were transmitted to the office of PFSA for analysis. It has further been observed that despite the fact that human DNA was obtained from items 1.1, 4, 6, 7.1, 8.1, 10.1, 11.1, 12.1, and 15 but no DNA profile matching was done, similarly, analysis of item 16 was also not done. All that indicate something adverse to prosecution, disclosure of which may have run against the culpability of accused persons and it can safely be said that it was an attempt to hide or conceal something to save the actual culprits responsible for such murders. Thus, Prosecution has not come up with complete truth. It has further been observed that expert who appeared as PW-16 neither deposed about the complete process of collection of samples with precautions taken to avoid contamination nor stated the places from where his team preferred to take such samples. In this case what the expert or police had collected from the spot remained within the knowledge of police and experts only because neither complainant, his son nor other private person are the attesting witnesses to such sampling and collection. Moreover, deposition of Zulfiqar Ahmad PW-17, investigator put another doubt when he without naming the forensic scientist said that *"officials of crime scene unit of PFSA procured finger prints and DNA sampling of accused persons thorough collecting 22 different articles"* which raises a suspicion that sampling was done in the presence of accused/appellants that was the reason both accused/appellants while responding to question No.4 in their statements under section 342 Cr.P.C stated that they were

arrested much prior to the date as shown by the police. These statements of accused/appellants also lend support from the deposition of investigator PW-17 when stated that *"I formally arrested the accused Muhammad Asim and Muhammad Umer on 29.04.2014"*. Word "formally" has clear connotation that they were already in custody. Sans direct evidence and frail circumstantial evidence, Court cannot record conviction mere on the basis of PFSA reports particularly when there are serious doubts on preservation, collection, packaging and dispatch of samples. Reliance is on case reported as *"BAHADER KHAN Versus THE STATE and another"* **(2012 P Cr. L J 24)**.

19. On the basis of claim for matching of DNA profile of Muhammad Asim with DNA available on tape role, glass and nail scraping of Tayyaba; and finger prints on 'an empty used ceramic cup of tea' were found to be identical with Muhammad Asim accused, likewise matching DNA of Muhammad Umar with nail scraping of Kanwal deceased, learned counsel for the complainant stated that conviction can be recorded even on the basis of forensic evidence and has referred proviso to Article 164 of the Qanun-e-Shahadat Order, 1984. Which says that *"conviction on the basis of modern devices or techniques may be lawful"*. Counsel was reminded that proviso to Article 164 was added in the year 2017 but present case relates to the year 2014 well before the said amendment. Even otherwise, non-analysis of item No.16 and non-disclosure of matching of human DNA on other items with any other person or with the accused/appellants plus above cited irregularities make such evidence doubtful. Even otherwise such reports are only corroborative evidence and corroborative evidence could only be relied upon if the prosecution has proved the case through substantive evidence and in this case, there is no direct evidence of committing of murder; circumstantial evidence structured by the prosecution is of no worth to rely on to pass or uphold conviction against the accused/appellants.

20. So far as medical evidence is concerned, it has been observed that Kanwal died of asphyxia due to manual restriction of breathing while applying yellowish sticky material while Tayyaba due to head injury in the nature of gapped incised wound on her forehead. Nobody has witnessed the occurrence; therefore, the condition of dead bodies hardly helps the prosecution to claim it as supportive evidence. Even no evidence of rape was available due to absence of marks of violence near or around the organs of generation as mentioned in postmortem reports, nor seminal material was detected on the vaginal swabs. Thus, medical evidence in this case is only in support of a fact in issue that two ladies have met unnatural death. It is trite that medical evidence cannot be made basis to record or sustain conviction because it could only give details about the locale, dimension, kind of weapon used, the duration between injury and medical examination or death and autopsy, etc. but never identifies the real assailant. In the case "*MUNAWAR ALI alias MUNAWAR HUSSAIN versus THE STATE*" (**PLD 1993 Supreme Court 251**) the Supreme Court of Pakistan held that:-

> "Medical evidence is corroboration to show that injuries were caused in a particular manner, with particular weapon and even it can supply corroboration to the fact as to how many assailants there were and whether number of injuries is commensurate with number of assailants or not, but, medical evidence can never be used as corroboration qua accused to show that particular accused has caused these injuries."

21. For what has been discussed above and having considering all the pros and cons of this case, I have come to this irresistible conclusion that the prosecution could not prove its case against the appellant beyond reasonable doubt and it is trite that to extend benefit of doubt to an accused person, it is not necessary that there should be several circumstances creating doubt, rather one reasonable doubt is sufficient to acquit. Reliance is placed on the cases "*Sajjad Hussain Vs. The State*" (**2022 SCMR 1540**) and "*Abdul Ghafoor Vs. The State"* (**2022 SCMR 1527**). Consequently, the appeal is **allowed** and the accused/appellants Muhammad Umer and Muhammad Asim are acquitted of the charges. They are directed to be released forthwith if

not required in any other case. The case property, if any, shall be disposed of in accordance with law and the record of the trial Court be sent back immediately.

22. In the light of above discussion, Criminal Revision No.49773 of 2020 for enhancement of sentence of the appellants has become infructuous and is dismissed.

(Muhammad Amjad Rafiq)
Judge

Approved for Reporting

Judge

Signed on 03.06.2024
*Irfan**