

JUDGMENT SHEET
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN.
(JUDICIAL DEPARTMENT)

MURDER REFERENCE No.55/2018.

CRIMINAL APPEAL No.778/2018.
Muhammad Tayyab Vs The State

CRIMINAL APPEAL No.492/2018.
Mst. Naseem Bibi Vs The State, etc.

JUDGMENT

DATE OF HEARING: 25.10.2022.
APPELLANT BY: Ch. Muhammad Saeed Machra, Advocate.
STATE BY: Mr. Muhammad Ali Shahab, Deputy Prosecutor General.
COMPLAINANT BY: In person.

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MUHAMMAD AMJAD RAFIQ, J: - Muhammad Tayyab (accused/appellant) along with two others namely Muhammad Shahid son of Muhammad Aslam and Muhammad Shahid son of Muhammad Bakhsh faced trial before learned Additional Sessions Judge, Multan in case FIR No.312 dated 01.07.2014 under sections 302, 364, 148, 149 PPC police station Qadirpur Raan, Multan and on conclusion of trial vide judgment dated 19.02.2018 co-accused Muhammad Shahid son of Muhammad Aslam and Muhammad Shahid son of Muhammad Bakhsh were acquitted of the charges, whereas, Muhammad Tayyab (appellant) was convicted under section 302(b) PPC and sentenced to death and further ordered to pay Rs.200,000/- as compensation to the legal heirs of deceased as envisaged under section 544-A Cr.P.C., in case of default to undergo six months SI.

2. Ghulam Murtaza 21/22 years of age was reportedly went missing who was searched upon by his sister Naseem Bibi, complainant along with Muhammad Akram her husband. His close friends' circle was contacted with whom he used to work as labourer though lives alone in a rented house. His co-workers were Shahid s/o Aslam, Shahid & Aslam sons of Muhammad

Bakhash, Tayyab (appellant) & Haji sons of Aashiq and Yasin. On 14.04.2014 in the evening a contact was established with Ghulam Murtaza on cell phone No. 0346-7049216 who told that he returned to his quarter. On 16.04.2014, complainant along with her husband and one Barish Ali noticing absence of Ghulam Murtaza went to inquire from Shahid Baloch at 11.00 a.m. to know the whereabouts of her brother because his cell phone was found switched off, who ensured return of Ghulam Murtaza soon. On 05.05.2014 a call of Ghulam Murtaza was received through his cell phone No. 0341-2440818 at evening time but nobody talked through and it later became a routine that on the other side no voice on the mouth piece despite running of a call. She suspected abduction of her brother by Shahid Baloch and his friends. With this allegation FIR was registered against all above persons on 01.07.2014 u/s 365 PPC.

3. Ghulam Fareed ASI, PW-2 started investigation, conducted raids at the residences of accused persons but in vain. On 04.07.2014, he arrested accused Shahid Baloch but abductee could not be recovered, therefore, sent him to judicial custody. He arrested Aslam and his brother and on their disclosure offence u/s 364 was added. Tayyab, appellant and Zafar alias Haji were also arrested and these two accused confessed their guilt of committing murder of Murtaza. Investigation was later taken up by Salamt Ali SI PW-7 who stated that Tayyab, appellant was arrested on 28.10.2014 by another police officer and on the same day he was assigned the investigation of this case. On 08.11.2014 Tayyab, led to the recovery of dead body which was got recovered from the graveyard Riaz abad Station Mouza Luthar. It was recovered in the presence of Naseem bibi complainant, her husband Muhammad Akram, one Barish Ali and Dr. Mukhtar Ahmad RHC Qadir Pur Raan and that too by digging a grave by accused/appellant himself. All the formalities were observed like taking the dead body into possession, preparation of injury statement and sketching of place of recovery. Dead body was handed over to the doctor who conducted Postmortem examination and prepared the report. Doctor handed over two boxes and two envelopes for chemical examination. Complainant received the dead body and last worn clothes of the deceased. Accused later got recovered pistol 30 bore and one live bullet in the presence of complainant and her PWs.

4. Shahid Baloch in the same fashion led to point out the place of murder of Murtaza for which memo was prepared and then went to the place of recovery of dead body of the deceased in the graveyard. Memo of verification of said place was also prepared. Later on, 05.01.2015, Salamat Ali SI PW-7 took the complainant to PFSA where her DNA test was conducted for its matching with dead body for identification. Thereafter report u/s 173 Cr. P.C was prepared and accused were sent to face the trial. Trial court charge sheeted three accused namely Tayyab, the appellant, Muhammad Shahid s/o Muhammad Aslam and Muhammad Shahid s/o Muhammad Bakhsh and after conclusion of trial two accused were acquitted and Tayyab was convicted and sentenced as forecited.

5. Learned counsel for the appellant sheets out many loopholes in prosecution case; according to him prosecution case cannot stand against the innocence of the appellant and termed it a result of grouch of the complainant; walls erected against the appellant to confine him in a narrow shell of allegation drum are weak and lack concrete support of admissible and cogent evidence. learned Deputy Prosecutor General states that circumstantial evidence is always regarded as good evidence because it cannot be belied with oral assertions and in this case the most important evidence is discovery of dead body on the lead of the appellant which was in his exclusive knowledge and it is sufficient material to sustain his conviction.

6. Heard both the stances, examined the indicators and directions; evidence was perused and reappraised.

7. The case as opened up by prosecution with a touch of circumstantial evidence claiming it as based on high probabilities to be relied upon considering in safe havens to convict the accused/appellant in that pocket of circumstances, was surely a notching task for this court, though trial court flew in that drape, to accept such circumstantial evidence as reliable and credible; therefore, with lineal approach evidence was examined which the prosecution coursed as fit to be read and relied upon against the appellant. To see what prosecution brings against the appellant, we have attended to the stances of proponents and minutely examined and reappraised the evidence.

prosecution produced following types of evidence to beg conviction of the appellant.

1. Recovery of hoer (Kassi) & Softy (shoes)
2. Recovery of dead body on the lead of the appellant along with last worn clothes.
3. Recovery of Pistol
4. PFSA report showing identification of dead body on the basis of matching of DNA with the complainant.

What was the value of such evidence and what other factors were also spoken in support of prosecution, it is necessary to see what direct or indirect information about murder of Murtaza was collected by the prosecution.

8. Naseem Bibi complainant PW-4 told the story of involvement of present appellant. According to her statement on 28.10.2014 Tayyab appellant while in police custody disclosed the reason for committing murder of Ghulam Murtaza deceased. She spoke in the words of Tayyab (appellant) that Zafar, brother of Tayyab (appellant) had abducted the wife of one Haji Ali Ahmad, brother of complainant & Ghulam Murtaza (deceased), and appellant had strong apprehension that he may be killed by Ghulam Murtaza due the abduction of his Bhabhi. Except this information no narration of facts encompassing events culminating to death of deceased was spoken by any of the witnesses. No anything or material was available which could throw light that at what time, where and how the murder took place or who committed the murder with which weapon and in whose presence, it was done. Absence of date, time, place and manner of occurrence hardly supply information for framing of a legal charge but trial court proceeded to pass the conviction.

9. Before discussion on the veracity of evidence, let's see what does reliable and credible evidence mean; though both terms are sometimes used interchangeably but there is delicate difference between the two. Reliability always depends upon capacity of a witness to depose, legality of processes and competency, whereas credibility touches the character of a witness in relation to any fact in issue or relevant fact. Any violations of the legally acceptable or mandated process of collection/recording may lead to it's becoming unreliable. Witnesses may be unreliable because of various factors such as old age, inability to remember past events, relationship with the victims and/or the complainant; any likely motives for the commission of

perjury, such as financial gain, duress, past history of witnesses, lack of requisite knowledge or experience etc. Both reliability and credibility of evidence is locus in a case of direct or circumstantial evidence for a well-reasoned decision in a case by the court.

10. The case in hand is based on circumstantial evidence, therefore, what are the contours of such evidence, its origin in Islamic law, version in English law and how the Honourable Superior Courts of this country has dealt with such type of evidence. Following verses of Holy Quran from Surah Yusuf is one the instances of circumstantial evidence whereby Hazarat Yusuf was declared innocent in a charge of an indecent advancement against a lady:-

Tafheem ul Quran
Surah 12 Yusuf, Ayat 21-29

(12:21) The man from Egypt who bought him said to his wife: "Take good care of him, possibly he might be of benefit to us or we might adopt him as a son." Thus, we found a way for Joseph to become established in that land and in order that We might teach him to comprehend the deeper meaning of things. Allah has full power to implement His design although most people do not know that. (12:22) And when Joseph reached the age of maturity, we granted him judgement and knowledge. Thus, do We reward those who do good. (12:23) And it so happened that the lady in whose house Joseph was living, sought to tempt him to herself, and one day bolting the doors she said: "Come on now!" Joseph answered: "May Allah grant me refuge! My Lord has provided an honourable abode for me (so how can I do something so evil)? Such wrong-doers never prosper." (12:24) And she advanced towards him, and had Joseph not perceived a sign from his Lord he too would have advanced towards her. Thus was Joseph shown a sign from his Lord that We might avert from him all evil and indecency, for indeed he was one of Our chosen servants. (12:25) Then both of them rushed to the door, each seeking to get ahead of the other, and she tore Joseph's shirt from behind. Then both of them found the husband of the lady at the door. Seeing him she said: "What should be the punishment of him who has foul designs on your wife except that he should be imprisoned or subjected to painful chastisement?" (12:26) Joseph said: "It is she who was trying to tempt me to herself." And a witness belonging to her own household testified (on grounds of circumstantial evidence): "If his shirt is torn from the front, then she is telling the truth and he is a liar. (12:27) But if his shirt is torn from behind, then she has lied, and he is truthful." (12:28) So when the husband saw Joseph's shirt torn from behind, he exclaimed: "Surely, this is one of the tricks of you women; your tricks are indeed great. (12:29) Joseph, disregard this. And you - woman - ask forgiveness for your sin, for indeed it is you who has been at fault."

A reference of happening in the house of Joseph connected with presumption on the basis of circumstantial evidence is cited in the case reported as "LEJZOR TEPER versus THE QUEEN" (PLD 1952 Privy Council 119), which is reproduced for reference:-

“Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined if only because evidence of this kind may be fabricated in order to cast suspicion on another. Joseph commanded the steward of his house, “Put my cup, the silver cup, in the sack’s mouth of the youngest”, and when the cup was found there Benjamin’s brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused’s guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.”

11. It is trite that conviction can be earned on the basis of circumstantial evidence but it must confirm to standards and principles of evidence; therefore, what implies circumstantial evidence and what are the standards of such evidence in the light of law and principles of evidence, it is highlighted for reference as under;

Circumstantial evidence means the evidence afforded not by the direct testimony of an eye-witness to the fact to be proved, out by the bearing upon that fact or other and subsidiary facts which are relied upon as inconsistent with any result other than the truth of the principal fact.

The leading rules of circumstantial evidence are the followings;

- 1) The facts alleged as the basis of any inference must be clearly proved and indubitably connected with the *factum probandum*.
- 2) The burden of proof is always on the party who asserts the existence of any act which infers legal accountability.
- 3) The corpus delicti must be clearly proved before any effect is attached to circumstances supposed to be inculpatory of a particular individual.
- 4) The best evidence must be adduced which the nature of the case demands.
- 5) Evidence ought to be received with distrust, wherever any considerable time has elapsed since the commission of alleged offence.
- 6) In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable explanation upon any other reasonable hypothesis than that of his guilt.
- 7) If there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

[An essay on the principles of Circumstantial evidence by William Wills. T. & J. W. Johnson & company, 1857]

Circumstantial evidence is evidence of relevant facts and contrast with direct evidence; it may take the form of oral or documentary evidence including admissible hearsay or real evidence. It is no derogation of evidence to say that it is circumstantial¹. Its importance lies in its potential for proving a variety of different relevant facts all of which point to same conclusion, as

¹ R v Taylor, Weaver and Donovan (1928) 21 Cr App Rep 20 (CA)

when it is sought to establish, that an accused committed murder, it must be proved by evidence of his preparation, motive and opportunity for its commission together with evidence of the discovery of a weapon, capable of having caused the injuries sustained by the victim, buried in the accused's back garden and bearing his finger prints.

12. Circumstantial evidence, it has been said, 'works by cumulatively, in geometrical progression, eliminating other possibilities'². It has been linked to a rope comprised of several cords: One strand of the cord might be insufficient to sustain the weight, but three strand together may be quite of sufficient strength. There may be a combination of circumstances, no one of which may raise reasonable conviction or more than a suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affair can require or admit it³. The circumstances in which a fact may be said to be relevant to a fact in issue, in the sense that the existence of the former gives rise to an inference as to the existence or non-existence of the latter, are many and various. Certain types of circumstantial evidence arise so frequently that they have been referred to as 'presumptions of fact' or 'provisional presumptions' such as the presumptions of intention, guilty knowledge, continuance of life and seaworthiness etc. Another type of circumstantial evidence is evidence of facts which are so closely associated in time, place and circumstances with some transaction which is in issue and they can be said to form a part of that transaction. such facts, referred to as facts forming part of the *res gestae* are more conveniently can be explored in Chapter-III of Qanun-e-Shahadat Order, 1984. *Res gestae* doctrine is mainly connected with the admissibility of statements of fact as evidence of the truth of their contents by way of common-law exceptions to the hearsay rule and has been described, not unfairly, in terms of a 'collection of fact situations' so confusing in its scope as almost to demand that a reader cease thinking before he go mad'⁴.

The following examples of circumstantial evidence are less demanding and more typical:-

² Per Lord Simon in *DPP v Kilbourne* [1973] AC 729 at p 758

³ Per Pollock CB in *R v Exall* (1866) 4 F & F 922 at p 929

⁴ Wright, 20 Can B R 714 at p 716

Motive: in an ordinary prosecution for murder one can prove previous acts or words of the accused to show that he entertained feelings of enmity towards the deceased, and this is evidence not merely of malicious mind with which he killed the deceased, but of the fact he killed him, it is more probable that men are killed by those that have some motive for killing them than by those who have not.⁵

Plans and Preparatory acts: facts which tend to suggest that a person made plans or other preparations for the performance of a particular act are relevant to question whether he subsequently performed that act. Thus, evidence may be given of the purchase by an alleged murderer of poison, or as the case may be, of gun or dagger.

Capacity: Evidence of a person's mental or physical capacity or incapacity to do a particular act has an obvious relevance to the question whether he in fact performed it.

Opportunity: circumstantial evidence of opportunity or lack of opportunity is evidence of the fact that a person was present or absent at the time and place of some act allegedly performed by him, like a plea of alibi.

Identity: circumstantial evidence of identity often takes a form of expert testimony that the fingerprints⁶ of the accused or samples taken from his body match those discovered on or taken from some material object at the scene of the crime or the victim of the offence in question⁷. Identity may also be established by the evidence that the accused present and the criminal share the same name, the same physical idiosyncrasy, for example left-handedness, the same style of hand writing or same particular manner of expression in speech or writing.⁸

Continuance: the fact that a certain act or event was taking place at one point in time may justify the inference that it was also taking place at some prior or subsequent point of time, thus evidence of the speed at which someone was driving at a particular point in time may be given to show the speed at which he was likely to have been driving a few moments earlier⁹ or later.¹⁰

Failure to give evidence: although in a criminal case, absence of accused from the witness box should not be equated with guilt¹¹ but an adverse inference may be drawn in cases where the uncontested or clearly established facts point so strongly to the guilt of the accused as to call for some explanation.¹²

Failure to provide evidence: where an accused has refused without good cause to the taking from him of an intimate body sample, the court determining whether he is guilty of the offence charge may draw such inferences from the refusal as appear proper.

Standards of comparison: in cases where it is necessary to decide whether a person's conduct meets some objective standard of behaviour, evidence of what other person would do in the same circumstances is admissible as a standard of comparison. Though this principle is more likely for civil cases yet a flow of natural behaviour in a certain circumstance can also be the subject in criminal

⁵ Per Lord Atkinson in *R v Ball* (1911) AC 47 at p 68

⁶ *R v Castleton* (1909) 3 Cr App Rep 74: cf *R v Court* (1960) 44 Cr App Rep 242 (CCA)

⁷ *Chappell v DPP* (1988) 89 Cr App Rep 82

⁸ *R v Voisin* [1918] 1 KB 531

⁹ *R v Dalloz* (1908) 1 Cr App Rep 258

¹⁰ *Berestford v St Albans Justices* (1905) 22 TLR

¹¹ *R v Sparrow* [1973] 1 WLR 488

¹² *R v Mutch* [1973] 1 All ER 178 (CA); *R v Corrie* (1904) 20 TLR 365

cases on the basis of inferences or observation of the court. If a dead body is buried in the house of any person, unusual activity or change at the place of burial can easily be observed if he is not the accused. likewise foul smell element or outbreak of germs are the factors which in the ordinary course of nature can easily be monitored and natural behaviour is to report that suspicious activity to police; not reporting to police is an unusual behaviour that indicates a guilty mind.

The above circumstances as relevant facts find their place in Articles 19, 20, 21, 22, 23, 24 and 129 of Qanun-e-Shahadat Order, 1984.

13. In following Judgments of Honourable courts, the principles were laid down for relying upon circumstantial evidence in order to convict the accused:-

The fundamental principle of universal application in cases dependent on circumstantial evidence, is that in order to justify the inference of guilt, the incriminating fact must be incompatible with the innocence of the accused or the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of his guilt. “ZAHID HUSSAIN versus THE CROWN” (PLD 1954 Lah. 710 (DB);

Cumulative effect of separate items of evidence. Taken separately the circumstances of the case may or not lead to an inference of guilt against the appellant, but considered cumulatively they lead to only one conclusion and that is that the appellant and no one else caused the death of the deceased. Conviction may follow on such evidence if inculpatory facts proved are incompatible with innocence of the accused. “ALI MUHAMMAD versus CROWN (DB)” (PLD 1953 BJ 17).

Court to examine probabilities in the light of the circumstances of the case. Lack of direct evidence connecting the accused or any other person with the murder does not mean that the guilt cannot be fixed. Straining the evidence in favour of the accused or against him is to be deprecated. “THE STATE versus MANZOOR AHMED” (PLD 1966 Supreme Court 664).

Onus heavy on accused to furnish explanation for circumstantial evidence not explainable on any hypothesis consistent with total innocence of the accused. Onus cannot be discharged by merely hinting of "possibilities" or "suggesting remote hypothesis". **PLD 1966 Supreme Court 664**, Supra.

Deceased last seen alive in the company of the accused shortly before the time she was presumed to have met her death, near the place of occurrence. Accused failed to furnish explanation. It is reasonable to infer that the survivor was responsible for her death. Conviction upheld. “ALLAH DITTA versus THE CROWN” (1969 SCMR 558); equivalent citation (1969 P.Cr.LJ 1108).

Circumstantial evidence could be relied upon where either direct evidence was not forthcoming or had not been found satisfactory. “MUHAMMAD ARSHAD versus THE STATE” (1992 SCMR 1187); “STATE versus HABIBUR RAHMAN AND OTHERS” (PLD 1983 Supreme Court 286); “MUHAMMAD ASLAM versus MUHAMMAD ZAFAR and 2 others” (PLD 1992 Supreme Court 1).

In case reported as HAMID MAHMOOD and another Versus The STATE,

(2013 SCMR 1314) while referring the principle laid down in Muhammad Amjad v. The State **(PLD 2003 SC 704)**; death sentence was confirmed on the basis of circumstantial evidence; principle is as follows;

"According to the standard of proof required to convict a person on circumstantial evidence, the circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which the conclusion of the guilt is to be drawn have not only to be fully established but also that all the circumstances so established should be of a conclusive nature and consistent only with the hypothesis of the guilt of the accused and should not be capable of being explained by any other hypothesis, except the guilt of the accused and when all the circumstances cumulatively taken together should lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime."

Extra-judicial confession of accused corroborated by medical evidence; the accused disclosed before the PWs that he took deceased to a house with intention to commit sodomy and on his failure to do the unnatural act, he tied up and strangled the deceased with an iron wire and concealed his body in an iron box; On disclosure of accused before police, dead body of deceased was recovered from a vacant house; Accused also got recovered the keys of said house, a shirt, bag, books and a register belonging to the deceased. circumstances were relied upon. "AKHTAR Versus The STATE" **(2020 SCMR 2020)**

14. Similarly, following principles have been outlined by the Hon'ble Supreme Court of Pakistan for relying upon circumstantial evidence in a case reported as "Fayaz Ahmed vs. The State" **(2017 SCMR 2026)**: -

- (i) There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the prosecution.
- (ii) The proximity of the crime scene played a vital role because if within a short distance the deceased was done to death then, ordinarily the inference would be that he did not part ways or separate from the accused and onus in such regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.
- (iii) The timing when the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.
- (iv) There must be some reasons and objects on account of which the deceased accompanied the accused towards a particular destination, otherwise deceased being in the company of the accused would become a question mark.
- (v) There must be some motive on the part of the accused to kill the deceased otherwise the prosecution had to furnish evidence that it was during the transit that something abnormal or unpleasant happened which motivated the accused to kill the deceased.
- (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.

(viii) The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts.

The above principles more or less have been explained in plethora of judgments while acquitting the accused. some of which are cited below: -

“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).

15. Coming back to the case in hand, let the evidence produced against the accused/appellant be examined in the light of law and principles of evidence cited above. According to prosecution, Tayyab appellant got recovered dead body on 08.11.2014. this discovery was not a secret information that could remain within the knowledge of police and the appellant so as to evaluate it in the light of Article 40 of Qanun-e-Shahadat Order, 1984 but as per evidence an application was moved before Illaqa Magistrate for disinterment of corpse, though such order was not brought into the evidence yet doctor Mukhtar Ahmad PW-8 confirmed the fact that exhumation of dead body was done in the graveyard of Moza Lothar, District Multan by the court order dated 31.10.2014 on the application Ex.PR moved by SI Salamat, Police Station Qadir Pur Raan. PW-7 Salamat SI stated that on the lead and pointing out by

the appellant dead body was recovered from the graveyard cited above in the presence of Naseem Bibi complainant, her husband Muhammad Akram, one Barish Ali and Dr. Mukhtar Ahmad RHC Qadir Pur Raan and that too by digging a grave by accused/appellant himself. It is strange when application was already moved for exhumation and information in this respect was available with the police, doctor and complainant, question of exclusive knowledge does not arise so as to make evidence of recovery of dead body as admissible under Article 40 of Qanun-e-Shahadat Order, 1984. Another strange factor was spoken by the witnesses that for digging out the dead body no men were hired for the purpose but this was done by Tayyab appellant himself. Now he being labourer by profession was rendering services as such or was under the charge as an accused is a question to be responded by the prosecution particularly when salamat Ali SI PW-7, investigating officer during cross examination admitted that earlier on 02.11.2014 appellant also led him to graveyard and pointed out a wrong grave which was dug out but no dead body was recovered. It was further admitted by investigating officer in following words: -

“Wherefrom the deadbody of deceased Ghulam Murtaza was recovered that place had been surrounded by several graves in the graveyard.”

It is beyond comprehension that a man was laid into grave in a populated graveyard and nobody noticed nor it was reported that in what circumstances the deceased was brought there. No witnesses were available who could even depose burial of dead body by the appellant or the co-accused.

16. During evidence, it did not come to light that Tayyab has ever pointed out a place where he committed the murder of Ghulam Murtaza. It was clear from the facts that there was no evidence of last seen in this case, nor any eye witness to the act of murder, act of burial and even claim of prosecution that a certain cell phone numbers were in use of Ghulam Murtaza deceased and it remained on in certain intervals between 14.04.2014 till the registration of FIR and thereafter too, but it was not supported with proof of ownership or report of a cellular company in this respect that cell phone numbers belonged to the deceased and even CDR of such cell phones showing connection of appellant or others with deceased was also not proved through the evidence.

17. Dr. Mukhtar PW-8 though conducted the postmortem examination on 08.11.2014 but observed the condition of dead body in PMR with following expression: -

OBSERVATION

Exhumation of dead body was done in the grave yard of Moza Lothar, District, Multan by the court order dated 31.10.2014 on the application Ex-PR moved by SI Salamat Ullah, Police station Qadir Pur Raan. Skelton of deceased Ghulam Murtaza was recovered. Soft tissue on the Skelton was not present except some of soft tissues in abdomen. Skelton was clad in dark grey colour Kameez, shalwar and banyan and checkdar the handkerchief (sic) are dirty with mud.”

INFORMATION FURNISHED BY POLICE:

Death due to fire arm injury.

EXTERNAL EXAMINATION OF BODY:

On examination of body, I noted following injuries:

1. A round whole in-skull 0.9 c.m. (0.9 c.m.) on Prieto occipital region of skull. 12.5 c.m. behind right orbit. 9 c.m. above right T/M joint. This is wound of entry of fire arm.
2. An irregular wound 2.5 c.m. (2 c.m.) on the base of head on right side. This is wound of exit of fire arm injury.

OBSERVATION:

Black hair was present on skull. Hair nail and one bone (radius) and tissue sent to chemical examiner for detection of poison. These are in jar containing tissue (1). Jar (2) containing hair and nail accompanied by packet of wound radius. Jar (3) containing molar teeth and sternal and accompanied by packet of ulna bone and sent to D.G. Forensic Science Laboratory, Lahore for DNA test.

CRANIUM AND SPINAL CORD:

Scalp was putrefied (sic) and decomposed. Black hair were present on skull.

SKULL:

Skull was entrance and exit wound already described. Fracture of skull was present. Fracture lining passing up to frontal and parietal bone junction. One fracture line was present passing up left parietal (sic) region.

MEMBRANES:

Membranes were putrefied and dried. Vertebrae was healthy. Spinal cord putrefied. Hyoid bone was intact.

THORAX

Bone was healthy. Tissue putrefied and dried. Sternum sent to Forensic Science Laboratory for DNA test to match with DNA of blood relation. Other tissues thorax was putrefied.

ABDOMEN:

Abdomen was putrefied. Some tissues from abdomen were taken and sent to Chemical Examiner for detection of poison.

UPPER LOWER LIMB:

Healthy.

FINAL OPINION:

Report of Forensic Science Agency bearing Sr. No.0000122273 dated 31.03.2015 is regarding forensic toxicology analysis report, which is Ex-PS. As per report no drug of abuse is detected in Hair in item # 1. Injury No.1 and 2 are entrance exit of single fire inflicted by fire arm weapon. This injury is sufficient to cause death in ordinary course of nature.”

During cross examination doctor responded that he prepared the postmortem report on 08.12.2014 (after one month) and about cause of death deposed as under:-

“It is correct that I had not given any official opinion about cause of death the deceased till now in postmortem report.”

Postmortem Report Ex.PT confirms the above fact wherein under final opinion cause of death is not mentioned. This exaggerated version of doctor deposing about cause of death by firearm before the court cannot be considered because accused was not aware of such opinion nor copy of it was provided to him, therefore, it is improper admission of such fact which lost sight of learned trial court. Doctor has further stated that he has not mentioned the time of death in the postmortem report. This being so under what law this evidence was relied upon by the learned trial court when it cannot help the prosecution to tally anything or take support to any fact except that doctor has examined a dead body without identification that whose body it was. Though this expression seems to the complainant’s counsel as strange yet there is serious issue about identification of dead body which fact is being dealt with in the next paragraph.

18. Doctor during his evidence as PW-8 stated that he prepared Jar (1) containing tissue, Jar (2) containing hair and nail accompanied by packet of wound radius. Jar (3) containing molar teeth and sternal and accompanied by packet of ulna bone and sent to DG Forensic, Lahore for DNA test and mentioned in the postmortem report the following articles were handed over to the police:-

1. Three Jars (1) (2) (3) sealed
2. Two packets sealed
3. Two sealed envelopes

But when appeared as PW-8 he did not specifically depose that such articles were handed over to the investigating officer or any constable but Salamat Ali SI, investigating officer PW-7 conceded that doctor has handed over him two boxes and two envelopes for the purpose of chemical examination. Salamat Ali Si did not say that such boxes and envelopes were handed over to the Moharrir, yet Ishfaq Ahmad 939/C Moharrir when appeared as PW-1 deposed that I.O. handed over him a pistol 30-bore along with four bullets, four boxes and four envelopes (though doctor has handed over three jars and two packets and two envelopes) for safe custody which he handed over to Jalil Ahmad 3021/C on 05.01.2015 for onward transmission to PFSA for DNA and chemical examination and after depositing the said parcels Jalil Ahmad 3021/C returned the road certificate regarding depositing of said parcels.

Now three different reports of PFSA were tendered in evidence. PFSA report Ex.PW relating to parcel of pistol correctly finds mentioned the name of Jalil Ahmad 3021/C as the man who deposited the said parcel. However, PFSA report Ex.PS regarding two sealed Jars and one envelope containing specimen (Tissues, hair, radius bone and nail) and PFSA report Ex.PX showing deposit of parcels (relating to teeth of unknown deceased, one piece of sternum bone, ulna bone and buccal swabs standards of Naseem Bibi) by Salamat Ali SI on 05.01.2015, whereas Moharrir has handed over the same to Jalil Ahmad 3021/C. Salamat Ali SI though appeared twice as PW-7 but did not depose about fact of depositing of said parcels yet claimed production of Naseem Bibi before PFSA on 05.01.2015. Safe transmission of parcels from doctor to PFSA was in serious doubt and chain is broken, therefore, PFSA reports EX.PS & Ex.PX are of no use to the prosecution. The case reported as “MEER NAWAZ alias Meero VS THE STATE ETC “; (PLJ 2022 Cr.C 955 Lahore) is referred in this regard. Therefore, DNA report showing the identity of deceased as biologically full siblings of Naseem Bibi loses its efficacy and cannot be read in favour of prosecution. Prosecution has also put complainant PW-4 and Muhammad Akram PW-5 with the claim that they had identified the dead body at the time of postmortem examination but both when entered into witness box did not depose about this fact. Identification of last worn clothes along with dead body is also in doubt because related recovery memo Ex.PF shows interpolation and addition of fact of

identification of clothes with different hand writing. In this case prosecution remained unsuccessful to prove the identity of Skelton as dead body of Ghulam Murtaza. So, the basic fact in issue has not been proved, further material cannot be used, though is also not worthy of appreciation, against the present appellant.

19. The recovery of dead body on a certain date was also an issue in this case due to contradictory statements of complainant, PWs, doctor or investigating officer. According to doctor and investigating officer dead body was recovered from the graveyard on 08.11.2014 whereas complainant PW-4 Naseem Bibi during cross examination deposed that Tayyab was arrested on 21.10.2014 and further as under;

“I visited the place of occurrence on 08.11.2014. On the said day I was along with the I.O. accompanied by Tayyab Jogi in police custody where Tayyab Jogi pointed out the place of occurrence and burial of deceased. I did not do any activity in this regard. On 11.11.2014 I visited the place of occurrence and on the same day Tayyab Jogi and I.O. were with us. On the said day Tayyab Jogi got recovered dead body of deceased and same was taken into possession by the police.”

Similarly, Muhammad Akram PW-5 deposed during cross examination as under: -

“The dead body was recovered on 28.10.2014. The I.O. obtained thumb impression as well as signature over recovery memo. I took the dead body from that place. I again visited the place of recovery of dead body on 11.11.2014. On 11.11.2014 I.O. took us at the place of recovery of dead body from where he recovered pistol from there on the pointation of Tayyab Jogi. After that we came back at the police station alongwith the I.O. and then we returned to home. On 17.11.2014 I again went at the place of recovery of dead body and put my thumb impression on memo, thereafter we came back at the police station alongwith the I.O. and from there we came back to home.”

20. Recovery of hoer (Kassi) and softy (shoes) are also of no avail when they were not sent for testing to obtain any forensic clue with respect to use of such Kassi for causing any injury or excavation of earth for burial of dead body. Similarly, shoes were also not sent for testing nor any expert examined such shoes to know about its size to be fit in the feet of deceased.

21. Pistol though was recovered but its recovery is doubtful from the place because police had already visited that place prior to 11.11.2014, even otherwise only a functionality test report of such pistol is available, no bullet casings were collected by the police so as to obtain any evidence of its

matching with alleged pistol. Though doctor has observed injuries by firearm weapon but it is not discernable from the record that it was caused with pistol shots. Moreso, neither the time nor cause of death was determined by the doctor as admitted by him during cross examination, therefore, recovery of pistol does not add any quality to prosecution case.

22. Motive bottomed by the prosecution was without support of any evidence yet from the accused's side Ghazala Shaheen appeared as DW-1 and deposed that she was wife of Haji Ali Ahmad, brother of the deceased who maintained criminal history and used to keep her under threat; once Ghulam Murtaza deceased attempted rape upon her, she told the fact to her husband who expelled her from the house. She later contracted 2nd marriage with Zafar, brother of the appellant and was living happily but her ex-husband carried on causing harassment to her, therefore, she filed a writ petition bearing No. 7607/2014 Ex. DF against her husband and others to desist such harassment and by virtue of order dated 16.06.2014 they were directed not to cause harassment. She further deposed that her son Ali Raza from the dynasty of ex. husband was later abducted by the complainant party due to such grudge. In proof whereof, defence has tendered copy of FIR bearing No. 818/14 dated 11.11.2014 Ex.DE showing the occurrence as of 28.10.2014 and nomination of complainant, Muhammad Akram, her husband and Barish Ali Pw as accused persons. She alleged that it was the reason for false involvement of her husband Zafar and his brother Tayyab, the appellant in this case. On her statement, Police opted to discharge Zafar from this case but appellant was falsely retained and shown involved only to appease the complainant party. From the above statement, it is clear that prosecution case theory on the basis of alleged motive is not made out and prosecution has failed badly to prove this aspect of the case.

23. For what has been discussed above, it is vividly clear that prosecution has not produced any evidence with respect to motive, plans and preparatory acts, opportunity, identity and continuance of any attempt earlier made, though the appellant being young man had capacity to commit murder but evidence of opportunity is not available, therefore, it lacks cogent evidence. when prosecution has no case on the evidential strength and other aspects, the

evidential burden is not shifted to the accused/appellant in order to dislodge the prosecution case, therefore, factors like failure to give evidence as witness or provide evidence cannot be read against him, though he too opted to produce DW to dislodge the alleged motive. Standard of comparison is also not attended to in this case because no evidence was produced in respect of conduct of accused to conceal the commission of offence. There was delay of about three months in reporting the crime without any plausible justification; identity of dead body was not proved; discovery of dead body was also not on the basis of exclusive knowledge of the appellant. After examining prosecution case in the light of principles and law of evidence, we are convinced and safely conclude that prosecution has failed miserably to prove the charge against the appellant on the touchstone of standard of proof required in criminal cases i.e., proof beyond reasonable doubt, therefore, appeal in hand is allowed, appellant is acquitted of the charges levelled against him. He may be released forthwith from the custody if not required in any other case. The case property, if any, be disposed of in accordance with law and the record of the learned trial court be sent back immediately.

24. In the light of above discussion, we find no force in Criminal Appeal No.492 of 2018 and the same is dismissed.

Murder Reference is answered in negative.
Sentence of death is not confirmed.

(Sadiq Mahmud Khurram)
 Judge.

(Muhammad Amjad Rafiq)
 Judge.

Approved for reporting.

Judge.

Judge.