2016 S C M R 274

[Supreme Court of Pakistan]

Present: Asif Saeed Khan Khosa, Mushir Alam and Dost Muhammad Khan, JJ

AZEEM KHAN and another---Appellants

Versus

MUJAHID KHAN and others---Respondents

Criminal Appeals Nos.497 and 496 of 2009, decided on 15th October, 2015.
(On appeal from the judgment dated 1-6-2009 passed by the Lahore High Court, Rawalpindi Bench Rawalpindi in Crl. A. 144-T of 2007, Crl. Revision 62-T of 2007 and CSR. No.50-T of 2007)

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

----Ss. 365-A & 302(b)---Anti-Terrorism Act (XXVII of 1997), S. 7(e)---Kidnapping for ransom, qatl-i-amd---Reappraisal of evidence---Benefit of doubt---Un-witnessed crime---Lack of corroborative evidence---Voice data of phone calls not presented---Recovery memo witnesses 'interested witnesses'---Crime in question was an un-witnessed incident and based only on circumstantial evidence and recovery of incriminating articles--- Important links in the chain of story set up by the prosecution were missing due to lack of corroborative evidence---No voice record transcript of calls had been brought on record to prove the ransom demand---Area from which the call for ransom was made, was not shown---Most crucial and conclusive proof that the cell phone from which ransom demand was made was owned by the accused and SIM allotted was in his name was also missing---Attesting witnesses of recovery memo were related to the deceased and thus were highly interested witnesses---Number of bones, allegedly belonging to deceased, which were recovered on pointation of accused persons did not match with the number of bones sent for analysis to the Forensic Science Laboratory---Trial Court had relied on highly cryptic and infirm evidence to award death sentence to accused persons---Supreme Court set aside convictions and death sentences awarded to accused persons and acquitted them of the charge.

(b) Criminal Procedure Code (V of 1898)---

----S. 164--- Confession recorded by Magistrate on oath---Admissibility---Such confession violated the law and rendered the same inadmissible.

(c) Criminal Procedure Code (V of 1898)---

----Ss. 164 & 364---High Court (Lahore) Rules and Orders, Vol. III, Chap. XIII---Judicial confession before Magistrate, recording of---Procedure and precautions to be observed by Magistrate for recording judicial confession of an accused.

Following procedure and precautions are to be observed by a Trial Court for recording judicial confession of an accused.

Before recording confession and that too in crimes entailing capital punishment, the recording Magistrate had to essentially observe all the mandatory precautions (laid down in the High Court Rules and Orders). Fundamental logic behind the same was that, all signs of fear inculcated by the investigating agency in the mind of the accused were to be shed out and he was to be provided full assurance that in case he was not guilty or was not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection was to be given after the first warning was administered. At the expiry of such time, recording Magistrate had to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person was willing to confess then, all required questions as formulated by the High Court Rules and Orders should be put to him and the answers given, be recorded in the words spoken by him. Statement of accused should be recorded by the Magistrate with his own hand and in case there was a genuine compelling reason then, a special note was to be given that the same was dictated to a responsible official of the Court like stenographer or reader and oath shall also be administered to such official that he would correctly type or write the true and correct version. In case, the accused was illiterate, and made a confession, which was recorded in another language i.e. Urdu or English, then the same should be read-over and explained to him in the language he fully understood, and thereafter a certificate, as required under section 364, Cr.P.C. with regard to these proceedings should be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official/officer whether he was Naib Court wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.

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

----Ss. 365-A & 302(b)---Anti-Terrorism Act (XXVII of 1997), S. 7(e)---Criminal Procedure Code (V of 1898), Ss. 164 & 364---Kidnapping for ransom, qatl-i-amd---Reappraisal of evidence---Judicial confession, recording of---Illegalities committed by Magistrate in recording confession of accused---Effect---Judicial confession unworthy of reliance---Recording Magistrate committed successive illegalities as after recording the confessions of the accused persons on oath, both were handed over to the same police officer, who had produced them in the Court in handcuffs---Recording Magistrate was either unaware of the law on the subject or he was acting on the desire of the police, compromising his judicial obligations---Such careless attitude of the Magistrate provided premium to the investigating agency because it was thereafter,

that the recoveries of the so-called incriminating articles were made at the instance of the accused persons---Recording Magistrate did not put many mandatory questions to the accused persons like duration of police custody and he also did not inform them that they would not be given back to the police whether they recorded the confession or not---Confessions of accused persons in such circumstances were of no legal worth, and had to be excluded from consideration, more so, when these were retracted at the trial---Even otherwise confessions of accused persons prima facie appeared to be untrue because the same contradicted the story set up by prosecution witnesses on material particulars of the case---Supreme Court set aside convictions and death sentences awarded to accused persons and acquitted them of the charge.

Khuda Bux v. The Crown 1969 SCMR 390 ref.

(e) Criminal trial---

----Evidence, appreciation of---One tainted (piece of) evidence could not corroborate another tainted piece of evidence.

Muhammad Bakhsh v. The State PLD 1956 SC 420 ref.

(f) Evidence---

----Documentary evidence---Oral evidence---Contradiction between---Documentary evidence shall prevail over an oral statement made at a subsequent stage, which contradicted the contents of documents.

(g) Criminal trial---

----Extra-judicial confession---Weak type of evidence on basis of which conviction on capital charge could not recorded.

Noor Muhammad v. The State PLD 1991 SC 150 ref.

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

----Ss. 365-A & 302(b)---Anti-Terrorism Act (XXVII of 1997), S. 7(e)---Kidnapping for ransom, qatl-i-amd---Reappraisal of evidence---Medical jurisprudence---Decomposition of human body---Recovery of bones---Doubt as to whether a human body could decompose into bones within a month---Pieces of bones allegedly belonging to deceased were discovered about a month after his murder---Such (rapid) destruction of entire body of a human being was not possible within a month because some visceras made of tough tissues and full skeleton of human body remained intact---In the present case, only scattered pieces of bones were recovered and not full skeleton of human body, which by itself was unbelievable, being against the well-established and universally recognized juristic view on the subject---Recovery of pieces of bones after one month was entirely doubtful---Supreme Court set aside convictions and death sentences awarded to accused persons and acquitted them of the charge.

Modi's Textbook of Medical Jurisprudence and Toxicology ref.

(i) Criminal Procedure Code (V of 1898)---

----S. 510---DNA test report---Not admissible piece of evidence as S. 510, Cr.P.C. did not mention the report of a biochemical expert on DNA (biochemist).

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

----Ss. 365-A & 302(b)---Anti-Terrorism Act (XXVII of 1997), S. 7(e)---Criminal Procedure Code (V of 1898), S. 510---Kidnapping for ransom, qatl-i-amd---Reappraisal of evidence---Recovery of bones to identify deceased---DNA report of bones---Not admissible in evidence---Not sufficient to award capital punishment---Even if in the present case such DNA report was admitted into the evidence and relied upon, it would in no manner be sufficient to connect the necks of the accused persons with the commission of the crime when the bulk of other evidence against them was found to be unbelievable thus, no reliance could be placed on such DNA report to award a capital sentence---To ensure fair-play and transparency, the samples in the laboratories from the parents (of deceased) should have been taken in the presence of some independent authority like a Magistrate and also the recovered samples from the crime scene in the same way to dispel the chances of fabrication of evidence through corrupt practices---Transition of the samples to the laboratory should have also been made in a safe and secure manner, but all such safeguards were ignored in the present case--- Supreme Court set aside convictions and death sentences awarded to accused persons and acquitted them of the charge.

(k) Criminal trial---

----'Interested witness' and 'independent witness', evidence of---Scope---Even evidence of uninterested (independent) witness, not inimical to the accused, may be corrupted deliberately (and hence not worthy of reliance), while evidence of inimical witness, if found consistent with the other evidence corroborating it, may be relied upon.

Waqar Zaheer v. The State PLD 1991 SC 447 ref.

(l) Criminal Procedure Code (V of 1898)---

----S. 156--- Penal Code (XLV of 1860), S. 302(b)--- Qatl-i-amd---Reappraisal of evidence--- Police documents---Recovery memo---Interpolation and over-writing---Court in such cases should be at guard and had to take extra care in making the appraisal of evidence, because once dishonesty in the course of investigation was discovered then Court would always seek strong corroboratory evidence before relying on the other evidence of the prosecution.

(m) Criminal trial---

----Crimes entailing capital punishment---Conviction---Circumstantial evidence, reliance upon---Scope---Different pieces of circumstantial evidence had to make one chain, an unbroken one where one end of it touched the dead body and the other the neck of the accused---Any missing link in such chain, broke the whole chain and no conviction could be recorded in crimes entailing capital punishment---Courts had to take extraordinary care and caution before relying on the circumstantial evidence---To justify the inference of guilt of an accused person, the circumstantial evidence must be of quality that was incompatible with the innocence of the accused; if circumstantial evidence was not of such standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment---Better and safe course in such circumstances would be not to rely upon such circumstantial evidence.

(n) Criminal trial---

----Conviction---Evidence---Strong unimpeachable evidence---No one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character that was legally admissible.

(o) Criminal trial---

----Evidence, appreciation/appraisal of---Benefit of doubt---Heinous or gruesome nature of crime---Nature of crime should not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a proper manner and to extend the benefit of reasonable doubt to an accused person---Any influence from the nature of the crime and other extraneous consideration might lead the judges to a patently wrong conclusion.

Agha Muhammad Ali, Advocate Supreme Court for Appellants (in Crl. A. 497 of 2009).

Sardar Muhammad Ishaq Khan, Senior Advocate Supreme Court for the Complainant.

Ahmad Raza Gillani, Advocate Supreme Court for the State.

Date of hearing: 15th October, 2015.

JUDGMENT

DOST MUHAMMAD KHAN, J.---The appellants (i) Mujahid Khan and (ii) Arbab Khan, at a trial held by the learned Presiding Judge of Anti Terrorism Court-II, Rawalpindi, upon conviction under sections 365-A and 302, P.P.C. read with section 7 of Anti-Terrorism Act, 1997, were handed down sentence(s) of death under section 365-A, P.P.C. and S.7(e) of A.T.A. Additionally, appellant Mujahid Khan was convicted and was sentenced to death under section 302(b), P.P.C. The properties of the appellants were also ordered to be forfeited.

2. Both the appellants filed appeal before the Lahore High Court, Rawalpindi Bench, Rawalpindi, which was heard along with Murder Reference No.50-T/2007 as well as Criminal Revision No.62-T/2007 filed by the complainant and vide impugned judgment dated 01.06.2009, the appeal of the appellants was dismissed and the Reference sent by the Trial Court under section 374, Cr.P.C. was answered in affirmative, however, the Criminal Revision Petition of the complainant was dismissed.

3. Both these appeals have been filed with leave of the Court dated 27.08.2009. The order is self speaking and elaborate one.
We have heard Sardar Muhammad Ishaq Khan, learned Sr. ASC for the complainant, Agha Muhammad Ali, learned ASC for the appellants in Crl. A. No.497/2009 and Mr. Ahmad Raza Gillani, learned Additional Prosecutor General, Punjab and have carefully gone through the evidence on record.

4. Precise but relevant facts are that, a pre-teen nephew of the complainant, Khan Wali (PW-4), namely Muhammad Bilal (deceased) aged about 10/11 years went missing on 16.07.2006. In the crime report (Ex-PH/1) the complainant expressed apprehension that his nephew was probably kidnapped. After registration of the crime report, Nazar Muhammad SI, Police Post Naseerabad inspected the spot and prepared the site plan thereof. In the meanwhile a cell phone call was received by Muhammad Wali (PW-3); the caller used cell phone No.0302-5665028 and the receiving cell phone number of Muhammad Wali was 0300-9866033. The caller demanded Rs.25,00,000/- however, bargain was struck at Rs.3,00,000/-, which amount was delivered by leaving it at the place told by the caller to Muhammad Wali (PW-3). At this stage section 365-A, P.P.C. was added to the charge. The Investigating Officer obtained phone calls data of both the cell phones from the mobile company through one Rana Shahid Parvez, DSP on 03.08.2006. On 17.08.2006 both the appellants were arrested. During interrogation the appellants jointly disclosed that they had murdered the abductee Muhammad Bilal on 5th day of his abduction at 12:00 midnight by chocking his mouth and the dead body was then buried in a ditch however, on 22.07.2006 they had received an amount of Rs.3,00,000/- as ransom money from Muhammad Wali PW, who is the son of the complainant. The appellants further disclosed that after abduction of the deceased on 16.07.2006, they tied him with a tree, situated on the bank of flood channel. The abductee was killed because he used to raise hue and cries.

5. After the said disclosure, both the appellants were jointly taken to Tarnol area where they pointed out the place of crime, wherefrom mud stained torn 'shalwar', shirt and a pair of slippers, allegedly belonging to the deceased were recovered along with a wrapper of candies/toffees. A strip containing six pills was recovered from the pocket of the shirt of the deceased. These articles were identified by the father and cousin (Muhammad Wali) to be of Muhammad Bilal deceased on the spot. 12 pieces of bones were also recovered from the crime spot through a recovery memo and were sealed into one and the same parcel. A Suzuki Mehran Car No.FDO 5481 with registration book was recovered from appellant Mujahid Khan besides, the cell phone with SIM No.0302-5071540 was also recovered from appellant Arbab Khan on his personal search.

6. Both the appellants made judicial confession before Ch. Muhammad Taufiq, Magistrate on 18.08.2006 however, against the procedure as required under the law, they were handed over back to the same police officer, who got further physical custody of both the appellants on the same day from the Anti Terrorism Court, Rawalpindi.

7. Besides the above, appellant Mujahid Khan had also made extra-judicial confession before Haji Muhammad Ashraf (PW-8), the close relative of the complainant, on 16.07.2006 at 11:00 am at Rawalpindi, however, Muhammad Ashraf instead of informing the complainant through any source including cell phone call, decided to proceed to Peshawar where, he had allegedly struck a bargain with regard to the purchase of property. According to him, he was required to pay the earnest money to the seller and when he came back, he informed the complainant on the following day about the said fact.

8. At the trial, Muhammad Wali (PW-3) had stated that, on 17.08.2006, they were present with the police party, headed by the Investigating Officer who got information that both the appellants were coming to Rawalpindi in the Suzuki Mehran Car, mentioned above, thus, the police laid barricade at Tarnol and both the appellants, on reaching there, were intercepted and arrested. Contrary to the police statement, this witness has further stated at the trial that both the appellants were taken to the crime spot one after another and at their pointation the above crime articles, clothes and pair of slippers were recovered therefrom, which were taken through separate memos, Ex-PA and Ex.PB.

9. The bones recovered, were sent to the Forensic Science Laboratory, Lahore however, Dr. Manzoor Hussain, Research Officer of Molecular Biology, University of Punjab, Lahore (PW-13) stated that he received 21 numbers of bones and in addition thereto teeth as well, however, these were not shown in Ex.PA. At the instance of Arbab Khan appellant, an amount of Rs.150,000/- was recovered from an iron box in his house. The attesting witnesses to the recovery memo (Ex.PG) are the complainant and Muhammad Wali, who have played very active role in the course of furthering the investigation of the case.

10. On the other hand, Dr. Manzoor Hussain (PW-13) brought on record the positive result of the DNA Test (Ex-PR) on the basis of samples, taken from Azeem Khan and Mst. Khiyal Bibi, the parents of the deceased with the recovered pieces of bones and teeth.

11. At the conclusion of investigation, charge sheet was filed against the appellants in the Trial Court, which ended in the conviction of both the appellants stated above.

12. The summary of the above detail would show that the prosecution has placed reliance on the following pieces of evidence:-

> (i) The cell-phone data, collected from the cellular company, of both the cell phones, the one allegedly belonging to appellant Arbab Khan and the other to Muhammad Wali (PW-3);

(ii) The judicial confession of both the appellants recorded by the Magistrate;

(iii) The extra judicial confession made by one of the appellants, namely, Mujahid Khan, before Haji Muhammad Ashraf (PW-8), Vice President, "Anjuman-e-Tajran, Bara Market" Rawalpindi;

(iv) The recovery of the bones (12 in number), clothes and slippers of the deceased from the crime spot;

(v) The recovery of money from the house of the above appellant;

(vi) The recovery of Suzuki Mehran Car, which one of the appellants had allegedly purchased from unknown seller, paying a portion of the ransom money; and

(vii) Positive result of the DNA test.

13. Undeniably, it is an un-witnessed crime. The entire edifice of the prosecution case is based on circumstantial evidence and recovery of the alleged incriminating articles, detail of which is given above.

14. The judicial confessions, allegedly made by both the appellants are the material piece of evidence in the prosecution hand, therefore, we would deal with the same in the first instance.

15. Keeping in view the High Court Rules, laying down a binding procedure for taking required precautions and observing the requirements of the provision of section 364 read with section 164, Cr.P.C. by now it has become a trite law that before recording confession and that too in crimes entailing capital punishment, the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that, all signs of fear inculcated by the Investigating Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily then in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he was in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the accused person is willing to confess, then all required questions formulated by the High Court Rules should be put to him and the answers given, be recorded in the words spoken by him. The statement of accused be recorded by the Magistrate with his own hand and in case there is a genuine compelling reason then, a special note is to be given that the same was dictated to a responsible official of the Court like Stenographer or Reader and oath shall also be administered to such official that he would correctly type or write the true and correct version, the accused stated and dictated by the Magistrate. In case, the accused is illiterate, the confession he makes, if recorded in another language i.e. Urdu or English then, after its completion, the same

be read-over and explained to him in the language, the accused fully understand and thereafter a certificate, as required under section 364, Cr.P.C. with regard to these proceedings be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process at no occasion he shall be handed over to any police official/officer whether he is Naib Court wearing police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.

16. In the instant case, the Recording Magistrate namely, Ch. Taufiq Ahmed did not observe least precautions, required under the law. He was so careless that the confessions of both the appellants were recorded on oath, grossly violating the law, the same, therefore, has rendered the confession inadmissible which cannot be safely relied upon keeping in view the principle of safe administration of justice.

17. The Recording Magistrate committed successive illegalities one after the other as after recording the confessions of the appellants on oath, both were handed over to the same police officer, who had produced them in the Court in handcuffs. This fact bespeaks volumes that the Recording Magistrate was either not knowing the law on the subject or he was acting in the police way desired by it, compromising his judicial, obligations. This careless attitude of the Magistrate provided premium to the Investigating Agency because it was thereafter, that the recoveries of the so-called incriminating articles were made at the instance of the appellants, detail of which is mentioned above.

18. In our considered view, the confessions of both the appellants for the above reasons are of no legal worth, to be relied upon and are excluded from consideration, more so, when these were retracted at the trial. Confessions of this nature, which were retracted by the appellants, cannot mutually corroborate each other on the principle that one tainted evidence cannot corroborate the other tainted piece of evidence. Similar view was taken by this Court in the case of Muhammad Bakhsh v. The State (PLD 1956 SC 420), while in the case of Khuda Bux v. The Crown (1969 SCMR 390) the confession made, was held not voluntary because the accused in that case was remanded back to the police after making confession.

19. Both the confessions of the appellants prima facie appear to be untrue because the same are clashing with the story set up by prosecution witnesses on material particulars of the case. In the confession of Mujahid Khan it is stated that Arbab Khan co-accused contacted Haji Azeem Khan (father of the deceased) on phone and demanded an amount of Rs.25,00,000/- from him as ransom money also telling him that he will call back. While, Muhammad Wali (PW-3) stated that it was he who was contacted by the accused on cell phone in this regard four times on different dates and he struck the bargain at Rs.3,00,000/- which amount he placed at the point, told to him by the accused. The cell phone data collected by the police is with regard to the two cell-phones, one is attributed to Arbab Khan appellant and the other to PW Muhammad Wali. At the relevant time, Azeem Khan, father of the deceased was abroad and only the complainant, Khan Wali and his son Muhammad Wali have been shown interacting with the caller on phone. The contradiction pointed out, is of a serious nature thus, has demolished the story given in the confessions of the appellants and has rendered the

same of no legal efficacy. Appellant Mujahid Khan has disclosed in his confession that with the share of the ransom money he purchased Alto Taxi Car but a car of different make (Suzuki Mehran) was recovered. This aspect of the matter was also not investigated to trace out the seller of the car besides, the time and date of the bargain of purchase of the car was also not brought on record. Similarly, appellant Arbab Khan stated in his confessional statement that he had spent the money on his engagement with a girl. Neither the name of the girl has been brought on record nor of her family members i.e. parents, to corroborate this aspect of the matter. Such evidence would have provided enough corroboration what was stated in the confession but it appears that, the same was deliberately withheld therefore, adverse inference is to be drawn against the prosecution. In his confession (Ex-PM), appellant Mujahid Khan has stated that he and Arbab Khan both were called on phone by the police and were then arrested, while PW-3, stated at the trial that both the appellants were arrested during snap checking on a barricade, laid near Tarnol. The above contradiction is of a grave nature, which cannot be lightly ignored. At the trial, the Recording Magistrate made crude attempts to rectify the wrong/illegalities, he had committed in recording the two confessions however, the law of evidence is clear on this point that documentary evidence shall prevail over the oral statement made at a subsequent stage, contradicting the contents of documents. Therefore, his belated statement at the trial cannot be safely relied upon. The subsequent statement of the Recording Magistrate created many doubts and had made both the confessions highly doubtful. In the circumstances the principle of re-benefit of doubt is attracted, which has to be extended to the appellants and not the prosecution. The questionnaire would show that many mandatory questions were not put to the appellants like duration of police custody and that they would not be given back to the police whether they record the confession or not. This is another infirmity of a serious nature, diminishing the voluntary nature of the confession to naught.

20. Leaving apart the above infirmities, Mujahid Khan, according to his confession, was a conductor on a Dumper while Arbab Khan was employed in a local hotel near Tarnol. In both the confessions, the appellants have stated that due to poverty they decided to commit the crime of abduction for ransom however, the investigative agency did not record the statements of the driver/owner of the Dumper and the proprietor of the hotel where the accused were employed. Thus, beside others, this important link is missing in the chain for lack of corroborative evidence. Moreover, when both the appellants had spent their share of ransom money, then how an amount of Rs.150,000/- was recovered from appellant Arbab Khan.

21. In both the confessions, it is stated that the abductee was immediately taken out to an open place and he was tied with a tree. One of the appellants, Mujahid Khan used to stay with him at night but at day time he used to leave behind the abductee all alone. Such unnatural conduct could not be believed as any passerby could come across and would have released the abductee. Such a fantastic story, bereft of logic, can only be believed by a blind or imprudent man because it was the abductee, on whom the appellants were to encash upon Rs.25,00,000/- No one, who catches a big fish would let it to swim again in the seawater because, its retrieval would become absolutely impossible.

22. The cell phone call data collected is of no help to the prosecution for the reasons that numerous calls have been made indicating continuous interaction between the two cell phones, contrary to the evidence given by Muhammad Wali (PW-3), who has stated at the trial that the unknown caller made calls on his cell phone four times. No competent witness was produced at the trial, who provided the call data, Ex.P-1 to Ex.P-5. No voice record transcript has been brought on record. Similarly from which area the caller made the calls, is also not shown in it. Above all, the most crucial and conclusive proof that the cell phone was owned by the accused and SIM allotted was in his name is also missing. In this view of the matter, this piece of evidence is absolutely inconclusive and of no benefit to the prosecution nor it connects the accused with the crime in any manner.

23. The extra-judicial confession, allegedly made by one of the accused before Haji Muhammad Ashraf (PW-8), Vice President of the "Anjuman-e-Tajran, Bara Market" Rawalpindi appears to be a concocted story because he admitted that the complainant is related to him and they reside in the same street.
Appellant Mujahid Khan allegedly made extra judicial confession before him on 14.08.2006, however, he being closely related and having somewhat business connection with the complainant, did not inform him immediately although he was having a car with him at that time and also a cell phone, rather he decided to go to Peshawar and when he came back on the following day, instead of persuading the complainant Khan Wali, under the direction of the latter, he straightaway went to Police Post Naseerabad and recorded his statement with the police against both the appellants. His plea that he had struck a bargain of property and was to pay earnest money therefore, he went to Peshawar thus, could not inform the complainant for that reason, is a fallacious one. Being a very serious matter and being a relative of the complainant and because the complainant was residing in Rawalpindi, few kilometers away from that place, when he got this information at 10:30 am on 14.08.2006, there was no impediment in his way to inform him directly or through phone. Peshawar city is roughly 100 kilometer away from Rawalpindi, if at all he was required to strike a bargain for purchase of property, he could have reached there within 2 hours after disclosing this fact to the complainant. Even, the IO did not go to Peshawar to verify this assertion of the PW, as to whether he had gone to Peshawar for the above purpose and who was the seller of the property, with whom he had struck the bargain. No document about the bargain was produced to the Investigating Officer.
Even otherwise, the story appears highly insensible and runs counter to natural human conduct and behaviour that the appellant, Mujahid Khan would have disclosed such a gruesome crime before this PW, involving the necks of both, knowing well that this witness was of no help to him/them because on record it is proved that this PW did not utter a single word to the complainant persuading him for re conciliation and for settlement, rather after disclosing the fact of disclosure of the crime, the appellant had made to him, he (Haji Muhammad Ashraf) on the direction of the complainant went straight to the Police Post and recorded his statement with the Investigating Officer. This, in our considered opinion, appears to be a concocted story. He being the relative of the complainant and also running the business in the same market, where the complainant do the same business, the appellant Mujahid Khan would have never opted for disclosing such a gruesome crime to him, when by then the complainant party and the Investigating Agency, both were clueless about the crime of murder of

the deceased and also about the actual culprits. This part of the evidence is nothing but a tailored story, which was arranged with, the help of the Investigating Agency thus, it is of no legal worth and being absolutely unreliable is excluded from consideration.

24. It is a consistent view of the Courts that extra-judicial confession, if made before a person of influence and authority, expected to extend helping hand to the accused, which is also strongly corroborated, can only be considered as a piece of circumstantial evidence. This Court held so in the case of Noor Muhammad v. The State (PLD 1991 SC 150). Such evidence is held to be the weakest type of evidence. No conviction on capital charge can be recorded on such evidence.

25. The recovery of 12 numbers of bones, shirt, shalwar and slippers of the deceased is also liable to be discarded. The recovery memo (Ex-PA) would show that father of the abductee, namely, Azeem Khan and PW Muhammad Wali are attesting witnesses to the same, who were naturally highly interested witnesses. Secondly, when this parcel was received after about one month in the Forensic Science Laboratory, Lahore, the numbers of bones were found 21 as have been shown in the report and in addition thereto, teeth were also received in the sealed parcel which, at no occasion was the case of the prosecution. Thus, this serious conflict between the two documents is of such a nature, which could not be reconciled altogether, either by the learned ASC for the complainant or by the Additional Prosecutor General. This fact by itself creates sufficient doubts and on this score, the DNA test report is of no legal worth.

The abductee was killed probably 2/3 days after 16.07.2006 while pieces of bones were recovered on 17.08.2006 which were also overrun by the flood water of the channel and mud as well. According to the well-known medico-legal jurist, MODI such like destruction of entire body of human being, even of teenager is not possible within two months because some of visceras made of tough tissues and full skeleton of human body remain intact. This opinion of the jurist is based on practical experience in many cases of this nature, instances of which are given by him in the Chapter "STAGES OF PUTREFACTION OR DE-COMPOSITION OF BODY". In this case, only scattered pieces of bones were recovered and not full skeleton of human body, which by itself is unbelievable, being against the well established and universally recognized juristic view on the subject. Thus, the possibility that the body of the person whether dead or alive was torn into pieces by beasts or dogs etc. Moreover, from where the nine additional bones and teeth were arranged by the police and when these were put in the same parcel, is a big question mark for which the prosecution has got no answer to give. In any case, the recovery of the pieces of bones after one month is entirely doubtful in light of the view expressed by MODI in his book. Same is the view of other renowned Jurists on the subject.

26. The next piece of evidence is the positive result of the DNA test. Whether the report was legally admissible, keeping in view the provision of section 510, Cr.P.C. whereunder, the report of biochemical expert on DNA (a biochemist) is not covered thus, it is open to a serious debate because under the above provision of law, specified experts' reports, excluding the report of above said expert, have been made admissible. This aspect would be discussed and decided in some other cases elaborately however,

at present we are unable to hold the same as an admissible piece of evidence in absence of any sanction of law.

27. In the recent past many scandals in USA, UK and other countries have surfaced where desired DNA test reports were procured by the investigative by contaminating the samples. Such contamination has also been reported in some cases while the samples remained in the laboratories. Many inquires were held on this issue and stringent law has been made by many States to prevent the contamination of samples outside and inside the laboratories. Proper procedure has been laid down for securing and carefully putting into parcel the suspected materials to correlate with the samples of the parents to establish paternity or maternity. Similarly, stringent check and procedure has been provided to avoid and prevent cross contamination of the two samples because if both come in contact with each others then, it will give false positive appearance and the expert is thus misled. It has also been discovered that credentials of many experts, claiming possessed of higher qualification in this particular field, were found fake and they were thus, removed from service. The DNA Wikipedia on web is an unrebutted testimony to these facts.

28. In any case, it is an expert opinion and even if it is admitted into the evidence and relied upon, would in no manner be sufficient to connect the necks of the appellants with the commission of the crime when the bulk of other evidence has been held by us unbelievable thus, no reliance can be placed on it to award a capital sentence. Moreover, to ensure fair-play and transparency, the samples in the laboratories from the parents should have been taken in the presence of some independent authority like a Magistrate and also the recovered samples from the crime scene in the same way to dispel the chances of fabrication of evidence through corrupt practices and the transition of the samples to the laboratory should have also been made in a safe and secure manner. But all these safeguards were kept aside.

29. The plea of the learned ASC for the complainant and the learned Additional Prosecutor General, Punjab that because the complainant party was having no enmity to falsely implicate the appellants in such a heinous crime thus, the evidence adduced shall be believed, is entirely misconceived one. It is a cardinal principle of justice and law that only the intrinsic worth and probative value of the evidence would play a decisive role in determining the guilt or innocence of an accused person. Even evidence of uninterested witness, not inimical to the accused, may be corrupted deliberately while evidence of inimical witness, if found consistent with the other evidence corroborating it, may be relied upon. Reliance in this regard may be placed on the case of Waqar Zaheer v. The State (PLD 1991 SC 447).

30. We have found that in the recovery, memo with regard to the bones, clothes of the deceased and pair of slippers, subsequently addition has been made at a later stage and for that reason alone, the same is liable to be discarded. In the case of Muhammad Sharif v. The State (1980 SCMR 231) interpolation/over-writings made in the inquest report, were considered seriously by this Court and it was held that in such a case the Court should be at guard and has to take extra care in making the appraisal of evidence, because once dishonesty in the course of investigation is discovered then

Court would always seek strong corroboratory evidence before relying on the other evidence of the prosecution.

31. As discussed earlier, the entire case of the prosecution is based on circumstantial evidence. The principle of law, consistently laid down by this Court is, that different pieces of such evidence have to make one chain, an unbroken one where one end of it touches the dead body and the other the neck of the accused. In case of any missing link in the chain, the whole chain is broken and no conviction can be recorded in crimes entailing capital punishment. This principle is fully attracted to the facts and circumstances of the present case.

32. It is also a well embedded principle of law and justice that no one should be construed into a crime on the basis of presumption in the absence of strong evidence of unimpeachable character and legally admissible one. Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty.

In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same. Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice.

33. In the instant case, both the learned Trial Judge and the learned Division Bench of the High Court in the impugned judgment have not observed, nor have taken care of these guiding and leading principles universally accepted and have at random relied on highly cryptic, infirm and incredible evidence, resulting into miscarriage of justice.
For the above mentioned reasons, Crl. Appeal No.497/2009 filed by the appellants, Mujahid Khan and Arbab Khan is allowed, while the connected appeal (Crl. Appeal No.496/09) filed by the complainant is dismissed. These are the detailed reasons for our short order of the even date, which is reproduced below:-

> "For detailed reasons to be recorded later on Criminal Appeal No.496 of 2009 is dismissed and Criminal Appeal No.497 of 2009 is allowed, the convictions and sentences of both the appellants in Criminal Appeal No.497 of 2009 recorded and upheld by the courts below are set aside and they are acquitted of

the charge by extending the benefit of doubt to them. They shall be released from the jail forthwith if not required to be detained in connection with any other case."

MWA/A-23/SC Order accordingly.

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