Untruthful witness - False and Confessions

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IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Jail Appeal No.319 of 2016
Confirmation Case No.07 of 2016

Present:

Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammad Karim Khan Agha

Appellant:	Habib Ahmed S/o. Muhammad Ramzan, presently confined in Central Prison, Karachi through Mr. Abdul Razzaq, Advocate.
Respondent:	The State through Muhammad Iqbal Awan, Deputy Prosecutor General Sindh.
Date of hearing:	**10.04.2019 and 12.04.2019.**
Date of Judgment:	**30.04.2019.**

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Appellant Habib Ahmed was tried by learned IInd Additional Sessions Judge, Karachi Central in Sessions Case No.354/2011 arising out of Crime No.279/2011 U/s. 365/302/201 PPC, P.S. Sir Syed vide judgment dated 30.08.2016, the appellant was sentenced to death subject to confirmation by this court with fine of Rs.1,00,000/- (Rupees One Lac only) to be paid to the legal heirs of deceased as compensation U/s. 544-A Cr.P.C. The appellant was also convicted and sentenced U/s. 201 PPC to suffer R.I. for 5 (five) years and to pay fine of Rs.50,000/- (Rupees fifty thousand only) and in case of default in payment of fine he was ordered to suffer R.I. for 06 (six) months more (the impugned judgment).

2. The brief facts of the prosecution case are that the complainant Mst. Hameeda Mai lodged FIR at P.S. Sir Syed stating therein that her husband Ajmal (the deceased) was working as a mason and on 14.05.2011 he along with Habib Ahmed (the accused/appellant) went from the house at 9.00 p.m. at night for purchasing medicine for Habib Ahmed. Habib Ahmed returned back whilst her husband Ajmal did not return home. After some time she enquired from Habib Ahmed where her husband was who informed her that her husband Ajmal had left him and ran away. The complainant went to P.S. and lodged report about her missing husband

whilst she continued to search and inquire about his whereabouts but without any success. Later the complainant and her relatives due to talking to Habib Ahmed became suspicious that due to some unknown reason he had kidnapped or arranged the kidnapping of her husband Ajmal and hidden him at some unknown place and as such lodged an FIR against Habib Ahmed for kidnapping her husband Ajmal and hiding him at some unknown place. After registration of the FIR the police arrested Habib Ahmed who confessed to the police that he had murdered Ajmal and took them to the grave yard where he had buried Ajmal after killing him with churri blows. The body of Ajmal was exhumed and identified and later Habib also took the police to where he had thrown the murder weapon being the churri which was recovered by the police on his pointation. Habib also confessed to the murder before a judicial magistrate.

3. After usual investigation, the case was challaned before the concerned trial court where the appellant was charged for the offenses as set out in the impugned judgment to which he pleaded not guilty and claimed trial of the case.

4. In order to prove its case the prosecution examined 9 witnesses and exhibited numerous documents and other items and thereafter closed its side. The accused recorded his statement under S.342 Cr.PC whereby he denied the allegations against him and claimed his false implication. He did not examine himself on oath and did not call any witnesses in support of his defense. After appreciating the evidence on record the trial court convicted and sentenced the accused as per the impugned judgment and made reference to this court for confirmation of the death sentence. Hence, this appeal against conviction has been filed by the appellant.

5. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment dated 30.8.2016 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

6. Learned advocate for the appellant has contended that the FIR was lodged after an unexplained delay of 17 hours; that the FIR in law was of no evidentiary value; that the appellant's confession before the police was

of no evidentiary value; that even the confession of the appellant before the judicial magistrate was defective and as such could not be safely relied upon especially as the confession had been retracted at trial; that the recovery of the dead body and churri on the pointation of the appellant were of no legal significance because the police already knew where the body was buried and the churri was foisted on the appellant; that there was no identification of the body of the deceased; that the case was entirely of circumstantial evidence and such evidence did not link the appellant to the offense through an unbroken chain of evidence as required by law and thus for one and/or all the above reasons their was doubt as to the guilt of the appellant and the appellant as a matter of law was entitled to the benefit of such doubt and as such his appeal should be allowed and he should be acquitted of the charge. In support of his contentions he placed reliance on **Mst. Askar Jan and others Vs. The State** (2010 SCMR 1604), **Muhammad Pervez and others Vs. The State** (2007 SCMR 670), **Wahab Ali and others Vs. The State** (2010 P.Cr. L.J 157), **Nasir Mehmood and another Vs. The State** (2015 SCMR 423), **Faiz Ahmed & others Vs. The State** (2003 P.Cr. L.J 1420), **Ulfat Hussain Vs. The State** (2018 SCMR 313), **Hayatullah Vs. The State** (2018 SCMR 2092), **Ghulam Abbas Vs. The State** (2008 YLR 1104), **Muhammad Zaman Vs. The State & others** (2014 SCMR 749), **Rohtas Khan Vs. The State** (2010 SCMR 566), **Riaz Ahmed Vs. The State** (2010 SCMR 846) **Muhammad Shah Vs. The State** (2010 SCMR 1009) **Altaf Hussain Vs. The State** (2019 SCMR 274) **Muhammad Khalil Vs. Messrs Faisal M.B Corporation and others** (2019 SCMR 321) **Fayyaz Ahmed Vs. The State** (2017 SCMR 2026) **Sabir Ali Vs. The State** (2011 SCMR 629) and **Mah Gul Vs. The State** (2009 SCMR 4)

7. On the other hand, Mr. Muhammad Iqbal Awan, learned Deputy Prosecutor General fully supported the impugned judgment which he contended did not require any interference as the prosecution had proved its case against the appellant beyond a reasonable doubt. He contended that in this respect the appellant had been named in the FIR, had confessed to his guilt before a judicial magistrate, had led the police to both the body of the deceased and the murder weapon which he had used to murder the deceased; that the medical evidence supported the prosecution case and that the body of the deceased had been conclusively

identified and as such the appeal be dismissed. In support of his contentions, he placed reliance on **Faiz Ahmed & others Vs. The State** (2003 P.Cr. L.J 1420), **Mahmood Khan Vs. The State** (2002 P.Cr. L.J 1402), **Zameer alias Shabeer Vs. The State** (2000 MLD 1561), **Muhammad Shahbaz Vs. The State** (2004 SD 11160), **Majeed Vs. The State** (2010 SCMR 55), **Muhammad Akram Vs. The State** (2006 SCMR 1567), **Mst. Askar Jan Vs. Muhammad Daud & 3 others** (NLR 2011 Criminal 154), **Shiraz Tufail Vs. The State** (2007 SCMR 518), **Dr. Javaid Akhtar Vs. The State** (PLD 2007 SC 249) and **Shaikh Muhammad Amjad Vs. The State** (PLD 2003 SC 704),

8. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law.

9. The first point to note is that there is no eye witness to the murder of the deceased and the case against the appellant is in essence mainly built on (a) his confessional statement before the judicial magistrate, (b) his pointation of the place of burial of the deceased and the recovery of the murder weapon on his pointation (c) the correct identification of the body and (d) other circumstantial evidence.

10. Let us consider each of these issues in turn.

Law on retraction of judicial confessions.

11. After a review of the relevant law on the legal validity of judicial confessions the Hon'ble Supreme court in the case of **Ch.Muhammad V Yaqoob V The State** (1992 SCMR 1983) reached the following conclusion:

> *"The legal position, which has emerged from the above reports, seems to be that in order to judge the evidentiary value of retracted confession, **the Court is to advert to the question, whether the same appears to have been made voluntarily, without any inducement, duress or coercion with the object to state the truth. If the Court is satisfied on the above aspect, the mere fact that there were some irregularities in recording of a confession, would not warrant disregarding of the same".***(bold added)

12. It is settled law that a retracted judicial confession can be legally admissible and used against its maker in certain circumstances. In the later case of **Muhammad Amin v. The State** (2006 PLD SC 219) it was held at P.224 Para 9 as under:-

> *"9. **There is no cavil to the proposition that conviction could have been awarded on the basis of retracted confession which proposition was examined in case of Mst. Joygun Bibi v. The State PLD 1960 (SC (Pak) 313 as under:-***
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> *"We are unable to support the proposition of law laid down by the learned Judges in this regard. The retraction of a confession is a circumstance which has no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and on the further question whether it is true. The fact that the maker of the confession later does not adhere to it cannot by itself have any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true, for to withdraw from a self-accusing statement in direct face of the consequences of the accusation, is explicable fully by the proximity of those consequences and need have no connection whatsoever with either its voluntary nature, or the truth of the facts stated. The learned Judges were perfectly right in first deciding these two questions, and the answers being in the affirmative, in declaring that the confession by itself was sufficient, taken with the other facts and circumstances to support Abdul Majid's conviction. **The retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true.**"*
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> *10. Similarly in the case of the State v. Minhun alias Gul Hassan PLD 1964 SC 813 this Court has observed as under:-*
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> *"As for the confessions the High Court, it appears, was duly conscious of the fact that retracted confession whether judicial or extra judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. **It is well-settled that as against the maker himself his confession, judicial or extra judicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement.**"* (bold added)

13. Thus, the court laid down a two pronged test as under (a) whether the retracted judicial confession appears to have been made voluntarily, without any inducement, duress or coercion **and** (b) was made with the object to state the truth.

14. Notably it was also held that if both (a) and (b) were satisfied that even if there were some irregularities in recording of a confession it would

not warrant disregarding of the same. In our view however following the case of **Azeem Khan V Muhahid Khan** (2016 SCMR 274) such irregularities must be of a very minor nature and must not have detracted from either the voluntariness or truthfulness of the confession.

15. In the case of **Bahadur V State** (PLD 1996 SC 336) although it was suggested that a judicial confession alone can be made the basis of conviction the safer course was to look to see if there was any corroborative material available to determine its truthfulness.

16. In the case of **Manjeet Singh V State** (PLD 2006 SC 30) a further requirement seemed to be added that in determining the truthfulness of the confession it had to be placed within the context of the whole of the prosecution evidence/case.

17. In our view therefore we are not in any doubt that a retracted confession before a magistrate can be the basis of convicting in a capital case however it must be;

> ***(a)*** *Voluntary i.e. without threat or inducement* ***and***
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> ***(b)*** *Its object must be to state the truth; assistance for which can be ascertained from (i) whether the confession appears truthful within the context of the prosecution case and (ii) whether there is any other evidence on record which tends to corroborate the truthfulness of the confession* ***and***
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> (c) *Only very minor irregularities regarding the rules concerning the recording of judicial confessions can be permitted as determined on a case to case basis the main criteria being that such irregularities have not adversely effected the voluntariness or truthfulness of the confession.*

18. In this case the appellant has retracted his judicial confession so the question arises whether it can be safely relied upon. Namely (a) has it been made voluntarily **and** (b) is it truthful **and** (c) whether there are any material irregularities in its recording.

19. In this case the accused has retracted his confession and has stated in his S.342 Cr.PC statement that in effect the confession was not recorded in his presence and that the police obtained his thumb impression on plain paper. During the appellant's cross examination of PW 8 Fida Hussain who was the civil judge and judicial magistrate who recorded his confession he has put questions to suggest that his thumb

impression was placed on the confession before it was made and also that the accused was subject to mal treatment before his confessional statement was recorded. The relevant extract of his cross examination reads as under:

> *"I have gone through the provisions of Section 364 sub-section 1, 2, 3 Cr.P.C. It is correct that the performa of confessional statement has overwriting in the number of court. It is correct that the confessional statement contains English language. Before recording statement of accused I enquired from him about his language on which he replied that he knows Urdu language. It is correct that I have not recorded the statement of accused in his own language viz. Urdu. The accused informed that he was arrested on 17.5.2011. It is correct that during intervening period of his arrest and statement he was produced before me by the police for obtaining his remand. During his appearance for remand the accused had not shown his willingness to confess his guilt. I had not checked the body of the accused personally as he was not complaining about maltreatment at the hands of police. It is incorrect to suggest that the accused was maltreated before recording his confessional statement. It is correct that there are L.T.Is of accused on each paper but on first two papers his name is not mentioned under L.T.I. It is also correct that L.T.I. of accused on last paper is obtained above his confessional statement. It is incorrect to suggest that I had not recorded confessional statement of accused properly and recorded his statement as per statement of the accused before police".*(bold added)

20. In this respect it is relevant that the appellant is an illiterate man and as such cannot read or write English or urdu. This is relevant because his confessional statement was **not** recorded in urdu a language which he can understand but in English which is a language he cannot understand and there is no evidence to show that his statement as recorded in English was read back to him in Urdu. In our view it is also relevant that the appellant was produced before the magistrate twice on remand in police custody and did not volunteer to make a confession yet whilst still in police custody after two remands and 8 days of his arrest he agrees out of the blue to make a confessional statement. There is an unexplained delay of 8 days in recording his confession after his arrest during which time he remained in police custody. He was also not warned that if he failed to make a confession he would not be taken back into police custody and he claims that he was maltreated in police custody.

21. The content of his confession, as is reproduced as under, also appears to be lacking in detail. For instance we do not find any mention of how he murdered the deceased and with what type of weapon if any:

> *"Ajmal had started illicit relations with my wife after threatening her. He used to threaten me. Therefore on 14.05.2011 at 10.pm I brought Ajmal in grave yard and committed his murder".*

22. Thus, for the reasons mentioned above **we have doubts** as to the voluntariness and truthfulness of the appellant's judicial confession especially as it appears that it was not conducted strictly in accordance with the law with respect to the principles relating to the recording of confessional statements by a judicial magistrate as laid down in the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274). In particular the fact that the appellant was illiterate as can be seen by the fact that he used a thumb impression in order to verify documents and in this case his confession was recorded in English language and there is no evidence on record that it was ever re-read back to him in the urdu language which he understood which in our view is a material irregularity in recording his statement.

23. For us to give any weight to his judicial confession in our view it must be strongly corroborated by independent evidence from an unimpeachable source.

Turning to the appellant's pointation of the place of burial of the deceased and the recovery of the murder weapon on his pointation.

24. In our view this **might have** provided some corroboration to the appellants judicial confession as it appears that he was the only person who knew where the body of the deceased was buried and when he took the police to the place where the body of the deceased was buried all the entries were made at the police station as required by law however **some doubt** arises with such taking of the police to the place of the buried body as although the required police entries were made no statement of the appellant has been exhibited whereby **prior** to the departure of the police he has stated where the body is buried as was required by law. In this respect reliance is placed on the case of **Mst Askari Jan** (Supra) which held as under in the following terms at P.1623 at Para 10;

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> *"Thus, firstly there should be an information or statement of the accused whether it may be confession or otherwise and that too when he was in police custody and secondly on the basis of such information or statement a fact is discovered. If there is no statement of the accused or information given to the Police, which is an essential requirement of the Article, then the subsequent discovery would become inconsequential. Further such information either oral or recorded by the police is required to be proved by the prosecution through evidence. Similar point was considered by Supreme Court of India in the case reported as Bhimappa v. State of Karnataka (AIR 1993 Supreme Court 1469) and at page 1471, it has been observed as under:-*
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> > *"The only evidence regarding the disclosure is "come with me" and thereafter the accused proceeded towards Harugeri and stopped near the stream situate at a distance of about 2 kms away and the accused took out the axe form inside the nallah (stream). **In the absence of any disclosure statement of recovery of axe itself becomes meaningless.**"* (bold added)

25. Thus, on balance, in our view **little weight** can be given to the recovery of the body on the pointation of the appellant in respect of corroborating the judicial confession of the appellant.

26. With regard to the recovery of the churri on his pointation we again have **some doubts** because although the relevant entries have been made by the police the question arises as to why he did not take the police to the churri at the same time when he took them to the body as the churri was in the bushes nearby. This conduct does not particularly appeal to logic, common sense or reason. Interestingly, as mentioned above in his confession the appellant does not say how he murdered the deceased and what was the murder weapon and as such this churri may well have been foisted upon him especially as one PW (PW 6 Tariq Mahmood) who was present when the churri was recovered states that it was a dagger and not a churri after confirming that he knew the difference between the two whilst the IO (PW 9 Wahid Bux) who recovered the churri says that the recovered murder weapon was not a dagger but a churri despite knowing the difference between the two. **Significantly** the post mortem report does not make any finding as to whether the incised wounds were caused by knife or any other weapon so in this respect corroboration as to the churri or a dagger causing the death of the deceased is not found in the post mortem report. The churri was also not sent to the chemical examiner for

analysis and once again although the required police entries were made no statement of the appellant has been exhibited whereby **prior** to the departure of the police he has stated where the churri is hidden as was required by law. In this respect reliance is placed on the case of **Mst Askari Jan** (Supra).

27. Thus, in our view **very little weight** can be given to the recovery of the churri on the pointation of the appellant in respect of corroborating the judicial confession of the appellant.

Turning to the correct identification of the body of the deceased.

28. According to PW 3 Dr.Abdul Haque who carried out the post mortem of the body after its exhumation the features were not identifiable. In this respect he states as under during his evidence;

> *"**The features of the dead body were not identifiable due to the injuries over the face as well as decomposition which was enhanced in this area due to the injuries.** The shallow grave about 18 inch and hot climate and nothing could be opined about postmortem lividity, tongue and ENT bleeding due to the decomposition."* (bold added)

29. It also appears from the evidence of PW 3 Dr. Abdul Haque that three teeth were taken from the body of the deceased for DNA examination in order to conclusively prove the identity of the deceased.

30. PW 1 Nazar Hussain is the complainant in the case who was at the exhumation and claims in his evidence to have recognized the dead body of the deceased. Keeping in view the fact that the features of the dead body were not identifiable as opined by PW 3 Dr Abdul Haque and that he had sent the teeth off for DNA examination we are of the view that the identification of the body by the complainant cannot be safely relied upon as absolutely correct especially as no DNA report was exhibited of the teeth to prove that the body was that of the deceased. According to the appellant in his S.342 statement he was falsely implicated in this case by the complainant party over a marriage dispute concerning his daughter and the nephew of the complainant's brother in law which marriage has been admitted by the complainant. The complainant was also the brother of the deceased and was therefore a related and interested witness who

also seems to be a partisan witness and as such we find that we cannot safely rely on his identification of the deceased for the reasons mentioned above. In fact as discussed later in this judgment we have come to the conclusion that the complainant has not been truthful in respect of at least some aspects of his evidence and as such the entirety of his evidence is excluded from consideration under the rule of *falsus in uno, falsus in omnibus* which has recently been recognized to be applicable in Pakistan following **the supreme court Order (unreported) dated 04-03-2019 in Criminal Miscellaneous Application No.200 of 2019 in Criminal Appeal No.238-L of 2013 (Notice in pursuance of the order passed by this Court on 13.02.2019 in Criminal Appeal No.238-L of 2013 to Police Constable Khizar Hayat son of Hadait Ullah on account of his false statement made before the trial court in a criminal case).**

31. Thus, we are of the view that the identification of the body as being that of the deceased has not been absolutely proven by the prosecution.

Turning to convicting the appellant on the basis of circumstantial evidence.

32. This concerns such evidence that to infer guilt the incriminating fact must be incompatible with the innocence of the accused and the only explanation is the guilt of the accused as was held in the case of **Wazir Muhammad and another v. The State** (2005 SCMR 277) at P.283 Para 8 in the following terms:-

> *"The question of circumstantial evidence and award of conviction has also been examined by this Court on different occasions in various cases and the judicial consensus seems to be that "**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.**" (bold added)*

33. Likewise in the case of **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274), at P.290 Para's 31 and 32 it was held as under;-

> *"31. As discussed earlier, the entire case of the prosecution*

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> *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."(bold added)*
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> *"32.....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."*** (bold added)

34. Based on our appreciation of the evidence on record we are of the view that the different pieces of evidence have **not** made an unbroken chain of evidence where one end of it touches the dead body and the other the neck of the accused especially when we consider the other factors discussed below which include there being no direct evidence that the appellant was even out with the deceased on the night of the deceased's alleged murder by the appellant.

35. **Even otherwise** we also consider that a number of other issues raise doubt over the appellant's guilt keeping in view that the complainant Mst. Hameeda died before she could give evidence at trial which we set out as under;

> (a) the deceased went missing at around 9pm on 14-5-2011 after allegedly going for a walk with the appellant who lived in the same house as the deceased. On 16-05-2011 the **appellant accompanied**

the wife of the deceased when she lodged a missing report at the PS. Yet, the next day on 17-05-2011 the wife of the deceased lodged an FIR accusing the appellant of the kidnapping of her husband. No explanation has come on record as to why the wife of the deceased changed her mind and decided to implicate the appellant within 24 hours which seems to us to be highly suspicious and

(b) There is no direct evidence that the appellant left the house with the deceased on the night in question. The FIR in this regard cannot be treated as evidence. The evidence concerning the appellant leaving the house with the deceased on the night of the incident is hearsay evidence as provided by PW 1 Nazar Hussain and PW 2 Muhammed Aslam **who was told** the same by Ms Hameeda who did not give evidence due to her death and as such is legally inadmissible. Both PW 1 Nazar Hussain and PW 2 Muhammed Aslam are related to the deceased and are partisan towards the appellant due to his daughter's marriage dispute with their relative.

(c) Furthermore, we can give no weight to the evidence of either of these PW's for the following reasons:

(i) In his evidence PW 1 Nazar Hussain states as under in material part

> *"On 14.5.2011 the accused Habib has committed murder of my brother namely Muhammad Ajmal at Christian Graveyard, New Karachi Area, on the pretext for buying some medicines for accused himself and took my deceased brother from his house at about 9.00 p.m. on the same day.* ***Such information had given to me by my deceased Bhabi Hameeda Mai. She also disclosed me*** *that later on the accused Habib came to her house where my deceased Bhai asked him that where is Ajmal to whom you took from the house and he replied that he ran away from there and I don't know about his whereabouts.* ***At such my Bhabi Hameeda Mai seen some spots of blood and mud on his clothes and asked that what happened to you in reply he stated that I have fallen some where due to which the mud and blood is seen on his clothes. The accused and my Bhabi were used to reside at one place/house. When the clothes of the accused Habib were put off by the inmates of the house then from the pocket of accused Habib, the CNIC, mobile phone and Rs.4500/- were dropped from his pocket which were belonging to my deceased brother Ajmal.*** *When the accused was asked about the belonging of my deceased brother Ajmal he replied that the deceased handed over to me the said articles and ran away and further directed that my belongings be handed over to my wife and accused further stated that I don't know where he had gone but you will be informed about him soon."*

Not only is such evidence (a) hearsay and legally inadmissible but is also (b) a great improvement from the FIR lodged by Mst Hameeda which in our view are dishonest improvements to improve the prosecution case which cannot be safely relied upon. In this respect reliance is placed on **Muhammed Mansha V State**

(2018 SCMR 772).**More significantly** (c) such evidence does not appeal to logic, reason, commonsense or natural conduct. In our view it is completely unbelievable that the appellant after murdering the deceased would return to a shared house with the deceased wife with blood stained clothes and would keep with him the CNIC and mobile phone of the deceased who he had allegedly just murdered which fell out of his pocket when changing his clothes in front of her. The murderer of the deceased in our view would have ensured that he had no trace of the deceased on him let alone the deceased's CNIC and mobile phone for which he had no use. In this respect reliance is placed on **Mst Rukhsana Begum v Sajjid** (2017 SCMR 596) and **Rohtas Khan** (Supra). The Supreme Court has also held in the recent case of **Rashid Aslam V The State** (unreported) dated 01-10-2018 in Criminal Appeals No.99 and 100 of 2017 albeit in a kidnapping for ransom case that it was not believable that an identification card which would fully implicate the accused in the crime was found at the place of incident in the following terms;

> *"An identification card of the deceased had statedly been recovered from a house wherein the deceased had statedly been kept and murdered by the appellants but the prosecution had utterly failed to establish any connection of the appellants with the said house.* ***It has been found by us to be unbelievable that the culprits who had taken every other precaution to conceal their crimes had left the identification card of the deceased at the place of murder. The prosecution had maintained that during the investigation the appellants had pointed out various places but admittedly nothing had been recovered from those places except an identification card of the deceased which has already been found by us to be a circumstance which was hard to believe".*** (bold added)

Based on the above discussion in our view certain aspects of this witnesses evidence are untruthful and thus on the basis of the rule of *falsus in uno, falsus in omnibus* his evidence is disregarded in its entirety

(ii) In his evidence PW 2 Muhammed Aslam states as under in material part:

> *"About four and half years back my aunty Hameeda, the wife of deceased came to my house at Gulshan-e-Maymar. She disclosed to me that Habib Ahmed took away her husband namely Ajmal who was my maternal uncle for taking medicine but till this time he had not come back.* ***My aunty also disclosed to me that Habib had come back and he had original CNIC and mobile phone of my deceased uncle.*** *I sent her back to her house and told her that in the morning time I would come to your house and would enquire about the matter. I alongwith my mother reached at the house of my aunty Hameeda. I enquired from the accused Habib that where was my maternal uncle? On this he returned the*

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CNIC and mobile phone of my uncle to me saying that my uncle Ajmal had run away."

Again, not only is such evidence (a) hearsay and legally inadmissible but also (b) a massive improvement from the FIR lodged by Mst Hameeda which in our view are dishonest improvements to improve the prosecution case which cannot be safely relied upon. In this respect reliance is placed on **Muhammed Mansha V State** (2018 SCMR 772).Again **more significantly** (c) such evidence does not appeal to logic, reason, commonsense or natural conduct. In our view as discussed above it is completely unbelievable that the appellant after murdering the deceased would return to a shared house with the deceased wife and would keep with him the CNIC and mobile phone of the deceased who he had allegedly just murdered which fell out of his pocket when changing his clothes in front of her. The murderer of the deceased in our view would have ensured that he had no trace of the deceased on him let alone the deceased's CNIC and mobile phone for which he had no use. **Again significantly** such CNIC and mobile phone of the deceased was never recovered or exhibited despite them allegedly being in the possession of this witness which again severely dents his evidence and the prosecution case. In this respect reliance is placed on **Mst Rukhsana Begum v Sajjid** (2017 SCMR 596). Again, in our view certain aspects of this witnesses evidence are untruthful and thus on the basis of the rule of *falsus in uno, falsus in omnibus* his evidence is also disregarded in its entirety.

With regard to the contents of the FIR itself this cannot be treated as a piece of substantive evidence unless its maker affirmed its content under oath and was subject to cross examination which has not been done in this case and as such the contents of the FIR regarding the incident are of no evidentiary value. In this respect reliance is placed on the cases of **Muhammad Zaman** (Supra) and **Dr.Javaid Akhtar** (Supra)

Thus the upshot of the above discussion is that there is no evidence on record to show that the appellant left the house with the deceased on the night that he allegedly murdered him as there is no legally admissible evidence or even circumstantial evidence on record to this effect and there is no evidence that any one even saw the appellant or the deceased at the time when he was allegedly out side his home committing the murder of the deceased which in our view creates a huge dent in the prosecution case as potentially any other person could have murdered the deceased. This again creates major doubts in the prosecution case

(d) The prosecution has not been able to prove that the appellant had any motive for killing the deceased.

36. It is a cardinal principle of criminal law that the prosecution has to prove its case beyond a reasonable doubt and that any doubt must go to the benefit of the accused as was recently emphasized by the Supreme

Court in the case of **Abdul Jabbar V State** (2019 SCMR 129). Based on the above discussion, we have considerable doubts as to the guilt of the appellant and accordingly whilst extending the benefit of that doubt to the appellant the appeal is allowed, the appellant is acquitted from the charge, the confirmation reference is answered in the negative and the appellant shall be released unless he is wanted in any other custody case.

37. The appeal is disposed of in the above terms with the confirmation reference being answered in the negative.

Arif