Child dead in House
Toffee Case

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IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.108 of 2017
Conf. Case No.03 of 2017.

Present:

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

Appellants:	1. Shakir Muhammad @ Shakeel S/o. Manzoor Ahmed, 2. Mst. Safina @ Sakina W/o. Shakir Muhammad @ Shakeel, both Muslims, adults, residents of House No.B-208, Natha Khan Goth, Karachi presently confined in Central & Women Jail at Karachi through Mr. Muhammad Arshad Tariq, Advocate.
Respondent/State:	The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh
Date of hearing:	12.11.2018
Date of Judgment:	**22 .11.2018.**

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J.- Shakir Muhammad @ Shakeel and Mst. Safina @ Sakina, appellants were tried by learned VIIIth Additional Sessions Judge Karachi (East) in Sessions Case No.716/2013 which through the impugned judgment dated 04-03-2016 awarded Death Sentence (subject to confirmation by this court) to both the appellants/accused u/s. 364-A PPC & 302 PPC and fine of Rs.10,00,000/- jointly as compensation to the legal heirs of deceased Muhammad Yousuf and in default ordered to suffer S.I. for six months. Appellant Shakir Muhammad @ Shakeel was also awarded life imprisonment u/s. 377 PPC and also fine of Rs.50,000/- without giving the benefit of section 382-B PPC.

2. Brief facts of the prosecution case as enumerated in the F.I.R. lodged by the complainant on 21.05.2013 at about 2315 hours' time is that on 20.05.2018 at 10.00 am complainant's son Muhammad Yousuf, aged about 02 years and his niece Rameen aged about 03 years went outside the house for playing but not return back, due to which, he and his nephews started to search them but failed, so his brother made such entry at police station. On 21.05.2013 at 1530 hours' time, accused Shakir, taking dead body of his son, was alighting from the stairs of his house, which was witnessed by mohalla people namely Safeer Ahmed,

Nisar Shah and Muhammad Javed that accused Shakir handed over the dead body of complainant's son to Mst. Akbar Zain, wife of his brother and PW Nisar Shah took the dead body while Baby Rameen was unconscious and was in custody of accused Safina W/o. co-accused Shakir. Both were brought to complainant's house. Complainant took both of them to Fouji Foundation Hospital, where doctors declared his son as dead, therefore, after treatment of his niece, brought to his house, whereas he took dead body of his son to Jinnah Hospital for postmortem and after completion of due formalities by police, dead body of his son was handed over to him, so after funeral ceremony, he lodged such F.I.R. with allegation that both the accused kidnapped his son and niece for unknown reason and killed his son by strangulation/throttling.

3. Investigation was conducted and on completion of usual process including recording of statements, I/O filed charge sheet report in the Court of area Magistrate who sent up the same to Sessions Court. Learned Sessions Judge, Karachi East transferred the same to Additional Sessions Judge-III, Karachi East for its disposal and after compliance of section 265(c) Cr.PC, learned former Court framed the charge at Ex. 02 to which the accused did not admit vide plea Ex. 2/A and Ex. 2/B and claimed trial.

4. In support of the charge, prosecution examined thirteen witnesses i.e. **PW-1** Marvaiz Khan at Ex.03, who produced F.I.R. at Ex. 3/A, memo of arrest and recovery at Ex. 3/B, memo of place of incident and seizure at Ex. 3/C. **PW-2** Nisar Shah at Ex. 04, **PW-3**, Safeer Ahmed at Ex. 05, **PW-4**, Muhammad Ayaz at Ex. 06, **PW-5** Feroz Khan at Ex.07, who produced dead boy receiving receipt at Ex. 7/A. **PW-6** Aziz-ur-Rehman at Ex. 08, who produced dead body inspection memo at Ex. 8/A, Dead Body inspection notes at Ex. 8/B. **PW-7** Shamroz Khan at Ex. 09. **PW-8** ASI Rana Javed at Ex. 10, who produced letter to MLO Dr. Dileep at Ex. 10/A, Death certificate from MLO at ex. 10/B, entry No.31 at Ex. 10/C. **PW-9** Dr. Rohina Hassan at Ex.11, who produced police letter at Ex. 11/A, Medical Certificate at Ex. 11/B. **PW-10** Dr. Dileep Khatri at Ex. 12, who produced medical certificate of cause of death at Ex. 12/A, police letter at Ex.12/B, his medical report dated 23.05.2013 at Ex. 12/C, **PW-11** Dr. Kaleem at Ex.13, who produced police letter at ex.13/A, Medico Legal Certificate vide No.4806 dated 22.05.2013 at Ex. 13/B. **PW-12** SIP Muhammad Khalid Araeen at Ex.14, he produced entry No.30 at Ex. 14/A, entry No.37 at Ex.14/B, site sketch at Ex.14/C, CDR of both the accused mobile phones at Ex.14/D. **PW-13** SIP Muhammad Ejaz Awan at

Ex.15, who produced respective letters addressed to Senior A.I.G. and Senior Superintendent of police S.I.U. at Ex.15/A and 15/B, four photographs taken by I/O SIP Khalid at Ex.15/C, 15/D, 15/E and 15/F, letter to Senior Superintendent of police for D.N.A. test permission at Ex.15/G, letter to D.N.A. at Ex.15/H, chemical examiner report at Ex.15/I, D.N.A. test report of accused sample at Ex.15/J, D.N.A. report Ex.15/K. Thereafter the prosecution closed its side.

5. The accused Shakir and his co-accused wife Safina both recorded their statements under S.342 Cr.PC denying the allegations against them. The accused Shakir examined himself on oath where he again denied the allegations against him. He stuck to his explanation that the case against him was false and that on receiving a knock on his door at about 2.15pm on 21-05-2013 he opened his door to find the bodies of the children on his door step and that such children had never been in his house. Neither accused Shakir nor accused Safina called any witness in support of their defense case.

6. Learned VIIIth Additional Sessions Judge Karachi (East) after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment , convicted and sentenced the appellants as stated above, hence, this appeal has been jointly filed by the appellants. By this common judgment we intend to decide the appeals and also answer the confirmation reference.

7. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment, therefore, the same are not reproduced here so as to avoid duplication and unnecessary repetition.

8. In a nutshell the case of the prosecution is that Marvaiz Khan (PW1) the complainant on 20-05-2013 at 10am during breakfast was informed by his wife that his one and a half year old son Mohammed Yousuf was missing. His brother's wife who was living in the same house as him informed him that her daughter Rameen aged about 3 years old had also gone missing. Thereafter the complainant and his other family members including Rameen's father Shamroz Khan (PW7) started searching for the missing children and even an announcement about there missing was made from the speakers of the local mosque. On the same day Shamroz Khan (PW7) lodged a report about the

missing children at the PS. The search was unsuccessful and was continued the next day on 21-05-2013 when Marvez Khan received a phone call from his cousin (Aziz Ur Rehman PW 6) that the children had been found. When he reached home he found that his son was dead and baby Rameen was receiving medical treatment. He took his son to JPMC via PS Shah Faisal where post mortem was carried out by Dr.Khatri (PW 10) who found the cause of death as cardio respiratory failure due to asphyxia resulting from smothering. Dr.Rohina Hasan examined Rameen who found marks of violence on her body and that she had been subject to anal intercourse about 24 hours earlier. Nisar Shah (PW 2) and Safeer Ahmed (PW 3) informed the complainant that the dead body of his son and Rameen had been found in the house of accused Shakir and his wife who had handed over both bodies. Thereafter the complainant at 11.15pm on 21-05-2013 registered an FIR. against the accused Shakir and his wife Safina for offenses under S.302/34/363 PPC. Muhammed Khalid (PW 12) was the first IO who investigated the case and recovered the children's slippers and shorts (Chaddi) from the house of the accused. On 30-05-2013 the case was transferred to Muhammed Awan who became the 2nd IO. The prosecution further relied on exhibits of various recoveries, CDR data, chemical report and DNA to prove that the accused committed the offenses as charged.

9. In a nutshell accused Shakir's defense was that he had nothing to do with the children going missing and the death of Muhammed Yousaf or any injuries to Rameen. According to him he was out with the search party and on returning home at about 2.15pm on 21-05-2013 his door was knocked and when he opened it he found the bodies of the two children outside his house. He claimed false implication as did his wife Safina in her defense.

10. Learned advocate for appellants initially submitted a written statement that he would not press the appeals on merits if the capital sentences in each case awarded to each appellant were set aside and the sentences in the cases of both appellants were reduced to imprisonment for life. Later under instructions, he withdrew the statement and submitted that this court should decide the appeals on merits. There after, he contended that the appellants had been falsely implicated in the case by the complainant; that the FIR was delayed by one day and thus it had been concocted; that this was a case of circumstantial evidence as there was no direct evidence to link the kidnapping, murder or sexual assault of the children to the appellants and even otherwise the circumstantial evidence

was lacking; that there were discrepancies in the evidence of the PW's; that the DNA report did not support any sexual assault on Rameen and that for all the above reasons the impugned judgment should be set aside and the appellants should be acquitted of the charges against them. In support of his contentions he placed reliance on **Zafar v. The State** (2012 MLD 466), **Khalid Javed and another v. The State** (2003 SCMR 1419), **Rashida Begum and others v. Sadi Baig and others** (2003 SCMR 1456), **Hashim and another v. The State** (2017 SCMR 986), **Akbar Ali v. The State** (2007 SCMR 486), **Muhammad Afazal alias Abdullah and others v. The State and others** (2009 SCMR 436), **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274), **Muhammad Shah v. The State** (2010 SCMR 1009) and **Waqar Nazir and others v. The State** (2007 SCMR 661).

11. On the other hand Mr. Muhammad Iqbal Awan, Deputy Prosecutor General who was also representing the complainant contended that the impugned judgment did not require interference as it had been decided in accordance with the law; that the dead body of Yousaf and the injured baby Rameen had been shown to be in the possession of both the appellants; that recoveries of the children's clothes were made from the appellants house; that the PW's in their evidence have mainly supported each other and there are minor contradictions in their evidence and as such the prosecution has proved its case against the appellants beyond a reasonable doubt and as such the convictions and sentences should be maintained and the confirmation reference against each appellant answered in the affirmative. In support of his contentions he placed reliance on the case of **Qadan alias Qadir Bux and another v. The State** (PLD 2015 Sindh 426), **Khadim Hussain v. The State** (2011 P. Cr.LJ 1443) and **Javed Iqbal v. The State** (2011 P. Cr.LJ. 835).

12. We have heard the learned counsel for the parties and scanned the entire evidence which has been read out by learned counsel for the appellants and considered the relevant law.

General.

13. Turning to the first point which is the delay in lodging the FIR. We find a delay of about 24 hours in the lodging of the FIR based on the particular facts

and circumstances of the case would not to be fatal to the prosecution case. In our view a delay in approximately 24 hours in lodging the FIR is not fatal in a case where a parent's small child goes missing. This is because it is natural human conduct to initially search high and low for the missing child through friends and other Mohalla people which was done in this case. In this respect reliance is placed on **Rahat Ali V State** (2001 P.Cr.LJ P.98).Even otherwise PW 7 Shamroz Khan who was the father of missing baby Rameen despite searching for his daughter and nephew (baby Yousaf) made a missing report at PS Shah Faisal on the day of the incident despite having hopes that his daughter and nephew may be found in a friends or relatives house. Thus, there was no room for any concoction of the FIR which was filed the next day when the bodies of the children were recovered.

14. Admittedly this is a case where there is no eye witness evidence of the kidnapping, murder or sexual assault of either of the children. Thus we must consider the circumstantial evidence.

15. As a matter of law we are cognizant of the fact that it is difficult to prove a case based on circumstantial evidence and that great care and caution must be shown in such cases. We have taken this legal aspect into account whilst deciding this case. For example 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 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)*
>
> *"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)***

16. The appellants have been convicted under S.464 A PPC, S.302/34 PPC and in the case of appellant Shakir under S.377 PPC. We shall consider each of the aforesaid offenses in turn and the evidence in respect of the same and consider whether based on the evidence on record the ingredients of each offense has been proved beyond a reasonable doubt by the prosecution.

Turning firstly to the offense u/s 464 A PPC for which the appellants have been convicted

S.464 A PPC reads as under:

> *"364-A. Kidnapping or abducting a person under the [age of fourteen], in order that such person may be murdered or subjected to grievous hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person shall be punished with death or with [imprisonment for life] or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years."*

17. As can be seen by the wording of the offense each of the ingredients in para 18 below have to be proved in turn. Thus if the first ingredient is not present for instance kidnapping or abducting the offense will not be made out.

18. The ingredients to be proved for an offense u/s 364 A are as follows: (a) Kidnapping or abduction **then** (b) a person under the age of 14 **then** (c) in order that such person may be murdered or subjected to grievous hurt, or slavery or to the lust of any person and **then** (d) the requisite intent known as mens rea must also be present.

19. The first ingredient in this case is whether the children were kidnapped **or** abducted. With regard to "kidnapping" this is defined by S.361 PPC as under:

> ***"S.361 Kidnapping from lawful guardianship.*** *Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound*

mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, said to kidnap such minor or person from lawful guardianship".

20. In the context of this case kidnapping would therefore require the "taking" or "enticing" of the children away from their legal guardian by either or both of the appellants .

21. With regard to "abduction" this is defined by S.362 PPC as under:

*"**S.362 Abduction.** Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person."*

22. In the context of this case abduction would therefore require the "taking by force" or "the inducing by deceitful means" the children away from their legal guardian by either or both of the appellants.

23. Thus based on the evidence for the first ingredient of S.364 A to be made out in the first instant the evidence must show that the children for a case of kidnapping were "taken away" or "enticed away" from their lawful guardians by the appellants or either one of them **or** for a case of abduction were "taken away by force" or "induced by deceitful means" away from their lawful guardians by either or both of the appellants.

24. In this respect reliance is placed on the case of **Ahsanullah v. The State** (PCr.LJ 627) where at P.631 Para 7 it was held as under;

"7. In order to invoke the provisions of section 364-A, it is incumbent upon the Court to first see whether there was kidnapping within the meaning of section 361, P.P.C. which envisages co-existence of three elements contained therein namely; (i) The minor was taken or enticed away by the kidnapper, (ii) The minor was out of keeping of the lawful guardian (iii) The keeping of the minor was without the consent of the guardian. Once kidnapping is established, the .question under section 364-A would be as to whether the appellant intended to murder the victim or subject her to grievous hurt or lust.

8. The words "takes" and "entices away" used in section 361, P.P.C. are key words to the offence of kidnapping implying some action on the part of the kidnapper to take or entice away the kidnapee followed by keeping the kidnapee out of the lawful guardianship of the guardian without his consent. In the case of Muhammad Sharif v. The State 1983 PCr.LJ 1817 it was held:---

> *"The expression "taking" and "enticing" call for some positive steps taken by the accused to remove the girl from the custody of her guardian. Neither section 361, P.P.C. nor section 363, P.P.C. would have any application if the girl of her own accord came word "kidnapping" connotes stealing away a child without the permission of a person under whose custody or care the child is."*

The Supreme Court of India in the case of T.D. Vadgama v. State of Gujarat reported in AIR 1973 SC 2313 (V 60 C 391) held:--

> *"Section 361 uses the expression "whoever takes or entices any minor". The word "takes" no doubt, means physical taking but not necessarily by use of force or fraud. The word "entice" seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other, and further.*
>
> *The two words read .together suggest that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered 'to have committed the offence of kidnapping. But if the guilty party has laid a foundation by inducement, allurement or threat, etc. and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him."*

25. In case the case of **Phalla Masih V State** (PLD 1989 FSC 72) where the girl willingly went with the accused this was not found to be a case of kidnapping or abduction under S.364 A and thus the accused was acquitted. At P.75 Para 14 the Court held as under;

> *"14. The first point for consideration is whether the offence of abduction has been proved or not. The learned Additional Advocate-General has conceded and we agree with him that in the situation on hand this is not a case of abduction because the Chobara is just by the roadside.* ***Moreover on the offer of maize butts the girl herself willingly accompanied the appellant to the Chobara and in the circumstances it cannot be said that she was kidnapped or abducted with the meaning of section 364-A P.P.C. Consequently his conviction under section 364-A, P.P.C. is set aside".*** *(bold added)*

26. The evidence on record reveals that the children went missing on the morning of 20-05-2013 and parents, family and people from the Mohalla thereafter went out in search of them as is corroborated by the evidence of many PW's .Even appellant Shakir claims to have been part of this search.

27. The question which arises is where did the children go after they left home. According to PW 7 Shamroz Khan who is the father of Rameen he states in his evidence that the children went for purchasing sweets. This seems to be true as PW 2 Nisar Shah corroborates this fact in his evidence by stating that the children on the morning of the incident purchased sweets from his shop prior to 10.30 am when the fathers of the children came to his shop asking the whereabouts of the children and as such he can be regarded as a last seen witness of the children. Thereafter the trail goes cold.

28. There is no evidence on record that the children came with any other person to the sweet shop. There is no evidence that the children left the sweet shop with any other person. In short there is no evidence that the children were with any other person from the time they went missing on the morning of 20-05-2013 until they were found by the appellants either inside or outside the house of the appellants at 2.15pm on 21-05-2013 which was the day when there bodies were recovered which we shall come to later.

29. In short there is absolutely no evidence on record that either or both of the children were seen with either of the appellants or both of the appellants from the time they went missing until the time when their bodies were found either inside or outside the appellants house. Thus, under these circumstances there can be no question of either the appellants or both of the appellants "taking way" or "enticing away" the children to fall within the definition of kidnapping. Like wise there can be no question of either the appellants or both of the appellants "taking away the children by force" or "inducing by deceitful means" the children to come with them to fall within the definition of abduction. The possibility exists that the children might have gone voluntarily on their own to the appellants house (if they did indeed go there) for the purpose of visiting the appellants

30. Thus, since the prosecution has failed through its evidence to prove that this is a case of either kidnapping or abduction the offense under S.464 A falls at the first hurdle and as such an offense u/s 464 A cannot be made out. Thus, both the appellants are acquitted of the charge under S.464 A PPC

Turning to the offense u/s 377 PPC for which the appellant Shakir has been convicted.

31. S.377 reads as under:

> *"Unnatural offence. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with [imprisonment for life], or with imprisonment of either description for a term which [shall not be less than two years nor more than] ten years, and shall also be liable to fine."*

32. The prosecution case is that baby Rameen was sodomised by the appellant Shakir. If, as we will come to later, baby Rameen was found inside the house of the appellants we agree with the prosecution that this act could only have been committed by appellant Shakir and not his wife. In his evidence under oath Shakir during cross examination stated that the second floor of his house was vacant and thus he had the space and opportunity to sodomise baby Rameen without his wife knowing. In respect of this aspect of the case although PW 9 Dr. Rohina Hasan had found that baby Rameen had been subject to sexual intercourse and the chemical report showed that semen was present in the anal area of her body the DNA report regarding semen came back negative. Although the prosecution have relied on the case of **Khadim Hussain** (supra) that in these circumstances the DNA evidence can be ignored we are of the view that the aforesaid case is distinguishable from the case at hand. This is because in **Khadim Hussain's case** (Supra) there were eye witnesses to the rape whereas in the instant case there are no eye witnesses to the sodomy of baby Rameen. Furthermore, there was an unexplained delay of 9 days in sending the swabs for chemical examination with no evidence of the safe custody of such swobs. As such, in our view, because of these conflicting reports (chemical and DNA) there is some doubt that this offense occurred. In criminal jurisprudence the accused is entitled to the benefit of the doubt even if there is a single circumstance which creates doubt. In the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), the Honourable Supreme Court has observed as follows:-

> *"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a* ***single circumstance,*** *which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."(bold added)*

33. Thus, under these circumstances we give the benefit of the doubt to appellant Shakir in respect of the offense u/s 377 PPC and acquit him of this charge.

34. Even otherwise we have also observed that during the recording of his S.342 statement no question was put to the appellant Shakir regarding the chemical report or DNA test in respect of an offense under S.377 PPC. It is settled law that any piece of incriminating evidence used to convict the accused which has not been put to him for an explanation while recording his S.342 statement cannot be used for convicting that person. In the case of **Muhammed Shah V The State** (2010 SCMR 1009) it was held as under at P.1015 at Para 11;

> *"It is not out place to mention here that both the Courts below have relied upon the suggestion of the appellant made to the witnesses in the cross-examination for convicting him thereby using the evidence available on the record against him. It is important to note that all incriminating pieces of evidence, available on the record, are required to be put to the accused, as provided under section 342, Cr.P.C. in which the words used are "For the purpose of enabling the accused to explain any circumstances appearing in evidence against him" which clearly demonstrate that not only the circumstances appearing in the examination-in-chief are put to the accused but the circumstances appearing in cross-examination or re-examination are also required to be put to the accused, if they are against him, because the evidence means examination-in-chief, cross examination and re-examination, as provided under Article 132 read with Articles 2(c) and 71 of Qanun-e-Shahadat Order, 1984. The perusal of statement of the appellant, under section 342, Cr.P.C. reveals that the portion of the evidence which appeared in the cross-examination was not put to the accused in his statement under S.342 enabling him to explain the circumstances particularly when the same was abandoned by him.* ***It is well-settled that if any piece of evidence is not put to the accused in his statement under section 342, Cr.P.C. then the same cannot be used against him for his conviction. In this case both the Courts below without realizing the legal position not only used the above portion of the evidence against him, but also convicted him on such piece of evidence, which cannot be sustained."*** *(bold added)*

35. Thus, also on this count since the chemical report and DNA report were not put to the appellant Shakir whilst recording his S.342 statement they cannot be used to convict him under S.377 PPC and thus as mentioned above he is acquitted of this charge.

Turning to the offenses u/s 302 and 34 PPC for which both the appellants have been convicted.

36. In essence these are the offenses of murder (S.302 PPC) and common intention (S.34 PPC)

37. As mentioned earlier there is no direct evidence as to the murder of the boy Yousaf and as such the prosecution has relied solely on circumstantial evidence to prove that the appellants murdered Yousaf. We have already mentioned the difficulties in convicting on the basis of circumstantial evidence and the need to take great caution in relying on the same. Hence we now come to consider whether the circumstantial evidence available is so linked to prove beyond a reasonable doubt that the appellants murdered Yousaf.

The circumstantial evidence as per the record.

38. The children went missing on the morning of 20-05-2013 and parents, family and people from the Mohalla thereafter went out in search of them as is corroborated by the evidence of many PW's.Even appellant Shakir claims to have been part of this search.

39. The question which arises is where did the children go after they left home. According to PW 7 Shamroz Khan who is the father of Rameen he states in his evidence that the children went for purchasing sweets. This seems to be true as PW 2 Nisar Shah corroborates this fact in his evidence by stating that the children on the morning of the incident purchased sweets from his shop prior to 10.30 am when the fathers of the children came to his shop asking the whereabouts of the children and as such he can be regarded as a last seen witness in respect of the children.

40. In this respect in terms of continuing the chain of circumstantial evidence the evidence of PW 4 Muhammad Ayaz is important. This is because he states in his evidence that when he went to the house of the appellants with the police at the time when the recovery was made of two neckers, shorts, foot sleepers he saw **one toffee sweet which was having marks of minor teeth from the 3rd Floor room of the appellants house.** In our view although the evidence of the toffee at first instance only appears to be a minor and not very significant piece of evidence when read with the earlier evidence in respect of the missing children on greater reflection we find it to be a very important piece of evidence as it is a **unique piece of evidence** flowing from the previous evidence about the purchase of sweets and continues the chain of unbroken circumstantial evidence leading to the appellants. Such a toffee with a child's teeth marks was extremely unlikely to have been planted and **indicates that the children were in the house**

of the appellants. Notably PW 4 Muhammad Ayaz is not a chance witness although he lives in the neighbourhood and is not related to the complainant or baby Reema's father and no enmity has been alleged against him by the appellants and as such he would have no reason to falsely implicate the appellants.

41. The importance of the above **unique piece of evidence** of the **toffee having marks of a minors teeth** is because in our view based on the evidence on record the case hinges on two alternate stories. Namely, the prosecutions case that the children were kidnapped, and then **taken to and went inside the appellant's house** being the same address as provided in the appellant's S.342 statements, where Yousaf was murdered and Reeema sexually assaulted as against the defense case that as per their S.342 statements and evidence of Shakir on oath the children were not in their house but when the door of their house was knocked at about 2.15pm on 21-05-2013 and they opened their door the bodies of the children were lying **outside the house** which he and his wife picked up and handed to PW 4 Muhammad Ayaz and PW 2 Nisar Shah according to his own evidence

42. Thus, the key issue appears to us to be whether the children were found inside the house or outside the house of the appellants. According to PW 2 Nisar Shah he heard noises from the appellants house so he went there and saw accused Shakir alias Shakeel come down the staircase and body of deceased child Yousaf was in his hands. Importantly PW 2 Nisar Shah is not a chance witness, he is an independent witness unrelated to the complainant and baby Reema's father and no enmity between him and the appellants has been brought on record and as such he has no reason to falsify his evidence against the appellants. PW 3 Safeer Ahmed also heard a noise and reached the first floor of the appellants house who was weeping and crying and the children of the complainant were where he saw the dead body of Yousaf being given by Shakir to his bhabi and one baby (Rameen) was in the hands of appellants Skahir's wife (appellant Safina). Again importantly PW 2 Nisar Shah is not a chance witness, he is an independent witness unrelated to the complainant and baby Reema's father and no enmity between him and the appellants has been brought on record and as such he has no reason to falsify his evidence. His evidence largely corroborates that of PW 2 Nisar Shah in confirming that the children were **inside the house of the appellants at the time when they were found.**

43. Furthermore, as admitted by appellant Shakir on oath in his own evidence he had both children and his brother's wife took one child from his lap. Under oath he also admitted that his second floor was vacant so he had every opportunity to hide the children in his house without any other person apart from his wife (co-accused Safina) knowing.

44. We find the evidence of both PW 2 Nisar Shah and PW 3 Safeer Ahmed to be truthful and confidence inspiring and thus rely upon the same. In this respect reliance is placed on **Muhammad Ehsan v. The State** (2006 SCMR 1857) where it was held at P.1860 at Para 6 as under:

> *"6. It is true that there is only ocular testimony of P.W. 4 Mst. Khatun Bibi corroborated by medical evidence, P.W. 6 Dr. Muhammad Sarfraz Sial. The fact that there is only ocular testimony of one P.W. which is unimpeachable and confidence-inspiring corroborated by medical evidence would be sufficient to base conviction.* ***It be noted that this Court has time and again held that the rule of corroboration is rule of abundant caution and not a mandatory rule to be applied invariably in each case rather this is settled principle that if the Court is satisfied about the truthfulness of direct evidence, the requirement of corroborative evidence would not be of much significance in that, as it may as in the present case eye-witness account which is unimpeachable and confidence-inspiring character and is corroborated by medical evidence".*** *(bold added)*

45. The next question is whether there is any other evidence to link the dead boy Yousaf and the unconscious baby Rameen to the appellant's house? The answer is yes. PW 4 Muhammed Ayaz saw one toffee sweet in the house of the appellants having marks of minor teeth. He was not a chance witness and was not an interested witness and like PW 2 Nisar Ahmed and PW 3 Safeer Ahmed he had no reason to falsely implicate the appellants and like PW 2 and PW 3 we find his evidence to be trust worthy and confidence inspiring. In addition from the appellant's house were also recovered knickers, shorts and chapels which belonged to the children for which the appellants had no explanation which is further evidence that the children were present in the appellant's house. There was no reason for the IO PW 12 Muhammed Khalid Araeem who recovered the clothes to have planted the same. There was no enmity or ill will between him and the appellants and he was not related to the complainant or PW 7 Shamroz Khan who was baby Rameen's father. He was an independent person. Even otherwise as alluded to earlier how could he have planted the rather unique

piece of evidence in the form of a toffee with tooth marks of a minor which was seen by PW 4 Muhammed Ayaz in the appellant's house. A sweet which the evidence has shown the children went out to buy, was bought by them and a piece of which turned up in the house of the appellants. It was in our view almost impossible to plant this piece of evidence and is important in showing the chain of circumstantial evidence connecting the appellants to the offense for which they have been charged.

46. Thus, based on the eye witness evidence from the PW's discussed above who we found to be reliable, trust worthy and confidence inspiring along with the recoveries made in the appellants house we find that the children were found **inside the house** of the appellants and Yousaf was already dead when he was handed back by the appellants and that he died from unnatural causes as confirmed by his post mortem. Namely suffocation.

47. We accept that there may be some contradictions in the evidence of the prosecution witnesses but we consider such contradictions as being minor in nature and not material and thus can be ignored. In this respect reliance is placed on the case of **Zakir Khan & others v. The State** (1995 SCMR 1793).

48. We also appreciate that it is up to the prosecution to prove its case beyond a reasonable doubt and the accused can put up any defense they wish or even change their defense and this will not detract from the prosecution's burden of proof but notwithstanding this we do not find the appellants defense case that they found the children on their door steps after opening their door after it was knocked appealing to reason, logic or common sense in the context of the case. Namely, would a person leave a murdered child and an unconscious child in broad day light outside the front door of a house when he could be seen carrying the lifeless children to such place and depositing them outside the front door when they must have known that the Mohalla people who were present had been searching high and low for the children. Why would such person even bother to waste time knocking repeatedly on the door of the appellants house with the children at his feet which would have drawn attention to him when he would have wanted to leave the area as soon as humanely possible just in case he was spotted by the Mohalla people who were on high alert regarding the missing children. No reasonable person in our view would take such risk. If someone else took the children he would almost certainly have disposed of them in a location far off and most probably hidden the bodies especially as he would have known

that the young boy was dead. In this respect reliance is placed on **Mohammad Asif v. The State** (2017 SCMR 486).

49. Thus, we find that based on the circumstantial evidence, last scene evidence, the eyewitness's evidence discussed above who saw both accused Shakir and Safina with the children **inside their house** and the recoveries made from the appellants house that the children were detained in the appellants house and that the young boy was murdered inside the appellants house since the young boy when handed over by appellant Shakir was already dead and the post mortem report has found that the cause of death as cardio respiratory failure due to asphyxia resulting from smothering which is an unnatural death. The question then arises whether either appellant Shakir or his wife appellant Safina murdered Yousaf.

50. We have noticed from the evidence that the young boy Yousaf who was killed by suffocation as per the medical report was at all times according to the relevant PW's in the hands of the appellant Shakir and **not** his wife and as such the only reasonable inference is that Shakir murdered Yousaf through suffocation but his wife (appellant Safina) shared the same common intention to murder Yousaf with her husband especially as the children it appears had been kept in their house for a day and a full night and up to 2.15pm on the next day and although S.377 could not be proved against as her husband Shakir there is no disputing the medical report that baby Reema was subject to violence and possibly sodomy. Thus we find both Sakir and his wife guilty of the murder of Yousaf under S.302 PPC and 34 PPC.

Turning to the issue of the sentence which should be handed down to appellant Shakir and appellant Safina on account of their conviction for murder u/s 302 PPC and common intention u/s 34 PPC.

51. In cases of murder and common intention the death penalty is attracted and generally speaking this is the sentence which ordinarily under the law should be handed down in such cases **unless** there are any mitigating factors which may justify the reduction in the sentence. After going through the evidence we are of the view that not only has the prosecution failed to prove the motive of either appellants in committing the offenses but it has not even alleged any motive. The Supreme Court has held time and again that the lack of a motive

is a mitigating factor justifying the reduction in sentence. Reliance in this respect is placed on the case of **Amjad Shah V State** (PLD SC 2017 P.152) where it was held as under at P.156 Para 9;

> *"Notwithstanding that the participation of the appellant in the commission of offence is duly established, his intention, guilty mind or motive to commit the same remains shrouded in mystery and is therefore, unproven.* ***In such like cases where the motive is not proved or is not alleged by the prosecution, the Court for the sake of safe administration of justice, adopts caution and treats the lack of motive as a mitigating circumstance for reducing the quantum of sentence awarded to a convict.*** *Reference is made to* ***Zeeshan Afzal v. The State (2013 SCMR 1602).*** *" (bold added)*

52. Thus, since no motive has been alleged against either appellant Shakir or appellant Safina for the offenses which we found that they committed under S.302/34 PPC we hereby reduce both their sentences to that of imprisonment for life.Thus, the confirmation reference is answered in the negative.

Summary:

1. Appellant Shakir is acquitted of kidnapping of Yousaf u/s 364 A PPC.
2. Appellant Shakir is acquitted of the offense under S.377 PPC
3. Appellant Shakir is convicted u/s 302/34 PPC for the murder of Yousaf and is sentenced to imprisonment for life and to pay compensation of RS 100,000 to the legal heirs of the deceased u/s 544 A Cr.PC and in default shall under go a further sentence of 6 months SI. The appellant shall have the benefit of S.382 (B) Cr.PC
4. The confirmation reference against appellant Shakir is answered in the negative.
5. Appellant Safina is acquitted of kidnapping of Yousaf u/s 364 A PPC.
6. Appellant Safina is convicted u/s 302/34 PPC for the murder of Yousaf and is sentenced to imprisonment for life and to pay compensation of RS 100,000 to the legal heirs of the deceased u/s 544 A Cr.PC and in default shall under go a further sentence of 6 months SI. The appellant shall have the benefit of S.382 (B) Cr.PC
7. The confirmation reference against appellant Safina is also answered in the negative.

53. As such the appeals are partly allowed and the confirmation reference is answered in the negative in respect of each appellant.

54. In view of the above the appeals are disposed of in the above terms

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