# IN THE HIGH COURT OF SINDH AT CIRCUIT COURT LARKANO

CRIMINAL APPEAL NO. S-60 OF 2011
ABDUL GHAFOOR BHAYO – APPELLANT
VS.
THE STATE

CRIMINAL APPEAL NO. S-61 OF 2011
IMDAD @ BEHRAM – APPELLANT
V.
THE STATE

CRIMINAL APPEAL NO. S-62 OF 2011
ABDUL QADEER BHAYO – APPELLANT
V.
THE STATE

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| Dates of hearing: | : 01.02.2019 |
| Date of Judgment | : 01.02.2019 |
| Appellants: | : Abdul Ghafoor Bhayo (Cr. Appeal No.60/2011) and Imdad @ Behram (Cr. Appeal No. 61/2011), through Mr. Faiz Muhammad Larik, advocate.<br><br>None present for Appellant Abdul Qadeer Bhayo in Cr. Appeal No. S-62 of 2011. |
| State through | Mr. Aitbar Ali Bullo, D.P.G. |

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## JUDGMENT

**Muhammad Saleem Jessar, J:-** Through this common Judgment, I intend to dispose of the above three criminal appeals which emanate from a common FIR and same incident.

2. Accused Imdad alias Behram and his two sons Abdul Qadeer and Abdul Ghaffar (who was tried separately being juvenile offender) were booked by Chak Police to face trial for committing offences punishable under sections 302, 201, 34 PPC. Vide the

impugned Judgment dated 23.5.2011, passed by Sessions Judge, Shikarpur in Sessions Case No.476 of 2009, accused Imdad @ Behram and Abdul Qadeer were convicted under section 302/34, PPC and sentenced to undergo R.I. for life as *Tazir* and also to pay fine of Rs. Five lac collectively as compensation to father of the deceased minor girl as provided under section 544-A. Cr.P.C. and in default thereof to further suffer R.I. for six months more and under section 201/34, PPC to undergo R.I. for seven years and to pay fine of Rs.20,000/- and in default of payment of fine, to undergo R.I. for six months more. However, they were extended benefit of section 382-B, Cr.P.C. and both the sentences were to run concurrently. While through impugned Judgment dated 23.5.2011 passed by Judge, Juvenile Court, Shikarpur in Sessions Case No.476 of 2009, juvenile offender Abdul Ghaffar was also convicted and sentenced in the same terms.

3. Facts of the case, as narrated in the impugned Judgments, are that on 08.06.2009 at 1400 hours informant Arbello Bhayo approached PS Chak, District Shikarpur and lodged FIR No. 36 of 2009, stating that he resides in village Bhirkan and his brother Mohammad Ismail Bhayo also resides with him. Daughter of Mohammad Ismail is married to one Abdul Razzak, who had got two sons and one daughter from said wedlock. Name of his daughter was Gul Banu having age about 4-5 years. They had come to the house of complainant on visit. Abdul Razzak was mason and he was working in Pir Chhuttal Shah. On 06.06.2009 at 6.30 p.m minor girl Gul Bano left her house and started going to see her father at Pir Chhuttal Shah

by going by the side of Imam Bargah. Her father, after completing the work, had gone to his house in village Jehan Khan. The girl did not return so complainant party started searching for her. They enquired from Abdul Razzak on phone, who told them that girl had not come to see him. Abdul Razzak came to village Bhirkan on next day. Later on, the complainant accompanied by Abid Hussain and Abdul Razzak took Holy Quran alongwith villagers and showed it to the people to return the girl or tell them about her whereabouts, if they knew, but none informed them. On 08.06.2009 they came to know that dead body of minor girl Gul Bano was lying in a well of the village. They went there, took out the dead body from well and found the girl bleeding from mouth and nose. Body had swelled, tissue of kin was not there and flesh looked being reddish in colour. Leaving the PWs to guard the dead body, the complainant came and lodged report at Police Station Chak stating that some unknown accused killed their girl Gul Bano and threw dead body in the well.

4. On 09.06.2009, additional statement of the complainant was recorded wherein he disclosed that on 06.06.2009 he was informed by villagers that the minor girl was lastly seen playing with juvenile offender Abdul Ghaffar son of accused Imdad alias Behram. They met with Imdad alias Behram who offered them to provide information about the girl through his super natural power locally called "Karo-Ilum". Subsequently he performed his ritual and recited Arabic words "*Ina lillahwainaeleh raja un*", a phrase usually recited when someone hears a sad news, Later on, he informed them that their girl has died and dead body will be found by them soon. He

then informed complainant party that dead body of the girl was lying in the well situated in the land of Sattar Muhajar. On the next date they were also informed by juvenile Abdul Ghaffar that dead body of girl was lying in the well. They went and took out the dead body from said well. In the said statement complainant further added that accused Imdad alias Behram then brought people to their residence and claimed that girl was subjected to illicit intercourse by juvenile offender Abdul Ghaffar and, in order to suppress the crime, they killed the girl by throwing dead body in the well. He sought forgiveness. The complainant party then alleged that accused Imdad alias Behram and his two sons Abdul Qadeer and Abdul Ghaffar were involved in the crime.

5. Investigation of the case was assigned to SIP Asghar Ali Solangi, posted in Investigation Branch of PS Chak, who inspected scene of offence under a memo in presence of mashirs Hadi Bux and Dilshad. He also prepared mashirnama and Inquest report on dead body in presence of same mashirs. He referred the dead body to hospital for autopsy, examined father of the deceased girl, namely, Abdul Razzak as well as Hajan alias Abid, who all claimed that they were informed by accused Imdad alias Behram that girl was subjected to lust by his son Abdul Ghaffar and they killed her by throwing her in the well but accused was not produced before Magistrate for recording his confessional statement. The I.O. also examined witnesses Ali Mohammad and Ali Murad who claimed to have seen accused Imdad alias Behram, his sons Abdul Qadeer and Abdul Ghaffar standing on the well from which dead body of the girl

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was recovered. On their query accused had informed that they had thrown garbage in the well. The IO produced all the four witnesses before the Magistrate concerned i.e CJ&JM Lakhi, who recorded their 164 Cr.P.C statements. He also collected autopsy report issued by Female Medical Officer, Taluka Hospital Lakhi, wherein it is mentioned that the girl had sustained an abriated wound on fore head, deep incised wound over tongue and she opined that death had occurred due to suffocation, shock, haemorrhage caused by the injuries sustained by her, especially the injury on her tongue. The IO arrested all the three accused and submitted charge sheet in the court. The Magistrate, finding accused Abdul Ghaffar minor, referred him for his medical examination, who was proved to be juvenile having age about 15 years as reported by the Chief Residential Medical Officer, RBUT Hospital, Shikarpur, vide his letter No.3140/41 dated 20.06.2009. The case was challaned and the accused were sent up for trial. It was assigned to learned 5th ADSJ Shikarpur for trial who separated case of juvenile offender Abdul Ghaffar from adult accused and tried it separately in his chamber while case of adult accused was tried in open court.

6. Charge against the adult accused was framed as Ex.3 to which they pleaded not guilty and claimed trial.

7. In support of case the prosecution examined complainant Arbello PW-1 Ex.6 who produced FIR as Ex.6/A, additional statement as Ex.6/B; PW-2 Abdul Razzak witness/father of deceased, as Ex.7 who produced his 164 Cr.p.c statement as Ex.7/A; PW-3 Hajan alias Abid as Ex.8, who produced his 164 Cr.P.C.

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statement as Ex.8/A; PW-4 Ali Mohammad as Ex.10, who also produced his 164 Cr.P.C. statement as Ex.10/A, PW-5 Ali Murad as Ex.11, who produced his 164 Cr.P.C. statement as Ex.11/A, PW-6 Hadi Bux mashir, at Ex.12, who produced memo relating to inspection of scene of offence as Ex.12/A, inquest report as Ex.12/B, and mashirnama of arrest of all the three accused as Ex.12/C, PW-7 Dr. Naila Shaikh at Ex.14, who produced post mortem report as Ex.14/A; PW-8 IO SIP Ali Asghar Solangi at Ex.15, PW-9 Mr. Abdul Hafeez Lashari, CJ&JM, Lakhi at Ex.16 who produced certified true copy of 164 Cr.P.C. statement of PW Hajan alias Abid as Ex.16/A, letter showing arrest of accused and confinement in jail as Ex.16/B. Thereafter, side of the prosecution was closed by DDPP vide statement Ex.17.

8. Statements of accused Imdad alias Behram and his son Abdul Sattar were recorded under section 342, Cr.P.C. as Ex.18 and 19. They again professed their innocence and prayed for acquittal. The accused Imdad alias Behram claimed that a false case is registered against him and his two sons by complainant party due to enmity over matrimonial affairs. He produced compromise agreement executed between him and his relatives before Mr. Abdul Sattar Janwari, Advocate / Oath Commissioner. However, both the accused did not examine themselves on oath under section 340(2), Cr.P.C nor led evidence in defence.

9. The learned trial Court, after hearing the parties and perusing the record sentenced and convicted the appellants as above. Hence, present appeals.

10. I have heard learned counsel for the appellants in Criminal Appeals No. S-60 and S-61 of 2011 and the DAG for the State and have perused the record with their assistance.

11. Learned counsel for the appellants has vehemently contended that the impugned judgment is contrary to law and facts available on record, hence the same is not maintainable and is liable to be set aside. Learned counsel submitted that there is no direct evidence to connect the appellants with the alleged offence as the entire evidence produced by the prosecution is hearsay and word against word, which is not supported by any independent and substantive piece of evidence. Learned counsel also submitted that the incident was not seen by anybody, therefore, there is no eye-witness of the incident and the trial Court has given undue weight to the circumstantial evidence without any reason and that the evidence produced by the prosecution at the trial is not confidence inspiring. Learned counsel further submitted that there are contradictions in the evidence of the prosecution witnesses, the benefit whereof must be given to the appellants. Per learned counsel, the evidence brought on record by the prosecution was not properly assessed by the trial Court and, resultantly, the impugned judgments suffer from non-reading and mis-reading of evidence. The learned counsel also submitted that the case of prosecution is not free from doubt and is riddled with lacuna and contradictions. Finally, it was prayed that the impugned judgments may be set aside and the appeals may be allowed by acquitting the appellants of the charge. In support of his submissions learned counsel for the appellants relied on the following cases:

1. Muhammad Akhtar & others v. The State (1986 P.Cr.L.J. 2711),
2. Mohammad Nazim v. The State (2000pcrlj 1032),
3. Amjad Ali v. The State (2008 P.Cr.L.J. 194),
4. Fayaz Ahmed v. The State (2017 SCMR 2026),
5. Ghous Bux v. Saleem and others (2017 P.Cr.L.J. 836), &
6. Abdul Jabbar and anther v. The State (2019 SCMR 129).

12. On the other hand, learned DPG supported the impugned judgment and submitted that an innocent minor girl has lost her life without any reason and the accused are involved in heinous crime, therefore, prayed that their convictions and sentences may be maintained. He contended that the juvenile offender committed excesses and the other appellants have tried to cover up his crime and in the process killed the minor girl and threw her body in the well. Therefore, it was prayed that instant criminal appeals may be dismissed and the conviction and sentence awarded to the appellants may be maintained.

13. The learned trial Court formulated the following points for determination:

1. Whether minor girl Gul Bano died her un-natural death?
2. Whether deceased girl was subjected to sexual inter course or un-natural lust by juvenile offender Abdul Ghaffar?
3. Whether accused Imdad alias Behram along with his two sons Abdul Qadeer and Abdul Ghaffar committed Qatl-i-amd of deceased girl by causing injuries and throwing her in well on date, time and place as claimed by the prosecution?
4. Whether dead body was thrown in well just to screen themselves from legal consequences?

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14. Learned trial Court answered Point No.2 as "ambiguous" while answered Points No.1, 3 and 4 in the affirmative and, accordingly, convicted and sentence the appellant as stated above.

15. In respect of Point No.1, the learned trial Court relied upon memos, inquest report, and statements of IO as well as WMO Dr. Naila Shaikh who conducted autopsy on the dead body of the deceased girl. They confirmed that the deceased died unnatural death as her dead body was recovered from well. The unnatural death of the deceased is not in dispute. Thus point No.1 was answered in the affirmative.

16. The Point No.2 formulated by the learned trial Court was whether the deceased girl was subjected to sexual intercourse or un-natural lust by juvenile offender Abdul Ghaffar and this point was discussed by the trial Court as under:

> *"Admittedly none had seen juvenile offender Abdul Ghaffar committing sexual inter course with the girl nor there is any medical evidence on this point that girl was subjected to sexual inter course or that accused Abdul Ghaffar was capable to perform sexual inter course whose medical examination was not conducted during investigation. There are only words in shape of extra judicial confession of Juvenile offender Abdul Ghaffar himself and his father accused Imdad alias Behram who firstly claimed himself to have got super natural power and informed complainant party that girl has died and her dead body was lying in the well but later on, he collected people, came at the residence of complainant party and sought forgiveness for assaulting sexual and killing the girl. Thus this point remained little bit ambiguous and cannot be answered correctly due to lack of medical evidence."* (emphasis supplied)

17. The learned trial Court has very rightly observed that "...*none had seen juvenile offender Abdul Ghaffar committing sexual inter course with the girl nor there is any medical evidence on this point that girl was subjected to sexual inter course".* All that has come on the record in this respect is the extra-judicial confession of accused Abdul Ghaffar and Imdad @ Behram. Although the trial Court has used the word "ambiguous" in respect pf Point No.2, however, in fact, Point No.2 was proved and the answer to this point should have been a clear "in negative" and should have proceeded to deal with the case accordingly. However, by using the word "ambiguous" the trial Court misguided itself and that resulted in miscarriage of justice, as would be discussed below.

18. The learned trial Court, while discussing Points No. 3 and 4, observed as under:

> *"Entire prosecution case is based on admission/extra judicial confession of the accused Imdad alias Behram and his son Abdul Ghaffar supported by circumstantial evidence regarding presence of girl with accused Abdul Ghaffar before her death, admission of accused before complainant party regarding sexual assault and subsequent murder of the girl by throwing her dead body in the well, their presence on well from which dead body of the girl was recovered and their act of seeking forgiveness from complainant party by bringing elders at their doors."*

19. The above observations by the learned trial Court are mostly result of misreading and non-reading of evidence as there is no evidence on record to show that accused Behram was with the

deceased before her death. The complainant has stated that they were informed by village people that accused Abdul Ghaffar was playing / sitting with deceased girl near Pir Chuttal Shah. This is hearsay evidence as no witness has been produced by the prosecution before the trial Court who has said that he / she saw the accused playing / sitting with the deceased. Such type of deposition has no evidentiary value unless it comes from the mouth of the person who saw the fact by his own eyes. The prosecution did not produce a single person before the trial Court who can testify to such fact.

20. Furthermore, the case of the prosecution is that the deceased girl was subjected to sexual assault by the juvenile offender Abdul Ghaffar and in order to cover-up / conceal the crime of Abdul Ghaffar, the appellants killed the girl by throwing her in the well. Thus, the act of killing the minor girl Gul Bano is result of illicit intercourse by the juvenile offender with her. Therefore, in view of the fact that neither there was any ocular evidence to prove that the minor girl was subjected to sexual assault by accused Abdul Ghaffar; nor is there any medico legal evidence to prove that the deceased was subjected to any sexual assault. Even the prosecution has not been able to pin point the place where the minor girl was allegedly raped by Abdul Ghaffar. Therefore, the learned trial Court rightly held that this point remained little bit ambiguous and cannot be answered correctly due to lack of medical evidence. The whole edifice of the prosecution case is built on the premise that the minor girl was first subjected to sexual assault by juvenile offender Abdul Ghaffar and, thereafter, in order to hide the crime committed by

accused Abdul Ghaffar, the accused threw the deceased girl in the well which resulted in her death. However, it is very strange that while holding that the first offence / act attributed to accused Abdul Ghaffar i.e. sexual assault on the minor girl by accused Abdul Ghaffar; remained ambiguous and that means this fact was not proved, but, still instead of following the well-settled principle of law of giving benefit of doubt to the accused, the trial Court answered Points No.3 and 4 in the affirmative and convicted and sentenced the accused / appellant. In case it was not proved beyond any reasonable doubt that the deceased minor was subjected to sexual assault by accused Abdul Ghaffar, then how it could be proved that she was thrown in the well by the appellants to hide the crime of sexual assault, a crime which was never proved by any evidence, let alone cogent and unimpeachable evidence.

21. The learned trial Court in answering the said points in affirmative relied on the extrajudicial confession of the accused / appellants Imdad and Abdul Ghaffar and circumstantial evidence.

22. In respect of extra-judicial confession, the Hon'ble Supreme Court in the case of Mst. Asia Bibi v. The State and others (PLD 2019 SC 64) has minutely considered the worth of extra-judicial confessions as under:

> ***"The legal worth of the extra judicial confession is almost equal to naught, keeping in view the natural course of events, human behaviour, conduct and probabilities, in ordinary course. It could be taken as corroborative of the charge if it, in the first instance, rings true and then finds support from other evidence of unimpeachable character. If the other evidence lacks such attribute, it has to be excluded from consideration. Reliance in this behalf may be made to the cases of Nasir Javaid v. State (2016 SCMR 1144), Azeem***

***Khan and another v. Mujahid Khan and others (2016 SCMR 274), Imran alias Dully v. The State (2015 SCMR 155), Hamid Nadeem v. The State (2011 SCMR 1233), Muhammad Aslam v. Sabir Hussain (2009 SCMR 985)."***

23. In the light of the observation made by the Hon'ble Supreme Court in the case of Asia Bibi (supra) the statements allegedly made by the appellants Imdad @ Behram and Abdul Ghaffar before the complainant and other people present cannot be relied upon at all. Even the statements of the accused Imdad and Abdul Ghafar cannot be termed as exetra-judicial confessions as in the cited case the Hon'ble Supreme Court was further pleased to held as under:

> ***"42. There is also another facet pertaining to this matter. The learned Trial Court had relied upon the evidence of the witnesses regarding the extra-judicial confession to convict the appellant. The learned High Court has disregarded the extra-judicial confession for the reason that the evidence of extra-judicial confession furnished by the witnesses, i.e. Qari Muhammad Salaam (PW.1), Muhammad Afzal (PW.4) as well as Muhammad Idrees (CW.1), to the extent of confessing the guilt in a public gathering, cannot be termed as an extra-judicial confession because no time, date and manner of commission of offence was given and further, no circumstances under which the appellant had allegedly committed the offence, have been narrated in the alleged confessional statement."***

24. Learned trial Court, with regard to the factum that the girl was thrown by the accused / appellants in the well also relied on the evidence of witnesses Ali Mohammad and Ali Murad who allegedly saw all the three accused standing on said well from where dead body of girl was recovered and on their query they disclosed that they had thrown garbage in the well. Learned trial Court observed that "*No doubt extra judicial confession is weakest source of evidence but it can be believed when it is corroborated by admissible and confidence inspiring evidence*." It would be worthwhile to

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examine the evidence of these two witnesses to reach a conclusion as to whether the same is confidence inspiring and can be termed as corroborative evidence or they are to be discarded:

25. PW-4, Ali Muhammad, in his deposition stated as under:

> ***"About 7/8 months ago at evening time I alongwith PW Ali Murad were going towards stand from our village and in a way we saw accused Imdad alias Behram, Abdul Qadeer and Abdul Ghaffar were standing and we asked them as to why they were standing there, on which they disclosed to us that they had thrown dusty material in the well. Thereafter, we went towards hotel and on the next day we came to know that one dead body has been taken out from well, for which it was said that dead body was of baby girl. My statement u /s 164 Cr.P.C. was recorded before Civil Judge & JM Lakhi, where I narrated the same facts of incident whatsoever I stated now. I produce original 164 Cr.P.C. statement as Exh.08/A and say that is same, correct and bears my signature."***

26. During his cross-examination this witness stated that "*the road through which we were going to hotel is busy road. There were other people available but at some distance from us.*"

27. PW-5, Ali Murad, in his deposition stated as under:

> ***"About some time back I alongwith PW Ali Muhammad were going to one hotel situated at Bus Stand Bhirkan. It was sunset time. I saw accused Imdad, Abdul Qadeer and Abdul Ghaffar who had thrown some thing in nearby well. Then I went to my duties and on the next day we came to know that some dead body was thrown by them in he well."***

28. This very witness produced his 164 Cr.P.C. statement during his deposition which reads as under:

> "I, Ali Murad and Abdul Jabbar left village and were going through road, we saw Imdad @ Behram, Abdul Qadeer, Abdul Ghaffar were standing over abandoned well, **on seeing us they threw some thing into well, on query they repleid that**

**they have thrown garbage into well, it was sunset time, thereafter we proceeded towards Hotel."**

29. As per the statement of these two witnesses i.e. PW-4 Ali Muhammad and PW-5 Ali Murad, they were going together to a hotel situated at Bus Stand Bhirkan. However, there is clear contradiction in their deposition. While, PW-4 Ali Muhammad states that "*we saw accused Imdad alias Behram, Abdul Qadeer and Abdul Ghaffar, were standing and we asked them as to why they are standing there*", he did not say that he saw the accused throwing anything in the well. However, PW-5 Ali Murad stated a different story by stating in his deposition that "*It was sunset time I saw accused Imdad, Abdul Qadeer and Abdul Ghaffar* ***who had thrown some thing in nearby well.*** *Then I went to my duties…*" Thus, while PW-4 Ali Muhammad did not state that they saw the accused throwing something in the well and that they asked the accused why they were standing there, but PW-5 Ali Murad states that he saw accused throwing something in the well and he did not say that they asked anything from the accused. Since both these witnesses clearly state that they were going together, therefore, their deposition should have been identical. This contradiction in their statements clearly indicates that their deposition is not worth giving weight and is liable to be discarded. On conviction can be based on such contradictory evidence. If their 164 Cr.P.C. statements are examined it will show further contradiction as in his 164 Cr.P.C. statements PW-4 Ali Muhammad stated that "*I, Abdul Jabbar and Murad were going through road* " and PW-5 Ali Murad in his 164 Cr.P.C. statement

states that "*I, Ali Murad and Abdul Jabbar left village and were going through road...*". However, in their deposition they did not mention the name of Abdul Jabbar. Thus, although in their depositions they state that only two persons were going to hotel while in their 164 Cr.P.C. statements they state that they were three persons going from village to hotel. There is also no explanation as to why this Abdul Jabbar was not made a witness.

30. In view of the above contradictions, the evidence of these two witnesses cannot be safely relied and cannot be termed as confidence inspiring. On the contrary, it creates doubt which results in creating dents in the prosecution case.

31. Then the words "they threw" also demonstrate ambiguity in the statement of the witness as three persons would not have thrown the child in the well it must be only one person. However, he did not mention the name of the person whom he saw throwing something in the well. This seems to be an attempt to rope all the three in the crime.

32. There are also other contradictions in the deposition of the PWs. The most important contradiction is as to who informed the complainant about the death body of the deceased.

- PW-3 Hajan alias Abid Hussain stated in his cross-examination "*Co-accused Abdul Ghaffar had come at our house, where he informed us that dead body of deceased is lying in abandoned well. Complainant Arbelow was also available with me at that time.*"

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- However, in the F.I.R. (Exh.4/A), the complainant stated that *"Today we were available at our home, when co-villagers told us that dead body of baby Gul Bano is lying into well."*
- It is surprising that this very witness, i.e. the complainant, in his further statement (Exh. 4/B) stated that *"On the next day Abdul Ghaffar s/o Imdad @ Behram Bhayo told us that dead body of baby Gul Bano is lying into well near land of Sattar Muhajar."* Thus, there are two different versions in this regard: (i) that co-accused Abdul Ghaffar informed the complainant about the presence of the dead body of baby Gul Bano in the well and (ii) co-villagers told them about presence of the dead body of baby Gul Bano in the well.

33. The assertion that the deceased Gul Bano was lastly seen playing with Abdul Ghaffar son of accused Imdad is a hearsay evidence as nobody came forward to depose that he / she saw Gul Bano playing with Abdul Ghaffar. In the case of Ghous Bux v. Saleem (2017 P.Cr.L.J. 836), a Division Bench of this Court, quoted from the judgment of Hon'ble Supreme Court in the case reported as 1972 SCMR 15 as under:

> ***"Mere fact that accused was last seen with the deceased is not enough to sustain conviction for murder. No link in the chain of circumstances should be broken and thus should not be acceptable on any other hypothesis."***

34. In the present case, the chain of circumstances is broken at many places and does not link the neck of the accused with the dead body. The entire evidence is based on information gathered by the complainant from unknown persons or children which falls in the

category of hearsay evidence or the confessions of accused Imdad and his son Abdul Ghaffar. It is very strange that although no specific role has been given in the contradiction ridden evidence to the third appellant Abdul Qadeer as there is no allegation against him that he sexually assaulted the minor girl and none of the witnesses named him as the person who threw the minor girl in the well but even he was not spared and was convicted on the strength of the deposition of witnesses who did not see anything worthwhile or their evidence is not worthy of credibility and confidence inspiring. PW-4 and PW-5, who allege that they saw the accused persons throwing something in the well are also not consistent in their testimony as one witness (PW-4) says that they saw the accused and asked them why they are standing there on which they disclosed that they have thrown dusty material in the well while the other witness (PW-5) stated that he saw the accused throwing something in the well. Thus, apart from being contradictory to each other, none of them saw the accused throwing the girl in the well. There is also no corroborative evidence to support these witnesses as nobody saw the deceased girl in the company of the accused a fact which was not denied by any one.

35. The trial Court with regard to the guilt of the accused also observed as under:

> "When circumstances tied the rope around his neck he collected people and came to seek forgiveness from complainant party by admitting to have killed the girl to conceal the incident wherein she was subjected to sexual assault by his minor son Abdul Ghaffar."

36. It is surprising to note that while answering Point No.2, which was to the effect whether deceased girl was subject to sexual intercourse or un-natural lust by juvenile offender Abdul Ghaffar, the trial Court, after discussing the issue threadbare, came to the conclusion that "this point remained little bit ambiguous and cannot be answered correctly due to lack of medical evidence." When the trial Court has already held that it is "little bit ambiguous" whether Abdul Ghaffar had sexually assaulted the deceased girl then how the trial Court can ignore its verdict on Point No.2 and hold "*she was subjected to sexual assault by his minor son Abdul Ghaffar*". This, to say the least, is contradiction in the impugned Judgment itself.

37. It seems very probable that the deceased girl, who was visiting the house of her relatives, lost her way and went towards the well and fell down in it and drowned. The medical report also supports this version as the cause of death has been shown as "Death occurred due to drowning into water." The wound on the fore-leg must be result of falling down in the well, whereas, there is no doubt that the deep incised wound on the tongue of the baby Gul Bano could not have been caused by any person as tongue would be most unusual part to inflict an injury thereon. It may have been caused due to crushing of the tongue between teeth while falling in the well.

38. The witnesses in this case are all related inter-se as PW-1 in his deposition stated that mashir Hadi Bux is son of his maternal uncle; while the co-mashir is son of his sister. PW Abdul Razzak is also son of complainant's sister and PW Hajan alias Abid Hussain is his nephew. Thus, all these PWs are related to the complainant. Then

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PWs Ali Murad and Muhammad Ali cannot be termed as natural witnesses as they have not shown any purpose for going to Bus Stand except going to hotel. Therefore, they can be termed as chance witnesses. It is to be kept in mind that the incident did not take place in an isolated area like house or agricultural land of some person etc. in which case it can be expected that the witnesses would be from the same family. The incident occurred in the village and it is alleged that accused Abdul Ghaffar took the minor from Peer Chuttal Shah to some place and there sexually assaulted her and, thereafter, she was taken to the well by the appellants / accused and thrown therein. However, not a single person in the entire village saw either Abdul Ghaffar taking the girl with him anywhere for sexually assaulting her nor anybody saw the accused / appellants taking the girl towards the well for throwing her in the well.

39. There is a very important aspect of this case which missed the attention of the trial Court. As per statement of PW-5, he saw the accused throwing something in the well. However, he could not recognize whether it was a sack of garbage or a girl. Apart from this, when the dead body of the deceased was taken out from the well it was not stated that the same was wrapped in any bag / sack or piece of cloth. It cannot be denied that if the accused were taking the girl to the well, who was 4/5 years old and was allegedly subjected to sexual assault, they will hide her from the eyes of people / passer-byes and the only way to do so was to wrap her in a sack or bag or some piece of cloth. As per Inquest Report (Exh. 10-B at page 51 of paper book) the deceased was wearing Shalwar and shirt of sky blue

colour. In his deposition as well as in his further statement, the complainant had not stated that the dead body of the minor girl was in a sack or bag or wrapped in a cloth. If the deceased was alive at the time when she was being taken by her alleged tormentor towards the well she must have made hue and cry. The medico legal report does not state that she was drugged with some tranquilizer or opiate. It does not appeal to a prudent mind that a minor girl will go alongwith her assailant silently. It also does not appeal to mind that the accused will take the girl for throwing her in the well in open view of all the people in the area without covering her in a sack / bag etc. There was every possibility that even her close relatives like uncle, father, or any other relative would have seen them as they were on the search for the girl.

40. In a case of murder the most important aspect of the case is the motive. In the present case the motive, as set up by the prosecution, was that since the deceased minor girl was sexually assaulted by accused Abdul Ghaffar, therefore, in order to hide his crime, the appellants threw the minor girl in the well which resulted in her death. However, the learned trial Court itself held under Point No.2 that it is ambiguous whether accused Abdul Ghaffar had sexually assaulted her. Thus, the very motive which resulted in the ultimate death of the minor girl, was not proved when the trial Court itself answered Point No.2 as ambiguous.

41. In order to convict and sentence an accused on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon in

our culture. Thus, very minute and deep examination of the same is necessary to secure the ends of justice. The Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence and there is no duty cast on the accused to disprove the case of the prosecution. If the evidence produced by the prosecution is short of such standard, it is better to discard such evidence so that an innocent person might not be sent behind bars or to the gallows, to draw an inference of guilt from circumstantial evidence, the Court has to apply its judicial mind with extra care and caution. To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in the chain of circumstances in an unbroken sequence, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain. Thus, it was not advisable to base conviction on such evidence.

42. In view of the scrutiny of the entire evidence and careful re-appraisal of the same I am led to an inescapable conclusion that the prosecution case is full of improbabilities, legal and factual infirmities of fatal nature, contradictions and is bristling with doubts of grave nature. Thus, the prosecution has miserably failed to connect the neck of the appellants with the dead body in any manner whatsoever.

43. I am constrained to observe that the learned trial Court has not penned down the impugned judgment in the light of well settled principles of criminal justice. I cannot express my feelings in a better

way than what has been stated by the Hon'ble Supreme Court in the above cited case of **Fayyaz Ahmed**, which is as under:

> ***"Before parting with this judgment, we express our concerns and are at loss as to how the Trial Court convicted the appellant, more so, the learned Judge of the High Court maintained the conviction, which amounts to serious miscarriage of Justice."***

44. Instant criminal appeals were allowed vide separate short orders dated 01.02.2019 whereby the impugned Judgment dated 23.5.2011, passed by Sessions Judge, Shikarpur in Sessions Case No.476 of 2009, and impugned Judgment dated 23.5.2011 passed by Judge, Juvenile Court, Shikarpur in Sessions Case No.476 of 2009 in respect of juvenile offender Abdul Ghaffar, were set aside and the appellants, namely, Imdad @ Behram, Abdul Qadeer and Abdul Ghaffar, were acquitted. They were in custody and were ordered to be released forthwith if not required in any other case.

45. Above are the reasons for my short order dated 01.02.2019.

46. Let R&Ps of Sessions Case No.476/2009 re-State Vs Imdad @ Behram & another alongwith copy of judgment be sent to learned trial court through learned Sessions Judge, Shikarpur for their record.

20.02.2019.

*Judge*

Larkano, 01st February, 2019.