IN THE HIGH COURT OF SINDH AT KARACHI

CR. JAIL APPEAL NO.102/2016

Appellant : Mst. Rehmat Bibi.

Respondent : The State.

CR. JAIL APPEAL NO.159/2016

Appellant : Zakir Hussain.

Respondent : The State.

Mr. Mehmood-ul-Hassan assisted by Miss. Mumtaz Chandio; and Ms. Abida Parveen Channar, advocates for appellant in Cr. Jail Appeal No.102/2016.

Mr. Muhammad Shabbir advocate for appellant in Cr. Jail Appeal No.159/2016.

Mr. Rahat Ahsan, DPG.

Date of hearing : 12th and 18th September, 2018.

Date of announcement : 13th November, 2018.

JUDGMENT

Salahuddin Panhwar, J: By captioned appeals, appellants have assailed judgment dated 23.02.2016 recorded by A.D.J concerned convicting and sentencing the appellants u/s 302(b) PPC as Tazir for imprisonment for life and imposing fine of Rs.100,000/- each as

compensation to legal heirs of deceased in terms of section 541-A Cr.P.C. and in default thereof to suffer S.I. for 6 months more.

2. FIR contains that complainant Muhammad Riaz got recorded his statement on 06.10.2013 at about 1140 hours at Civil Hospital Karachi, that his brother Muhammad Aslam aged about 42 years was living with him and about three and half years back he performed marriage with Mst. Rehmat Bibi; sometime after marriage his brother started to live with brother-in-law Talib Hussain; about 4 months back his brother's wife become unhappy and left the house and started to live out of PTC Saeedabad in a rented house and also demanded divorce; thereafter complainant's brother compromised with his wife and brought her to his house about 15 days back and both of them started to live at the house of HC Nadeem, Quarter at No.H-8, PTC, Saeedabad; they have one male child namely Azan aged about 1 year who was also residing with them. Complainant stated that on 06.10.2013 HC Nadeem came to complainant's house at about 05:30 a.m. and informed that, someone has cut the throat of complainant's brother on which complainant immediately rushed to HC Nadeem's Quarter and saw that his sister in law Mst. Rehmat Bibi (Bhabi) was present and dead body of his brother was lying on floor with blood and his throat had been cut with sharp edge weapon. Police came at spot and examined dead body in his presence and shifted it to Civil hospital.

Complainant stated that he came to know that his brother was murdered by his wife Mst. Rehmat and another person namely Zakir with sharp edge instrument over the matter of marriage.

3. Appellants/accused denied the charge framed and pleaded not guilty. Prosecution examined PW-1 complainant Muhammad Riaz at Exhibit 3, PW-2 Rana Talib Hussain at Exhibit 4, PW-3 SI Khalid Mehmood Butt at Exhibit 5, PW-4 Muhammad Shameer Nadeem at Exhibit 6, PW-5 PC Rashid Ali at Exhibit 7, PW-6 Muhammad Imran at Exhibit 8, PW-7 SI/I.O Shan Muhammad at Exhibit 10, PW/MLO Dr. Qarar Ahmed at Exhibit 11, PW Ayaz Hussain at Exhibit 12 and PW/SI Imam Bux at Exhibit 13. Statements of both accused were recorded at Exhibits 15 & 16 respectively wherein they have denied the allegations leveled and the recovery of weapon used in the alleged crime and stated that witnesses being related to complainant are interested ones and that they have been implicated falsely. They were willing to examine themselves on oath but did not examine any witness in their defence.

4. Trial Court framed and answered the points for determination are as under:-

Point No.1 Whether on 06.10.2013 deceased Muhammad Aslam died due to un-natural	Proved

death and his neck was cut by sharp edge weapon.?	
Point No.2. Whether accused persons above named committed murdered of the deceased namely Muhammad Aslam (brother of complainant) on relevant date, time and place as alleged in the FIR?	Proved
Point No.3 What should the judgment be?	Accused persons convicted under section 265-H(ii) Cr.P.C and sentenced them imprisonment for life under section 302 (b) P.P.C and pay fine of Rs.1,00,000/- each in default they will suffer S.I for six months more.

5. I have heard learned counsel for appellants and learned DPG, and perused the record.

6. The learned counsel for accused Mst. Rehmat Bibi (appeal No.102/2016) contend that appellant has been falsely involved in this case as complainant who is brother of deceased wants want to usurp her plot; that there is material contradiction in the evidence of prosecution witnesses; nothing was recovered from possession of accused Mst. Rehmat Bibi; that actually dacoits had entered into house of Mst. Rehmat Bibi and they committed murder of her husband; thereafter she informed neighbour and public gathered there; complainant came there, police recovered dead body and after

consultation with complainant has involved Mst. Rehmat Bibi in this case falsely; that all the witnesses are related to the complainant and highly interested and there is no independent witness; that there is no any eye witness of this incident and this is unseen incident; hence accused is liable to be acquitted. Reliance was placed on 2012 YLR 1753 Lahore, 2013 MLD 665 Peshawar, 2015 SCMR 993, 2015 SCMR 840, 2018 SCMR 772, 2018 SCMR 911, 2018 SCMR 344, 2017 SCMR 1468, 2018 SCMR 1995, 2017 SCMR 724, 2008 SCMR 1086, PLD 2008 Karachi 182, 2007 SCMR 1307 and 2007 PCrLJ 63.

7. Learned counsel for accused Zakir Hussain (Appeal No.159/2016) contended that accused has been falsely involved in this case by the complainant; there is no eye witness; all witnesses are interested hence their evidence cannot be relied upon; he prayed for setting aside impugned judgment and acquittal of appellant.

8. Learned D.P.G. argued that accused have committed a murder of young man; witnesses have fully supported the prosecution case and their evidence is consistent and confidence inspiring as well free from doubts; that accused Zakir had voluntarily produced the weapons used in the murder; medical evidence is in consonance with circumstantial evidence, evidence of the complainant and witnesses; that mere relationship does not make a witness to be an interested one who otherwise seems to be truthful witness and his evidence cannot be rejected on such ground; that according to post mortem report

deceased was murdered with sharp cutting weapon (Churri), the recovery of weapon (churri) has been effected on pointation of accused Zakir Hussain; accused has not alleged any enmity with the recovery mushir and I.O. of the case so as to falsely depose against him and involved him in this heinous offence of murder; that accused have committed murder hence by impugned judgment they have been rightly convicted and sentenced.

9. Perusal of the available material, has made me to *first* say that Criminal Administration of justice gives only ***two*** the duty of **'finding the truth'.** Those are known as **'investigating officer'** and a **'judge'.** The role of the ***former*** starts the moment the law is brought into motion (lodgment of FIR). He is never supposed to follow the dotted line, as laid by the ***informant*** but was / is always required to look into / investigate all possible aspects / angles of a **crime** because truth is not dependant on what one says but what facts and circumstances tell. Reference may well be made to the case of *Sughran Bibi v. State* (PLD 2018 SC 595) wherein at Rel. P-628 it is held as:-

> "….. Rule 25.2(3) which reads as under
>
> > "(3) It is the duty of an investigating officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person"
>
> This Rule should suffice to dispel any impression that investigation of a case is to be restricted to the version of the incident narrated in the FIR or the allegations levelled therein.

> It is quite evident from this Rule that once an FIR is registered then the investigating officer embarking upon investigation many not restrict himself to the story narrated or the allegations levelled in the FIR and he may entertain any fresh information becoming available from any other source regarding how the offence was committed and by whom it was committed and he may arrive at hi own conclusions in that regard. The final report to be submitted under section 173 Cr.P.C. is to be based upon his final opinion and such opinion is not to be guided by what the first information had stated or alleged in the FIR. **It is not unheard of that sometimes the final report submitted under section 173 Cr.PC. the first information is put up before the court as the actual culprit**.
>
> 15……. All subsequent or divergent versions of the same occurrence or the persons involved therein are to be received, recorded and investigated by the investigating officer in the same "case" which is based upon the one and only FIR registered in respect of the relevant "offence" in the prescribed book kept at the local police station.

Since per established legal position, the *opinion* of the investigating officer is never binding however this shall never be an excuse in discharge of legal duties by an *Investigating Officer.* This has been the reason that an ***opinion*** of the I.O only turns an ordinary person into dress of an **'accused'** which *however* no where prejudices presumption of **'innocence'.** This has been the reason that an Investigating Officer cannot exercise gold principle i.e **benefit of doubt'** but has to send one up to face trial on basis of **'sufficient material / evidence'.**

10. On the other hand, the duty of the **'Judge'** is rather **serious** because such verdict determines the **guilt or innocence** therefore, powers of a **judge** in reaching to a **just decision** is not limited to what the prosecution or defence wish but a court / judge can competently summon any **material** witness or **document.** Reference may well be

made to the case of *Chairman, NAB v. Muhammad Usman & Ors (*PLD 2018 SC 28) wherein it is observed as:-

> "11. …. The role of the Court under the provision of section 540 Cr.PC is inquisitorial where it endeavours to discover the truth, suppressed by both or one party to the case to incapacitate the Court to reach at a just conclusion. The role of the Judge does not undergo change because in exercising inquisitorial powers, the law has imposed obligation on it to discover the truth and to secure the ends of justice."

At the end of trial, the *trial Court / Judge* is to evaluate the available material so as to record a **'just decision'** but, as already discussed such decision shall always be decisive of **guilt** or **innocence** therefore, no Court can depart from two legal duties i.e:

i) neither one should be construed into a crime on basis of presumption nor mere heinous or gruesome nature of crime should detract the Court of law, in any manner, from due course; &

ii) to make appraisal of evidence in laid down manner & to give benefit of reasonable doubt to accused, being his indefeasible and inalienable right

Reference can safely be made to the case of *Azeem Khan & another v. Mujahid Khan & ors* (2016 SCMR 274).

11. Now, while reverting to merits of the instant case, I would say that there had been number of *questions* which were never attempted to be answered by the Investigating Officer or by the trial Court. I would come to those *later.* The perusal of the record *prima facie* establishes that it was an ***unseen incident*** but was completely based on

circumstantial evidences with clear allegations that appellants Rehmat Bibi and Zakir Hussain in league and collusion with each other conspired to kill Muhammad Aslam and in consequence thereto on fateful date and time appellant Zakir Hussain with **'Churri'** trespassed into quarter (place of incident) where deceased and appellant Rehmat Bibi (as husband and wife) alongwith their one year child were sleeping and then appellant Zakir Hussain killed Muhammad Aslam with **'Churri'** by cutting throat (neck) of deceased. Thus, *prima facie,* the accusation was / is based completely on **'suspicion'** and **'circumstantial evidences'.** I would not hesitate in saying that suspicion, *howsoever,* grave or strong may be but can never be a proper substitute for **proof** beyond reasonable doubt. Guidance is taken from the case of *Muhammad Ashraf v. State* (2016 SCMR 1617). As regard the **circumstantial evidences** , it is by now well settled that conviction may be record *solely* on **circumstantial evidence** but only if it is incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of this guilt. In any other case, it shall never be safe to record conviction. Reference may well be made to case of *Nasir Javaid & another v. The State* (2016 SCMR 1144) wherein it is observed as:-

> "7. ….. Deduction about the guilt of the accused could well be drawn from the circumstances as are well authenticated. But where the circumstances so reported are tinkered and tampered with, or contrived and conjured up, there cannot be accepted without careful and critical analysis. Circumstantial evidence can form basis of conviction if it is incompatible with the innocence of the accused and incapable of explanation upon

> any other reasonable hypothesis than that of this guilt. The case thus has to be analyzed and adjudged in this perspective."

In another case of *Azeem Khan* supra, it was held as:-

> "In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same…… To justify the inference of guilt of an accused person, the circumstantial evidence must 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."**

As per the prosecution case, so was believed by learned trial Court Judge, the charge was in *two* parts i.e one relating to **conspiracy**, hatched by both appellants, while other was that of acts did on fateful night. The relevant portion of impugned conviction (page-19) reads as under:-

> "I have gone through the evidence of complainant. PW/1 Muhammad Riaz he has stated that brother and father of Mst. Rehmat Bibi had come to his house and said that Muhammad Aslam may be directed to give divorce to Mst. Rehmat Bibi as **Mst. Rehmat Bibi wants to marriage (marry) with Zakir Hussain**. This PW has further stated that about 2/3 days prior to this murder Mst. Rehmat Bibi went with Zakir Hussain and remained for about two days in the house of sister of accused Zakir Hussain. It was planning of Mst. Rehmat Bibi and accused Zakir Hussain that **they will murder to Muhammad Aslam**, after planning Mst. Rehmat Bibi again returned to Muhammad Aslam and remained with him at the house of Muhammad Shahmmir Nadeem, prior to residing at above place deceased and Mst. Rehmat Bibi as remained with accused Zakir as per evidence of complainant and PWs. Pw/ Muhammad Shahmmir Nadeem has also supported this version that **about 15/20 days back the above resident was given to Muhammad Aslam for residential purpose**. PW Rana Talib has also stated in his statement that police brought the accused Zakir at place of incident on next day of his arrest and he repeated the incident in the manner how he climbed the wall entered in the house of deceased and murdered him. He

> has further stated that, on the pointation of accused Zakir Churri was recovered from bushes near the place of incident. Accused Zakir Hussain also pointed out the shop from where he purchased the Churri. Police has recorded the statement of shop keeper from where accused purchased the churri. The prosecution has produced two independent witness Rashid Ali and Ayaz Hussain, they both have stated before this court that on 06.10.2013 at about 02:30 A.M accused Zakir was seen by them at outside of house and accused demanded cigarette of charas from them but they could not give him then accused went away on next day they came to know that accused Zakir Hussain and Mst. Rehmat Bibi had committed the murder of Muhammad Aslam…"

I can safely say that claimed **'conspiracy'** was *prima facie* nothing but subsequent improvement as such fact was not disclosed by the complainant in his 154 Cr.P.C. statement. The relevant and operative part whereof reads as:-

> ".. After few times of marriage, he used to reside with my brother-in-law Talib Hussain s/o Rana Abdul Aziz. About four months back, wife of my brother Aslam having annoyed went from his house and she used to reside outside PTC on rent, while she also demanded to divorce from my brother on account of some grudge. She having compromised with my brother Muhammad Aslam started to reside in quarter No.H-8 of HC Nadeem situated at PTC Saeedabad, while their one child named Ali aged one year also used to reside with them. Today on 06.10.2013 at about 05:30 AM, HC Nadeem came at my house and informed that someone has cutoff throat of your brother Muhammad Aslam. I rushed to his quarter and witnessed that my brother' wife Mst. Rehmat was present in house and dead body of my brother Muhammad Aslam was found prone, while his throat was cutoff with main vein. Police arrived on the spot and examined dead body in presence of me and my brother-in-law Talib Hussain and prepared memo. After that dead body of my brother Muhammad Aslam brought to Civil Hospital through Ambulance, where MLO/Doctor conducted his postmortem. **On my enquiry, it came to know that Mst. Rehmat, wife of my brother Muhammad Aslam alongwith one person named Zakir in nighttime have killed my brother Muhammad Aslam with sharp edge weapon with intention to contract marriage. Legal action may be taken"**

It is also worth mentioning here that such 154 Cr.PC statement was recorded after '**five** hours' of lodgment of report under section 174 Cr.PC. During such short-period, the complainant never claimed to have availed sufficient time to conduct an **'enquiry'** yet he (complainant) not only claimed complete knowledge of *hatching of conspiracy* between two specific persons but named them both as **killers.** Such claimed **'enquiry'** even was never supported by the PW Rana Talib Hussain who, in his examination-in-chief, stated as:

> "..I and complainant were informed by H.C Nadeem that our brother Muhammad Aslam has been murdered in the house where he was tenant of H.C. Nadeem. Again says I am maternal brother of deceased M. Aslam. I and complainant Riaz went to the said quarter of H.C. Nadeem we saw dead body of M. Aslam lying on ground whereas his neck cut with some blunt weapon. In my presence SI Khalid Butt informed to police about the incident and police arrived there. Police prepared memo of dead body, 174 Cr.PC proceeding and taken my signature on both documents. I see Ex.3/A and Ex.3/B which bear my signature. I remained there where police again came at about 01:30 pm and caught hold the Mst. Rehmat Bibi. Police prepared memo of arrest on which I also signed. I see Ex.3/E, which is same correct and bear my signature. On same day after post mortem M. Aslam was buried. I was present in graveyard when I.O Imam Bux informed me on mobile that actual culprit is residing in our centre. I informed him that he is Zakir as she run away from her parent's house with Zakir and she was residing with him. I requested her to go back but she did not hear me thereafter I returned back. On the instigation of Mst. Rehmat Bibi accused Zakir murdered M. Aslam.."

From above, it is quite clear that both PW Rana Talib Hussain and complainant never denied their *joint* presence at time of preparation of 174 Cr.PC whereby admitting their *deliberate silence* for considerable period of **'five hours'** in disclosing names of **accused** and alleged **conspiracy** between them. Such delay of **'five hours'** was always

'**significant'** and begged for an explanation which, *however,* was never given by the complainant and said PW Rana Talib Hussain. Such *unexplained* delay was always giving a room of *deliberation* and *consultation* but was never appreciated by trial Court. Reliance may be made to the case of *Muhammad Zubair v. State* (2007 SCMR 437) wherein it is held as:-

> "4. … Generally delay in lodging F.I.R cannot in all cases lead to the inference that the case set up in the F.I.R. is necessarily true or false, however, it is relevant circumstance to be considered. …. "

Not only this, but both PW Rana Talib Hussain and complainant even not claimed to have given *details* of such conspiracy at one and same time though it was their claim that all proceedings happened within their presence. Thus, it is quite obvious that details of **'conspiracy'**, given by complainant before trial court, was never disclosed in his 154 Cr.PC statement but was an *after* though improvement. Thus, such improvement was not only dishonest but with *prima facie* intention to bring the case in line. Such conduct of the complainant was always sufficient to hold him *dishonest* and not worthy of safe-reliance for holding conviction. Reliance may well be made to the cases, reported as 2007 SCMR 1825 and 2011 SCMR 1517 as well case of *Sardar Bibi and another v. Munir Ahmed and others* (2017 SCMR 344) wherein it is held as:-

> "2. ….. So the improvements and omissions were made by the witnesses in order to bring the case of prosecution in line with the medical evidence. Such dishonest and deliberate

> improvement and omission made tem **unreliable and they are not trustworthy witnesses.** It is held in the case of *Amir Zaman v. Mahboob and others (1985 SCMR 685)* that testimony of witnesses containing material improvements are not believable and trustworthy. Likewise in *Akhtar Ali's case (2008 SCMR 6) it was held that when a witness made improvement dishonestly to strengthen the prosecution's case, then his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvement once found deliberate and dishonest, cast serious doubt on the veracity of such witness. …."*

Be that as it may, it is however a matter of record that prosecution brought nothing on record so as to establish such **'conspiracy'** between the appellants for committing murder then how the complainant came to know about of the alleged conspiracy, was always begging for an answer but remained *unanswered.* In the case of *Haq Nawaz & Others v. State & Others* (2018 SCMR 95) it was observed as:-

> "5. … **It does not appeal to a prudent mind that the appellants and their co-accused would allow a person to hear out the alleged conspiracy of committing the murder of Mst. Nooran and be a witness against them**. If at all it is admitted that Mst. Husina Mai was allowed to hear out the conspiracy being hatched by the appellants and their co-accused, then as per her own stance (as reproduced above), after preparing meal for the appellants and their co-accused by 8.00 p.m, she slept by 8/9.00 p.m, **how come she came to know of the alleged conspiracy being hatched by the appellants and their co-accused between 9.00 p.m to 12.00 midnight** when she was already sleeping. "

The allegedly hatched **'conspiracy'** was in house of sister of appellant Zakir Hussain where the witnesses never claimed to have been to hear or witness such **'conspiracy'** therefore, it was always safe to conclude that such claimed hatching of **'conspiracy'** was never established *safely.*

Be that as it may, even if it is believed as it is claimed, yet I am unable to find answers to following questions which are:-

i) Mst. Rehmat Bibi was residing with appellant Zakir Hussain just two days prior to incident and had demanded divorce for marrying with Zakir Hussain then why necessity arose for re-union?
(in 154 Cr.PC statement demand of divorce was with claim of ***personal grudge)***

ii) Admittedly deceased alongwith Rehmat Bibi had shifted in portion of quarter of PW Muhammad Shahmeer 15/20 days back then why he (witness Muhammad Shahmeer) never spoke a single word about going away of Rehmat Bibi with Zakir Hussain; her stay with Zakir Hussain two days prior to incident and her re-union;

iii) If conspiracy stood hatched to kill deceased then why it was necessary for appellant Rehmat Bibi to allow such murder in her presence thereby exposing her to every suspicion for such murder;

iv) If appellant Zakir Hussain, with clear intention to kill, was stepping towards house of deceased then why he met with witnesses Rashid Ali and Ayaz Hussain thereby making them **witnesses** against him;

There appear no logical answers to above questions nor the Investigating Officers attempted to look for such answers. It was always easy for the appellant Rehmat Bibi and Zakir Hussain to get *divorce / khulla* by approaching the Court when *allegedly* appellant Mst. Rehmat Bibi, not only had abandoned deceased husband, but was residing with sister of appellant Zakir Hussain and even she (Rehmat Bibi) had refused to rejoin when PW Rana Talib Hussain approached her with such request, so claimed in his examination-in-chief as:

> "I informed him that he is Zakir as she run away from her parent's house with Zakir and she was residing with him. **I requested her to go back but she did not hear me thereafter I returned back**. ...."

Thus, presented story was / is against the normal human conduct because every **criminal** shall, while planning for commission of an offence, keep his *safety* at priority which includes concealment of *identity*. Guidance is taken from the case of *Muhammad Asif v. State* (2017 SCMR 486) wherein it was observed as:-

> "17. **It is , normal practice and conduct of culprits that when they select night time for commission of such crime, their first anxiety is to conceal their identity so that they may go scot-free unidentified and in that course they try their level best to conceal or destroy each piece of evidence incriminating in nature which, might be used against them in the future**, thus, human faculty of prudence would not accept the present story rather, after committing crime with the dagger, the appellant could throw it away anywhere in any field, water canals, well or other place and no circumstances would have chosen to preserve it in his own shop if believed so because that was susceptible to recovery by the police."

12. Now, let's attend other circumstances i.e evidence of PWs Rashid Ali and Ayaz Hussain who claimed to have met with appellant Zakir Hussain on fateful night at 02:30 a.m. Let's have comparative analysis over evidence of these witnesses which is:

PW Rashid Ali.	PW Ayaz Hussaiun.
On 6.10.2013 at about 02:30 a.m night I along with Ayaz were sitting in front of house at bridge situated on Nala and were smoking a cigrate (cigarette). Meanwhile accused Zakir met us at about 02:30 a.m we asked from him that why he is visiting this place, he replied that he wants	On 6.10.2013 I was present in front of my house along with Rashid, police training college, Saeedabad Karachi at about 02:30 a.m mid night. I saw accused Zakir who is also residing in same training college, came from his house, who met us. On our enquiry as what is he doing at about 02:30 a.m mid

Charas as he can not sleep. We had no charas, therefore, he left the same place and want (went) towards Nadeem H-8, Quarter. ..	night out of his house whereas we were waiting for our brothers who went in some marriage ceremony and still not returned. Zakir requested to give him charas cigerate (cigarette) for which we refused as it was not available with us. Thereafter he went away…

From above, it is quite clear that both these witnesses never given one and same reason for their *presence* at such place at 2:30 a.m. Not only this, but these witnesses even not supporting each other in respect of their place of ***sitting*** nor **reason** of their such availability at such particular time. Since, these witnesses were always falling within meaning of **'chance-witnesses'** hence even a single doubt in establishing their *presence* at such place at claimed time was always sufficient to discard their testimonies as a *whole.* Reliance may well be made to the case of *Mst. Rukhsana Begum & Ors v. Sajjad & Ors (*2017 SCMR 596) wherein it is observed as:-

> 'chance witness is one who, in the normal course is not supposed to be present on the crime spot unless he offers cogent, convincing and believable explanation, justifying his presence there.
>
> Single doubt reasonably showing that a witness's presence on the crime spot was doubtful during the occurrence, it would be sufficient to discard his testimony as a whole.'

Be that as it may, it is also a matter of record that these witnesses also not claimed to have felt any *abnormal* thing in behaviour of appellant Zakir Hussain who, *otherwise,* was either going to kill or coming after

killing deceased Muhammad Aslam because as per learned trial Court the time of murder was between **'01:00 am to 03:00 am night'** , so was observed in impugned judgment as:

> "… From the perusal of the above record it appears that the above both accused were in contact with each other, from 02:14 am, and as per opinion of medical officer this incident was taken place about 8/10 hours prior to the post mortem. Post mortem was conducted at about 10:40 am and if as per the opinion of the medical officer the murdered was committed about 8/10 hours before, then the time of murdered would be about in between **01:00 a.m to 03:00 a.m. night..**

If it was so, the appellant Zakir Hussain could not be believed to be **normal** as he (appellant Zakir Hussain) was not alleged to be having any criminal record / history, therefore, an ordinary person cannot be believed to be **'calm / normal'** when he alleged going to kill some one.

Besides, these witnesses also not claimed to have left such place *immediately* after going away of appellant Zakir Hussain i.e **02:30 a.m** as they were waiting for their brothers, went in some marriage ceremony. Thus, these witnesses must have been in a position to see the appellant Zakir Hussain going towards place of incident or coming out of place of incident but no such thing was claimed but in their 161 Cr.P.C statements they claimed that said Zakir Hussain, having met them, went towards his house. Such admission was made by PW Rashid Ali in his cross-examination that:

> **"It is correct to suggest that in my 161 Cr.PC statement I deposed that Zakir went towards his house. Whereas today I deposed that he went towards quarter No.H-8 of Nadeem."**

Thus, *prima facie,* the claim of these witnesses to have met with appellant Zakir Hussain at such time was never *safe* to be believed *least* his (appellant Zakir Hussain's) going towards place of incident which, *even otherwise,* was an improvement from the earlier stand i.e **161 Cr.PC statements** hence was never safe to be believed, being an **'improvement'**.

13. Now, let's see evidence of PW Muhammad Imran from whom the appellant Zakir Hussain *allegedly* purchased **'table knife'** on **'4.10.2013 at 2:30/3:00 p.m".** It is never worth believing that one shall **choose** a **table-knife** for committing murder because *normally* the **'table-knife'** is never meant for such purpose. Reference in such view may well be made to the case of *Shahzad Tanveer v. State* (2012 SCMR 172) wherein to such claim it was observed as:-

> "13. It is strange that none of the accused carried any weapon except a small kitchen knife, the total length and width of which was 6-½ x ½ including its handle **while going to commit a capital offence.** …."

Further, it is also quite surprising that said witness **'identified'** such sold **'table-knife'** which , per said witness, he used to purchase from **'Bolton market'** and it was never claimed to have any **'specialty'** or **mark** etc. Further, this witness also not claimed to have identified such **'table-knife'** while referring to any *special* mark etc. Relevant portion of his evidence is reproduced hereunder:-

> "…. I replied that so many persons used to purchased the same therefore I can not say whether he purchased or not but I can not identify my articles Viz. table knife of my shop. The

> said table knife shown to me and **I confirm before Police that is same which was purchased from my shop."**

Therefore, no much reliance could safely be made on such evidence. Reference may well be made to the case of *Muhammad Nawaz & others v. State & Ors (*2016 SCMR 267) wherein it is observed as:-

> "(f) During the occurrence, certain gold ornaments, identity card and bag of the complainant were snatched by the appellants. During the course of investigation some articles allegedly robbed during the occurrence were allegedly recovered at the instance of the appellants. **No description of the robbed articles was given by the complainant in the FIR**. The complainant whose ornaments were allegedly robbed during the occurrence and who allegedly identified the same, during her cross-examination, affirmatively responded to the suggestion that the gold ornaments referred above could be purchased from the goldsmith's shop. Therefore, it is highly unsafe **to rely on the evidence of recovery, which even otherwise is a corroborative piece of evidence and relevant only when the primary evidence i.e ocular account inspires confidence**."

From above evidence it was *specific* claim of the prosecution that *only* one **'table-knife'** was used in the commission of the offence which *allegedly* was thrown by appellant Zakir Hussain and was subsequently recovered at his pointation which the learned trial court judge viewed as:-

> ".. The above act of accused throwing the churri after committing the offence at the place of incident do not appear to be act of criminal or robber, prima facie it has been done by the killer, who after the offence has left the place of incident and he did not threw churri at the place of incident so that the weapon used in the crime should not be recovered from the possession of his accomplice (Mst. Rehmat Bibi).."

However, the *investigating officer* as well learned trial court judge entirely failed in appreciating that at time of preparing **'memo of examination of dead body'** (Exh.3(a)), the SI Shan Muhammad Khokhar had recovered one **'blood stained knife, lying on upper side of iron box'.** The relevant portion of said (Exh.3(a)) reads as:-

> "Dead body is lying prone on floor inside cot of said room, blood of deceased is scattered and vest is found in neck of deceased, deceased is attired gray color shalwar, whose head towards sought and legs are towards north.
>
> **One blood stained knife is lying on upper side of iron box**, which was taken into police possession…"

Such recovery of **blood stained knife** from place of incident (room) not only negates the theory of learned trial court judge but also creates serious doubt about truthfulness of alleged extra-judicial confession whereby the appellant Zakir Hussain, having used **'table-knife'** once had left the place of incident and while running away threw it. The relevant portion of evidence of PW Muhammad Shameer, whereby details of such *extra-judicial confession* was given, is referred hereunder:-

> "…On 09.10.2013 police brought accused Zakir on the place of incident who practically repeated the said incident that how he murdered the deceased Muhammad Aslam. He further disclosed that he kept one foot on Kunda of the door and one foot on tree beside the door, climbed in the inner side of the house of Mst. Rehmat Bibi. He saw Muhammad Aslam was sleeping on western side and Mst. Rehmat Bibi was sleeping on Eastern side on cots in the room. Mst. Rehmat Bibi asked to Zakir that he should murdered to Muhammad Aslam. **He stood on western side of the cot of Muhammad Aslam, captured head with left hand and with right hand he cut the neck of Muhammad Aslam. Thereafter he left the house of Mst. Rehmat Bibi by way of outer door. He threw the churri in which churri was recovered**…."

However, it is quite obvious that prosecution never attempted to justify recovery of such **blood-stained churri** from place of incident nor even insisted during course of investigation as well trial as prosecution claimed happening of **incident** in a *specific* manner which was not allowing introduction of recoveries of '**two blood stained knifes'**. At this point, I may add that evidence of extra-judicial confession, because of its being concocted easily, is always looked at with doubt and suspicion. It could, *at the most,* be taken as corroborative of the charge if it, in the first instance, rings true and then finds support from other attribute. It has to be excluded from consideration when, on its examination, it does not agrees with truth nor fits in with the surrounding circumstances of the case. Reference may be made to the case of *Nasir Javaid & another v. The State* (2016 SCMR 1144).

It is quite surprising that as per alleged *extra judicial* confession of appellant Zakir Hussain he had thrown **table-knife** near the place of incident (in bushes) without making any attempt to clean it because at time of its recovery it was found **'blood-stained'.** Exh.3/H (*mashirnama of recovery at pointation of appellant Zakir)* says as:-

> "… .He conducted search of knife in bushes and while searching disclosed that it was same knife from which he cutoff neck of slain, which is lying. I, the SI, tactfully took out knife further checked and showed to the witnesses, knife white silver color sharp edge "6 ½ inch having wooden handle **upon which dried blood stains have found**…"

Such throwing of **'churri'** near place of incident without cleaning it was always against the normal human conduct of a prudent mind particularly when such murder was allegedly done under ***planning. B***e that as it may, *prima facie,* appears that appellant Zakir Hussain had no time to clean the ***blood*** from the crime weapon yet surprisingly this (***crime weapon)*** was not found having any finger-prints. The Exh.13(O) *(examination report),* issued by Incharge Fingerprint Unit, says as:-

> "**REPORT.**
>
> The examination of the cited above **knife (churri)** were observed that:
>
> 1. After chemical process no any impression (s) appeared on the above mentioned knife (churri) in question. It is observed that the knife's (churri) **metallic part is rusted"**.

I am unable to understand that if the appellant Zakir Hussain had sufficient time to remove his *finger-prints* from crime weapon then why he not attempted to clean **blood** from crime weapon?. Or if the appellant Zakir Hussain was so clever to have worn gloves then why the **offence** was committed in a manner which no **prudent mind** shall do i.e **making accomplice a direct suspect thereby leaving all possibility of his *indirect* involvement.**

Further, the above document (Exh.13(O) shows that the alleged crime weapon was examined having received it under letter dated **10.10.2013** i.e **few days after incident** yet the ***metallic part*** thereof was found **rusted.** Non-appearing of the ***fingerprints*** and ***metallic part*** of **churri** , being **rusted,** were always never sufficient to

safely believe such **table-knife** as **crime weapon** , particularly when as per the Exh.13(S) *(Chemical Examiner's report)* the **blood-group cannot be determined due to material being insufficient'.** Reference may well be made to the case of *Muhammad Asi*f (2017 SCMR 486) wherein it was categorically observed as:-

> "19. We have noticed that the Punjab Police invariably indulge in such a practice which is highly improper because unless the blood stained earth or cotton and blood stained clothes of the victim are not sent with the same for opinion of serologist to the effect that **it was human blood on the crime weapon and was of the same group** which was available on the clothes of the victim and the blood stained earth / cotton, such inconclusive opinion cannot be used as a piece of corroboratory evidence. Therefore, copy of this judgment be sent to the Prosecutor General, Punjab, and Chief Incharge of Investigation, Punjab Provincial Police to issue instructions to the investigating agencies in this regard."

I would also add that though as per, referred *extra judicial confession* as well specifically claimed case of prosecution, the deceased must have only one ***injury*** on his neck but as per the **postmortem report** there were as many as **'four injuries'** on person of the deceased. All these aspects *however* were never appreciated by the learned trial court judge nor even were discussed which *otherwise* were always sufficient to take both *extra-judicial confession* as well *'recovery'* as of no **significance** least **doubtful** which, being doubtful, were never safe to accept as **'have corroborated the prosecution case'** as such approach was always likely to prejudice the object of **golden principle of benefit of doubt.**

14. Now, I would come to another aspect of the matter which *even* remained un-noticed although it was very material. It is a matter of record that place of incident was / is not an ***independent*** place but was / is part of the quarter of PW Muhammad Shahmeer. It was described by said PW in his examination-in-chief as:

> "I am employee of police department. I am resident of house No.8, Block H, PTC, Saeedabad Karachi. On deputation of PTC Saeedabad, Karachi besides my house / police quarter No.8, I construction (constructed) one rook like **Battakkak** which has separate entrance. Muhammad Aslam who was working as a private worker in PTC Saeedabad in mess, **I handed over such Bhattak for some days on his request for residence purpose.** He shifted the about 15/20 days back from the said incident."

The said Pw was residing in his quarter with *family* however surprisingly he (PW Shahmeer) or any of his family members heard nothing *abnormal* when murder was done in alleged manner. Worth to keep in mind that as per alleged *believed* extra-judicial confession the deceased (person with average built and height of 5'-6") after cut on his neck had jumped out of his cot and even struck with wall. The *room* (Baithak) was never claimed to be ***big*** which already had two cots and other utensils therein yet the persons, available on other-side of wall, heard nothing. Such attitude from inmates of house / quarter of Pw Shahmeer were also requiring number of *answers* but were never attempted. Further, said PW Shahmeer , *admittedly,* serving in police department and was the first person, who was called by appellant Rehmat Bibi yet he preferred to go to call brother of deceased and made no attempt to call police or other neighbourers. Thing shall stand

clear from referral to relevant portion of evidence of PW Shahmeer which is:-

> "… I saw deceased Muhammad Aslam who was on ground and his body was face to ground. I immediately went to the bother of Muhammad Aslam namely Riaz who is residing at the distance of **200 yards** from my house. **Riaz alone came there. He informed to police.** Police as well as public gathered there. "

Such attitude was also against normal human conduct and even negates *least* makes doubtful manner in which appellant Rehmat Bibi, while crying about murder of his husband, had come out of house / Baithak.

15. Be that as it may, let's examine the CDR of cell-phones, allegedly remained in use of both the appellants. Though, prosecution (*investigating officer)* claimed certain *specific* cell-phones (*sims)* to be in use of both the appellants. However, it is also a matter of record that prosecution, at no material times, examined any body so as to *prima facie* establish that allegedly CDR of Cell-phones (*sims)* were , *in fact,* in names / use of the appellants. It is worth to add here that even, per the learned trial court judge, the cell-phones (*sims)* were not in **names** but in **use** of appellants. Relevant portion of judgment reads as:-

> "I.O has submitted cell phone record of accused Mst. Rehmat bibi and accused Zakir Hussain cell phone No.0313-0290899 **was in use of Mst. Rehmat Bibi** and cell phone No.0313-2041903 **was in use of accused Zakir Hussain** as per record."

There can be no *denial* to the fact that it is the record of ***sim*** which details the **owner / user** thereof hence examination of such competent

person was always material but prosecution examined no such witness. Thus, in absence of such *important* link such evidence (CDR) legally can be of no **'significance'.** Reliance is made on the case of *Azeem Khan* supra wherein it is observed as:-

> "22. …..No competent witness was produced at the trial, who provided the call data, Ex.P.1 to ex.P-5. No voice record transcript has been brought on record. Similarly from which area the caller made the calls, is also not shown in it. **Above all, the most crucial and conclusive proof that the cell phone was owned by the accused and SIM allotted was in his name is also missing**. In this view of the matter, this piece of evidence **is absolutely inconclusive and of no benefit to the prosecution nor it connects the accused with the crime in any manner**."

Without prejudice to above legal position, I would go a *little* further and would say that even if record of phone-calls on such phones *(sims)* is believed, as was by learned trial Court Judge, while saying :

> "I.O has submitted cell phone record of accused Mst. Rehmat Bibi …….have remained in contact to each other since long time, but at the night of incident they have remained with contact at about **02:14 a.m**, **02:21 a.m**; **4:23 am**; **04:44 am** and **06:12 a.m."**

If it is believed that both appellants came in contacts at **'02:14 am** and **02:21 am"** which, per prosecution story, could be for no other purpose but to call appellant Zakir Hussain for killing deceased Muhammad Aslam, then I am unable to understand that why the appellant Zakir Hussain was not provided **access** by opening the door but was made to have access in a difficult way i.e :

> "He further disclosed that he kept one foot on Kunda of the door and one foot on tree beside the door, climbed in the inner side of the house of Mst. Rehmat Bibi."

Leaving this question, if both appellants were in continuous contact then why the appellant Zakir Hussain, per his claimed *extra-judicial confession,* on getting access in the room found as:

> "He saw Muhammad Aslam was sleeping on western side and **Mst. Rehmat Bibi was sleeping** on Eastern side on cots in the room"

Without making any comments on above, I am also unable to understand as to why both appellants needed to come in contacts at **'4:23 am** and **04:44 am** because if it is believed that they were *together* at place of incident per the Pw Shahmeer she (appellant Rehmat Bibi) knocked at his door at **"5:15 am"** then such **contacts** were / are never worth believing. However, if it is believed that appellant Zakir Hussain had left the place then, per presumed conspiracy, the appellant Rehmat Bibi was to start crying (as was claimed in *extra-judicial confession)* yet there remains no ***possibility*** of such contacts. Be that as it may, the last claimed contact, per CDR, was at **06:12 a.m** which contact is not *possible* nor is expected from any ***prudent mind*** because *undeniably* appellant Rehmat Bibi had disclosed murder of her husband to Pw Shahmeer at **5:15 am** thereby closed all chances of her **finding** loneliness. Such claimed contacts, since appearing to be no logical, couple with failure of prosecution to establish **ownership** of appellants of such **'sims'** by examining such competent witness were / are always sufficient to hold such piece of evidence as of no **significance.**

16. *Prima facie,* none has witnessed any of the appellants committing any **act** or **omission** but mainly the conviction was recorded while disbelieving *plea* of appellant Mst. Rehmat Bibi as *she* otherwise was undeniably present in the room where murder took place. Such fact does shift some part of the onus on the appellant to explain as to how her husband had met an unnatural death but this shall not absolve the prosecution to prove its case, if claimed in a particular manner. If the prosecution utterly fails to prove its own case against then it would never be safe to convict the accused *merely* on his / her failure to explain the death. Reliance is made on the case of Nazeer Ahmed v. The State (2016 SCMR 1628) wherein it is observed as:-

> "4. It may be true that when a vulnerable dependant is done to death inside the confines of a house, particularly during a night, there some part of the onus lies on the close relatives of the deceased to explain as to how their near one had met an unnatural death but where the prosecution utterly fails to prove its own case against an accused person there the accused person cannot be convicted on the sole basis of his failure to explain the death. These aspects of the legal issue have been commented upon by this Court in the cases of *Arshad Mehmood v. The State* (2005 SCMR 1524), *Abdul Majeed v. The State* (2011 SCMR 941) and *Saeed Ahmed V. The State* (2015 SCMR 710)."

In the instant case, the claimed allegations were never established / proved rather the appellant Rehmat Bibi , per available record, seemed to have acted in a natural manner. There came no answers to following questions which *otherwise* were always sufficient to extend benefit of

doubt to appellant Rehmat Bibi even if her plea of murder by dacoits is disbelieved i.e:-

i) alleged killer, despite alleged conspiracy & continuous contact, had to get access at his own;

ii) the appellant Rehmat Bibi was claimed by such killer (appellant Zakir Hussain) **sleeping** when he entered into room;

iii) the appellant Rehmat Bibi though had every opportunity to administer intoxicated medicines to deceased but on examination of secured articles, no such thing was found by Chemical Examiner (Exh.13/H);

iv) her clothes were not found blood-stained nor there came any allegation of destruction of such clothes;

v) she made no efforts to change position of room and even not removed **blood-stained** churri which was found on **iron box,** available in room;

vi) she, though had left deceased and had demanded divorce, yet not a single witness was examined to prove this fact rather complainant admitted in his cross as:

> "It is correct to suggest that no family suit was pending neither any Faisla was taken place before any Naik Mard in respect of Family dispute between Rehmat Bibi and deceased M. Aslam."

vii) despite clear refusal to Pw Rana Talib Hussain by Rehmat Bibi to effect that:

> "..I requested her to go back but she did not hear me therefore, I returned back."

Despite above, the appellant Rehmat Bibi re-joined the deceased without any ***faisla*** which, *undeniable fact,* was always sufficient to negate plea of running away of Rehmat Bibi with Zakir Hussain;

viii) if appellant had planned to kill her husband then prudence was always demanding some overt-act by appellant towards such object which *too* must not be at cost of her liberty as well ultimate object i.e **to**

marry with Zakir Hussain but manner in which she appears to have acted proves *otherwise;*

If above aspects are appreciated while keeping in view the *abnormal* conduct and behaviour of the prosecution witnesses, particularly that of:

i) introduction of **conspiracy** which too with delay of **five hours;**

ii) making improvements in their stands;

iii) failing to prove **earlier relations** between appellants;

iv) failing to prove act of deserting by appellant Rehmat Bibi and her stay with Zakir Hussain;

v) failure of placing any reason by complainant and Rana Talib Hussain of re-union of appellant Rehmat Bibi with deceased was always sufficient to be taken as a circumstance that these witnesses never enjoyed good relations with deceased else must have been in knowledge of all family affairs of deceased;

were always sufficient to extend benefit of the doubts to appellants. I would add that mere non-existence of enmity between complainant party and accused was / is never a sufficient ground to believe their words. Reference, if any, can well be made to the case of *Azeem Khan* supra wherein such plea was held as **'misconceived'.** Relevant portion reads as:

> "29. The plea of the learned ASC for the complainant and the learned Additional prosecutor General, Punjab that because the complainant party was having no enmity to falsely implicate the appellants in such a heinous crime thus, the evidence adduced shall be believed, is entirely misconceived one. It is a

> cardinal principle of justice and law that only the intrinsic worth and probative value of the evidence would play a decisive role in determining the guilt or innocence of an accused person. Even evidence of uninterested witness, not inimical to the accused may be corrupted deliberately while evidence of inimical witness, if found consistent with the other evidence corroborating it, may be relied upon. Reliance in this regard may be placed on the case of *Waqar Zaheer v. The State* (PLD 1991 SC 447)."

17. Under these circumstances, suffice to say that prosecution story lacks logical reasons and is not free from doubt. Needless to add that once doubts about the genuineness of prosecution story lurked into the mind of a judge, the only permissible course would be to acquit, as observed in the case of *Nazia Anwer v. State* (2018 SCMR 911). Accordingly, impugned judgment is set aside and appellants are hereby acquitted of the charge. They shall be released forthwith if not required in any other custody case.

IK **J U D G E**