

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT:

Mr. Justice Amjad Ali Sahito

Criminal Jail Appeal No.147 of 2019
Criminal Appeal No.541 of 2018
Criminal Appeal No.36 of 2019
Criminal Appeal No.75 of 2019

Appellant in Crl.Jail
Appeal No.147/2019 : Naseer Khan S/o Ghulam Sarwar
Through Ms. Abida Parveen Channar
Advocate.

Appellants in Crl.
Appeal No.541/2018 : (i) Saqib Ali S/o Liaquat Ali
(ii) Zahid Ali S/o Liaquat Ali
Through Mr. Ahmed Ali Ghumro,
Advocate.

Appellant in Crl.
Appeal No.36/2019 : Waqas S/o Niaz
(None present for the appellant)

Appellant in Crl.
Appeal No.75/2019 : Dur Muhammad s/o Atta Muhammad
Through Shaikh Muhammad
Mushtaq, Advocate.

Complainant : Ms. Zubaida Mai W/o Abdul Razzak
Through Mr. Nasrullah Malik,
Advocate.

Respondent : The State
Through Mr. Talib Ali Memon, A.P.G.

Date of Hearing : 5th August 2020

Date of Order : 5th August 2020

J U D G M E N T

AMJAD ALI SAHITO, J.— Being aggrieved and dissatisfied with the judgment dated 17.12.2018 passed by learned IInd Additional Sessions Judge, Karachi East, in Sessions Case No.1309 of 2014 arising out of the FIR No.433/2013 for an offence under sections 302, 201/34, PPC registered at Police Station Korangi Industrial Area, Karachi, the appellants have challenged their conviction, whereby they have been sentenced to suffer R.I. for life imprisonment for committing an offence under section 302/34 PPC and to pay fine of Rs.100,000/-

each accused as compensation to the legal heirs of deceased as provided under section 544-A, Cr.P.C., however, in failure, they shall further suffer S.I. for six months more each. The appellants were also convicted and sentenced to suffer R.I. for seven years for committing an offence under section 201 PPC and to pay fine of Rs.10,000/- each and in default thereof, to further undergo S.I. for one month more each. The benefit of section 382-B Cr.P.C. was also extended in favour of the appellants.

2. The case of the prosecution as depicted in the FIR is that on 06.07.2013 the statement of complainant Zubaida Mai W/o Abdul Razzaq, R/o. House No.77, Gali No.8, Sector-A, Kashmir Colony near Marwat Hotel, Karachi, was recorded by SIP Nazeer Ahmed Arain which was incorporated into the FIR wherein she stated that before the above-mentioned address, she was residing in House No.21, Gali No.20, "B" Area, Qayyumabad, Karachi. It is stated in the FIR that on 09.05.2013 at about 1900 hours her son Hasnain aged 08 years went out from the house and he did not return, therefore, on 11.05.2013 at about 2000 hours she filed NC report No.08/2013 at PS KIA, and started searching of her son. On 12.05.2013 the dead body of her son recovered from the drainage/dirty nala of Gizri, thereafter, the police of PS Gizri brought the dead body of her son at Jinnah Hospital, thereafter, complainant reached the hospital wherein presence of SI Muhammad Jamsheed and MLO Dr. Kaleem he refused to conduct the postmortem of deceased. Later on, the complainant took the dead body of her deceased son to her native village for burial purposes. The complainant in the FIR further stated that she came to know that her son was kidnapped by accused Naseer along with a companion and committed murder and thrown his dead body into drainage nala, hence this FIR was registered. After registration of the FIR, the usual investigation was carried out and submitted charge-sheet before the concerned Judicial Magistrate East on 22.09.2013 against the above named accused persons and the report was filed before the learned trial Court for disposal according to law.

3. The learned trial Court framed the charge against the accused persons at Ex.4, to which they pleaded not guilty and

claimed to be tried to vide their pleas Ex.4/A to Ex.4/E respectively. To establish the accusation against the accused persons, the prosecution examined complainant PW-1 Mst. Zubaida at Ex.22, who produced memo of inspection of a dead body at Ex.22/A, inquest report at Ex.22/B, superdiginama of a dead body at Ex.22/C, application addressed to SHO of PS KIA at Ex.22/D, order dated 02.07.2013 for registration of FIR passed by the learned Sessions Judge, Karachi East at Ex.22/E, statement of complainant recorded under section 154 Cr.P.C. at Ex.22/F, memo of site inspection from where the dead body of deceased was recovered at Ex.22/G, memo of site inspection at Ex.22/H, memo of the arrest of accused persons at Ex.22/I, Ex.22/J and Ex.22/K. PW-2 SI Nazeer Arain examined at Ex.23, who produced FIR No.433/2013 at Ex.23/A. PW-3 Naseem Bibi also examined at Ex.24. PW-4 Ahmed Bux examined at Ex.25. PW-5 Zulfiqar Ali examined at Ex.26. PW-6 Judicial Magistrate Mr. Muqtader Ali Khan examined at Ex.27, who produced an application for recording confessional statement of accused Dur Muhammad filed by the I.O. at Ex.27/A, another application for recording confessional statement of accused Dur Muhammad filed by IO at Ex.27/B, confessional statement of accused Dur Muhammad recorded at Ex.27/C containing four pages and CNIC of accused at Ex.27/D. Statement of Process Server SIP Imran Ahmed was recorded at Ex.28 wherein he reported that SIP Ghulam Mustafa retired from government service and shifted to some unknown place. He produced his report, retirement order of SIP Ghulam Mustafa and unexecuted NBW at Ex.28/A to Ex.28/C. PW-7 Judicial Magistrate (now Senior Civil Judge) Mr Waseem Ahmed examined at Ex.29, who produced an application for recording confessional statement of accused along with his certificate containing four pages and photocopy of CNIC of accused at Ex.29/B. PW-8 SIP Iftikhar Ahmed examined at Ex.31. PW-9 SIP Imran Ahmed examined at Ex.32, who is well conversant of signature and handwriting of SIP Ghulam Mustafa and produced retirement order of said SIP at Ex.32/A and memo of site inspection at Ex.32/B.

4. All the prosecution witnesses were cross-examined by the learned counsel for the accused persons. Thereafter, learned ADPP closed the prosecution side vide statement dated 16.8.2018 at Ex.34.

5. Statements of the accused persons were recorded under Section 342 Cr.P.C. by the learned trial Court at Ex.35 to Ex.39, in which they denied the allegations as levelled against them by the prosecution and claimed to be innocent. However, the accused persons neither examined themselves on oath as required under section 340(2), Cr.P.C. nor led any evidence in their defence.

6. The learned trial Court, after hearing the parties and on the assessment of the evidence, convicted and sentenced the appellants as stated above vide judgment dated 17.12.2018 which is impugned before this Court by way of filing the instant Criminal Appeals.

7. Learned counsel for the appellants in Crl. Appeal No.541/2018 mainly contended that the impugned judgment is against the law and facts of the case; that the present appellants are innocent and have falsely been implicated in this case; that there are major contradictions between the evidence of the prosecution witnesses; that neither any specific role has been assigned by the prosecution to the appellants nor any postmortem was conducted as per the wish of the complainant. He lastly contended that prosecution has miserably failed to prove its case against the appellants and thus, according to him, under the above-mentioned facts and circumstances, the appellants are entitled for their acquittal. Learned counsel for appellants Naseer Khan and Dur Muhammad while supporting the contentions advanced by learned counsel for the appellant in Appeal No.541/2018 has further argued that confessional statement of one co-convict cannot be used against the convicts involved in the same crime until and unless circumstantial evidence is corroborated but in this case, no corroborative evidence is available on the record to prove the case against the appellants; hence, the appellants are entitled for their acquittal.

8. Conversely, Mr. Talib Ali Memon, learned Asst. Prosecutor General Sindh assisted by Mr. Nasrullah Malik learned counsel for the complainant while supporting the impugned judgment has contended that the prosecution has proved its case beyond any shadow of doubt against the appellants; that the police officials had no enmity with the appellant. He lastly prayed for dismissal of the instant appeals.

9. We have heard the learned counsel for the appellants as well as learned Asst. Prosecutor General Sindh and have minutely perused the record with their able assistance.

10. On careful perusal of material brought on record, it appears that the prosecution case depends upon the circumstantial evidence adduced in the shape of confessional statements as well as other evidence available on the record. On an eventful day as narrated by the complainant that on 09.05.2013 at about 1900 hours her son Hasnain aged about 8 years went out from the house and did not return, therefore on 11.05.2013 at about 2000 hours she filed NC report at PS KIA and started searching of her son. On 12.05.2013 the dead body of her son recovered from the drainage/dirty nala of Gizri, therefore, she has registered an FIR against an unknown person. By showing suspicious upon appellant Naseer, therefore, the investigation was started. On the information of PW-1 Zubaida on 06.09 2013, the appellant Dur Muhammad was arrested and appellant Naseer was arrested on 03.01.2014. She has further disclosed that the accused Shah Bibi and Liaquat Ali was arrested and after getting bribe both were released by the police. In cross-examination, she admits that **“It is a fact that till 10.05. 2013 I not reported the matter to police.”** In this case, PW-4 Ahmed Bux is an important witness, In his deposition, he has stated that on 22.08.2013 he found that Riaz Ahmed, Mst. Zubaida, Naseer Ahmed, Zulfiqar and Muhammad Iqbal were available at the roof of the building where one Jirga was sitting in which one accused Naseer Khan admitted that he is ready to disclose the names of actual culprits involved in the murder of child Hasnain. He further stated that appellant Naseer Khan disclosed that Dur Muhammad/appellant brought the deceased

in the building of Saqib by inducing him, where Waqas, Zahid, Shakil and Saqib were already available, who brought two injections and also administered two tablets to the deceased. The deceased started crying while accused Waqas was holding a pistol and accused Saqib strangulated the child and accused Dur Muhammad fixed clothes in his mouth, resulted in the death of an above child. Based on his statement, accused Dur Muhammad was arrested and his confessional statement was recorded before the learned Judicial Magistrate and subsequently, the accused Naseer Khan was also arrested and his confessional statement was also recorded before the learned Judicial Magistrate and based on their confessional statements, they were booked in this case.

11. Undeniably, it is an un-witnesses crime. The entire edifice of the prosecution case is based on circumstantial evidence. The judicial confession, allegedly made by both the appellants are the material piece of evidence in the prosecution hand, therefore, I would deal the same in the first instance.

12. Keeping in view the High Court Rules, laying down a binding procedure for taking required precautions and observing the requirements of the provision of section 364 read with section 164, Cr.P.C. by now it has become a trite law that before recording confession and that too in crimes entailing capital punishment, the Recording Magistrate has to essentially observe all these mandatory precautions. The fundamental logic behind the same is that all signs of fear inculcated by the Investigating Agency in the mind of the accused are to be shedded out and he is to be provided full assurance that in case he is not guilty or is not making a confession voluntarily than in that case, he would not be handed over back to the police. Thereafter, sufficient time for reflection is to be given after the first warning is administered. At the expiry of that time, Recording Magistrate has to administer the second warning and the accused shall be assured that now he is in the safe hands. All police officials whether in uniform or otherwise, including Naib Court attached to the Court, must be kept outside the Court and beyond the view of the accused. After observing all these legal requirements if the

accused person is willing to confess, then all required questions formulated by the High Court Rules should be put to him and answers given, be recorded in the words spoken by him, The statement of accused be recorded by the Magistrate with his hand and in case there is a genuinely compelling reason then, a special note is to be given that the same was dictated to a responsible official of the Court like Stenographer or Reader and oath shall also be administered to such official that he would correctly type or write the true and correct version, the accused stated and dictated by the Magistrate. In case, the accused is illiterate, the confession he makes, if recorded in another language i.e. Urdu or English then, after its completion, the same be read over and explained to him in the language the accused fully understands and thereafter a certificate, as required under section 364, Cr.P.C. concerning these proceedings be given by the Magistrate under his seal and signatures and the accused shall be sent to jail on judicial remand and during this process, at no occasion, he shall be handed over to any police official/officer whether he is Naib Court wearing a police uniform, or any other police official/officer, because such careless dispensation would considerably diminish the voluntary nature of the concession made by the accused.

13. In the instant case, Recording Magistrates namely PW-6 Muqtadir Ali Khan and PW-7 Waseem Ahmed did not observe least precautions, required under the law. PW-7 Waseem Ahmed even did not follow the guidelines as provided by the Hon'ble Supreme Court of Pakistan in the case of ***Azeem Khan & others vs. Mujahid Khan & others (2016 SCMR 274.)*** He in his deposition deposed that on 07.01.2014 he was posted as Civil Judge/Judicial Magistrate, Karachi East. The Investigating Officer produced accused Naseer Khan of recording his confessional statement. Same was recorded. From the perusal of the confessional statement, it appears that examination-in-chief was recorded in which no precautionary measurements were made nor any question was put but simply the examination-in-chief of appellant Naseer Khan was recorded in which he has stated as under:

Examination-in chief.

“I am security guard and reside at Flat No.5, Rafiq Plaza Tariq Road, Karachi for one month, prior to this I used to reside at House No.14, Street No.16, Area Qaymabad and was servant of TPL Security Guard Company. We used to perform our duty in night time altogether at bungalow No.43/2 Khayaban-e-Bahria. During duty Saqib informed me that “our enmity is going on with maternal uncle Muhammad Hanif at our village and I have dire need of money you tell me man of money or jeweller, I having committed loot will snatch.” On which I stated to him that I have no money, vehicle, arms and house, on which Saqib said me that I will persons, vehicle and Arms. About 15/20 days back, Saqib took away me at garage Qayumabad, where Saqib, Zahid Waqas, Shakeel and me were sat, in the meanwhile Saqib said that we have talked with Dur Muhammad, so asked Naseer to remain silent in this work then Saqib said me that Dur Muhammad is giving a work. Further Firdous Ant informed that committee of Zubaida Mai has to draw, on which I remained silent. On 09.05.2015 at about 6/7 hours, Dur Muhammad brought a child namely Hasnain aged 8 years, in the meanwhile Saqib and Waqas brought Motorcycle, three injections and (paper is torn), on which Saqib said me that they will pay money, you have a dire need then don’t disclose such facts to anyone and you have to surveillance to the house of Zubaida Mai, on which I attached with them, in the meanwhile, Saqib put injection to child Hasnain and Dur Muhammad (paper is torn) and I along with Saqib, Dur Muhammad, Zahid, Waqas and Shakeel took away above child at Flat, while the child was raising the hue and cry, on which Saqib put cloth at the mouth of the child and wrapped tap, Waqas having a pistol and Dur Muhammad and Zahid caught hold to the child, while I along with Shakeel stood up outside and they said that now there is our work you go away. After passing one hour Saqib called me on phone said that where are you to reach my Flat, on which I reached there and they informed me that child passes away you don’t disclose anyone we will do something and in the meanwhile, I witnessed that Saqib gave burka and Dur Muhammad worn burka and brought the child down. Saqib and Dur Muhammad sat on the motorcycle. Saqib was riding the bike while Dur Muhammad was carrying the child and I do not know where they took him as there was a power breakdown in the area. I am involved in all this, however, my sister Shahida Bibi w/o Ghulam Fareed and her children are not involved in this and are innocent as false allegations have been levelled against them. Saqib, Dur Muhammad, Zahid, Waqas, Shakeel and myself are involved in killing the child. I am deposing this statement for fear of Allah. May Allah forgive me! I had been lured by greed.”

14. Furthermore, PW-6 Muqtader Ali Khan, Judicial Magistrate in his statement has deposed that on 07.09.2013 he was posted as Xth Judicial Magistrate, District East, Karachi. On the day Ghulam Mustafa Shah of PS KIA brought an application with a prayer to record the confessional statement of accused Dur Muhammad S/o Atta Muhammad. He has allowed the application with direction to produce the accused on 09.09.2013 for the recording of his confessional statement. On the suggested

date, the I.O. has produced the accused but due to strike of the advocates, his confessional statement could not be recorded and the matter was adjourned to 12.09.2013 thereafter his statement was recorded on the said date. It is pertinent to note here that on 07.09.2013, simply appellant was produced by the I.O. for recording his confessional statement but the matter was adjourned on 09.09.2013 without recording the confessional statement of the appellant and the custody was given to the same I.O. to produce him on 12.09.2013. If such like situation arises, then the Magistrate has to send the custody of the appellant in the judicial lockup to provide a fair chance and to remove any kind of fear from his mind but all was not followed and when the appellant was again produced on 12.09.2013 then his confessional statement was recorded, which is appropriate to be reproduced hereunder:

“On 25.04.2013, my relative namely Muhammad Naseer S/o Sarwar got met me with Saqib, Zahid Waqas and Shakeel, they enquired me that are you know Zubaida w/o Abdul Razaq, and whose son’s name is Hasnain, on which I replied them yes, they said me to bring Hasnain aged 8 years. They said me that they will demand money to release above child, on which I flatly refused. On my refusal they threatened to kill me, after that I went away. On 09.05.2013 at 07.30 PM, I had discharged work came back then it came to know that Hasnain, child of Abdul Razaq has been abducted away, I knew that this action might be taken by the Aqib etc. thereafter I went to the place of Saqib & others located at Qayumabad C-area. This building is consisting on the fifth floor, where I went to the 4th floor then witnessed that child is present there. On that day at 07.45 PM, Saqib caught hold face of the child, while Zahid caught hold his legs and Naseer had caught hold hand of the child, Waqas was holding the pistol, while Shakeel was also present there. I having seen this afraid and run away from there. I was afraid that if I will disclose such facts to anyone then they will also kill me. After that, I have come down stopped at a road near a vehicle because two persons found whom I know. A few times later, I witnessed that they were coming down, Zahid had picked to child and Zahid, Saqib and Naseer took away child at an unknown place on a motorcycle. I don’t know whether the child is alive or dead because it was night time and the light was shut down. After three days, it came to know that the dead body of the child has recovered thereafter I went away to my village and contracted marriage. Last month on dated 22 or 25, I came back and met with the mother of the child then I informed her all such fact after that police arrested me and enquired all facts from me. I had also informed such facts to my uncle at the village, on which my uncle gave me consultation to abscond away but I became afraid of the Allah Almighty and approached the police. This much is my statement.”

15. In cross-examination, P.W-6 Muqtader Ali Khan Judicial Magistrate has admitted that **“It is correct that I made no inquiry from accused with regard to confessing his guilt and adjourned that matter on 09.09.2013. It is correct that accused did not ask to get record his confessional statement on 07.09.2013. It is correct that there is no mentioned in Ex.27/C that handcuff of accused was removed. It is correct that on 12.09.2013 accused made no application for recording his confessional statement... I think the custody of the appellant was handed over to I.O. in order to send him in jail”**.

16. The Recording Magistrate committed successive illegalities one after other as PW-7 Waseem Ahmed while recording the confession has not observed the legal formalities which are the binding procedure for taking required precaution and observing the requirements of the provision of section 364 read with section 164 Cr.P.C. From a perusal of Ex-29/B, no warning was issued to him/accused that he is not bound to confess nor he was informed that if he confesses, it may be used as evidence against him. Even no question was put to him that ‘has he been given any inducement to make his confessional statement?’. The information was not given to appellant Naseer Khan that after making a statement whether confessional or not before him, he will not be remanded to police custody but will be sent to the judicial lockup. All the questions were not put nor have been brought on the record but simply his examination-in-chief was recorded.

17. In the instant case accused Dur Muhammad was arrested on 06.09.2013. The statement was filed by the I.O. for recording his confessional statement on 07.09.2013 and his confessional statement was recorded with a delay of six days on 12.09.2013. The reason is shown by the learned Magistrate that he has not recorded confessional statement promptly on the ground that there was a strike of Advocates if so, the strike was of the Advocates not for the litigants; hence, when the accused was produced before him, he should have recorded his confessional statement after observing all the codal formalities. In cross-

examination, he admitted that **“he has not mentioned that handcuffed of the accused was removed.”** Furthermore, the guidelines as provided by the **Hon’ble Supreme Court of Pakistan in case of Azeem Khan (supra)** that the fundamental logic behind the same was that, all signs of fear inculcated by the investigating agency in the mind of the accused were to be shaded out. In the instant case, the accused was in the custody of police for the last six days. Whereas, when the accused was produced before the Magistrate for his confessional statement, which was not recorded then the recording Magistrate has to send in the judicial lockup by providing a peaceful atmosphere to remove all the fears from his mind. But all was not done.

18. In my considered view, the confessions of both the appellants for the above reasons are of no legal worth, to be relied upon and are excluded from consideration, more so, when these were retracted at the trial. Confessions of this nature, which were retracted by the appellants, cannot mutually corroborate each other on the principle that one tainted evidence cannot corroborate the other tainted piece of evidence. Taking the guideline provided by Hon’ble Supreme Court of Pakistan in the case of **Muhammad Bakhsh v. The State (PLD 1956 SC 420)**.

19. Now reverting to the confessional statement made by accused Dur Muhammad in which he has stated that on 25.04.2013 accused Naseer Khan got met him with Saqib Ali, Waqas Zahid and Shakil, they inquired him that you know Mst. Zubeda, whose son’s name is Hasnain, on which he replied them, Yes. They told him to bring Hasnain for the demand of money for his release on which he has refused and on an eventful day on 09.05.2013 at 07:30, after completing his work he came to know that Hasnain has been abducted away then he went to the place of Saqib located at Qayyumabad, where Saqib resides is consisting of five floors and he went at fourth floor where a child was present while Zahid caught hold his legs and Naseer had caught hold hand of a child, Waqas was holding a pistol while Shakeel was also present there. After seeing, he was afraid and run away from the place of incident and subsequently, the

accused present there shifted the child to some unknown place; whereas, accused Naseer Khan has disclosed in his confessional statement that he is a Security Guard and residing at Flat No.5, Rafiq Plaza Tariq Road, Karachi. He used to perform his duty where Saqib informed him that he has enmity with uncle Muhammad Hanif and he has dire need of money, on which he replied that he has no money. On 09.05.2013 at about 6 hours Dur Muhammad brought a child namely Hasnain aged about 8 years, in the meantime, Saqib and Waqas brought a motorcycle, three injections on which Saqib told him that they will pay money, you have dire need then they will not disclose such facts to anyone. In the meanwhile, Saqib put injection to child Hasnain and he along with Dur Muhammad, Zahid, Waqas and Shakeel took away the child at Flat while a child was raising hue and cry, on which Saqib put cloth at the mouth of the child and wrapped tap, Waqas having a pistol and Dur Muhammad and Zahid caught hold to the child, while he along with Shakeel stood up outside and thereafter all went away.

20. PW-4 Ahmed Bux claimed that in the Jirga Naseer Khan admitted that Dur Muhammad brought the decease at the building whereas Dur Muhammad in his statement deposed that on 09.05.2013 after completing his work, he came at the house where he came to know that a child namely Hasnain was abducted and thereafter he went to Saqib's Flat where a child was present. Per PW Ahmed Bux that the deceased was abducted by Dur Muhammad but Dur Muhammad has denied all allegations in his 164, Cr.P.C. statement by saying that when he reached home, he came to know that child Hasnain has been abducted by other accused persons.

21. Both the confessions of the appellants appear to be untrue because the same are clashing with the story set up by the prosecution witnesses on material particulars of the case. In the confession of Naseer Khan, he has stated that injection was injected by Saqib to child Hasnain and Dur Muhammad. Furthermore, the accused Saqib and Waqas were brought the motorcycle along with three injections whereas Dur Muhammad has stated that they were already present in the Flat and due to

fear, he came down from their flat. Neither I.O. has recovered the injections from the accused nor motorcycle on which the deceased was shifted. Furthermore, as per the statement of Dur Muhammad, he went at the 4th Floor of the building located at Qayyumabad C-Area but no mashirnama of the incident was prepared. The accused Naseer Khan has stated in his statement that the injection was injected and he along with Saqib, Dur Muhammad Zahid and Waqas and Shakeel took away the child at flat while the child-raising hue and cry on which Saqib put a cloth on his mouth and wrapped with tape, Waqas having a pistol and Dur Muhammad caught hold to a child while he along with Shakeel stood up outside and they said that now this is our work you go away, hence pistol was not recovered from Waqas. All these circumstantial evidence were available with the prosecution to connect the appellants with the commission of offence but the Investigating Officer failed to collect incriminating materials to connect the appellants with the commission of an offence.

22. The prosecution has also relied upon the confessional statements made by co-accused Dur Muhammad and Naseer have implicated three accused/appellants namely Saqib, Zahid and Waqas in the commission of the offence, that the confessions being exculpatory in nature could not have been taken into consideration against the appellants. In view of Article 16 of Qanun-e-Shahadat Order, 1984, that an accomplice shall be a competent witness against an accused person, except in the case of an offence punishable with Hadd and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. Further in the analysis of Article 43 of Qanun-e-Shahadat Order, 1984 the Court may take into consideration such confession as circumstantial evidence against such other person, hence it is appropriate to reproduce the Article 43 of Qanun-e-Shahadat Order, 1984 hereunder:

“43. Consideration of proved confession affecting person making it and others jointly under trial for the same offence. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons is proved.

(a) such confession shall be proof against the persons; making it; and

(b) the Court may take into consideration such confession as circumstantial evidence against such other person.”

23. From the above, it appears that the exculpatory confessional statements made by the accused can be used as evidence/proof against the person making it and as against other accused persons, it may be taken into consideration as circumstantial evidence. The next evidence with the prosecution was circumstantial evidence. In the case of circumstantial evidence, the prosecution has to prove all the links of the chain of circumstantial evidence. There should be no gap between the links of the chain. In case of circumstantial evidence, the rule is that the facts proved must be incompatible with the innocence of the (accused) convict and incapable of explanation upon any other reasonable hypothesis than that of the guilt of (accused) convict. It is pertinent to note that a concurrence of well-authenticated circumstances composes a stronger ground of assurance than the positive testimony of circumstances. It is no doubt true that in a case based on a piece of circumstantial evidence, one should remember that process of inference and deduction involves delicate and perplexing character liable to numerous cases of fallacy. It is to be noted that a man can tell lie but the circumstances cannot tell lie. To justify the inference of the guilt, incriminating facts must be incompatible with the innocence of the accused of the guilt of any other person and incapable of explanation upon any other reasonable hypothesis than that of the guilt of the accused. In a case of circumstantial evidence, no link in the chain should be missing and all the circumstances must lead to the guilt of the accused. The reliance is placed on the case of **Ali Khan vs. The State (1999 SCMR 955)** in which Hon'ble Supreme Court of Pakistan has held that:

“It is well settled that in a case resting on the circumstantial evidence, no link in the chain should be missing and all the circumstances must lead to the guilt of the convict.”

24. In the instant case, PW-4 Ahmed Bux has stated in the evidence that in the presence of Jirga, names of the appellants Dur Muhammad and Naseer were disclosed but I.O has failed to

examine the leader of the Jirga or any person who were present in the Jirga. He has also disclosed that the Complainant Mst Zubaida was also available in the Jirga but while deposing she has not stated a single word that any Jirga was held and Naseer has admitted his guilt and implicated the other accused in this case. Furthermore, the I.O. also failed to record a statement of other PWs, who were present in the Jirga. The cause of the death shown by the accused in their alleged confession was strangulated but after the recovery of the dead body, the child brought to the Jinnah Hospital but no post-mortem was conducted on the dead body of the deceased to ascertain the cause of the death, hence the cause of the death has remained in the mystery.

25. Now the question is whether the statement of Naseer Khan and Dur Muhammad recorded under section 164 Cr.P.C. can be used against three convicts namely Waqas, Zahid and Saqib. In the case of **Federation of Pakistan vs. Muhammad Sham Muhammadi 1994 SCMR 932**, in which Hon'ble Federal Shariat Court has held that an accomplice falls within the category of wicked person in the terms of the Verse of the Holy Qur'an, therefore, before acting upon his testimony, the truthfulness of it should be verified from other corroborative evidence. In the aforesaid case, it was not laid down that no reliance should be placed on his statement: but it was laid down that the truthfulness of it may be verified from another corroborative piece of evidence for having proper perception. In the above-cited case of **1994 SCMR 932 (supra)** wherein the Supreme Court of Pakistan has held that:

“(O’Ye who believe! If a wicked person comes to you with any news ascertain the truth).

(12) An accomplice who takes part in the commission of the offence for which his co-convict is charged which falls within the category of a wicked person in terms of the above Verse of the Holy Qur’an and, therefore, before acting upon his testimony, the truthfulness of it is to be verified by corroborative piece of evidence on material particulars.”

26. No doubt that the aforesaid Verse of the Holy Qur'an conveys that before relying upon the statement of co-convict, it should be verified from another corroborative piece of evidence.

While section 43 of Qanun-e-Shahadat Order, 1984, contained that when more than one person is being tried jointly for the same offence and confession made by one of such persons affecting himself and some others, may be taken into consideration against such other persons as well as against the person who made such confession. For having proper perception.

27. The crux of the above discussion is that while relying on the statements of Naseer Khan and Dur Muhammad, the Court has to verify from the other corroborative evidence. If the statement of co-convict finds corroboration from the other evidence then reliance can be placed on the statement of the co-convict. In this case, a piece of evidence with the police was a motorcycle, in which the child was brought in the Flat, injections which were injected, piece of cloth, which was fixed in the mouth of the child and a pistol being shown in the custody of Waqas. The accused have abducted the child and detained in the Flat but no evidence was brought on record that the I.O. has ever visited the place of detention of the child and recorded the statement of the vicinity or flat-holders to believe that Naseer Khan and Dur Muhammad are residing in the said Flat. Furthermore, the I.O. has failed to collect the injections injected to the minor, piece of cloth which was put in the mouth of the child, motorcycle and another incremental piece of evidence to connect all the links of chains; hence prosecution has miserably failed to prove its case against the appellants.

28. The upshot of the above discussion is that the prosecution has miserably failed to bring home the guilt of the appellants/accused beyond reasonable doubt and it is settled proposition of law that for giving benefit of doubt to an accused there doesn't need to be many circumstances creating doubts. If a single circumstance creates reasonable doubt in the prudent mind, then its benefit is to be extended in favour of the accused not as a matter of grace or concession, but as the matter of right. In this respect, reliance is placed on the case of **MUHAMMAD MANSHA v. THE STATE** reported in **2018 SCMR 772**, wherein the Hon'ble Supreme Court of Pakistan has held that:

“4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to be benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, “it is better than one innocent person be convicted”. Reliance in this behalf can be made upon the cases of *Tarique Parvez v. The State* (1995 SCMR 1345), *Ghulam Qadir and 2 others v. The State* (2008 SCMR 1221), *Mohammad Akram v. The State* (2009 SCMR 230) and *Mohammad Zaman v. The State* (2014 SCMR 749).

29. It is well-settled principles of criminal administration of justice that no conviction can be awarded to an accused until and unless reliable, trustworthy and unimpeachable evidence containing no discrepancy casting some cloud over the veracity of prosecution story is adduced by the prosecution. I am of the view that in the present case, the prosecution story engulfed under the thick clouds of doubt and the learned trial Court has not evaluated the evidence in its true perspective and thus arrived at an erroneous conclusion by holding the appellants guilty of the offence. Resultantly, the instant appeals were allowed. The conviction and sentence awarded to the appellants were set-aside and they were acquitted of the charge by extending them the benefit of the doubt. The appellants were ordered to be released forthwith if not required in any other custody case vide order dated 05.08.2020. These are the reasons for my aforesaid order dated 05.08.2020.

JUDGE

Karachi

Dated: ____ August, 2020.