

IN THE HIGH COURT OF SINDH AT KARACHI

CR. APPEAL NO.701/2019

Appellant : Mst. Shazia @ Ruqiya,
through Mr. Faqeer Qurban Ali Soomro
advocate.

Respondent : The state,
through Mr. Siraj Ali Chandio, DPG.

Date of hearing : 15.04.2021

Date of order : 15.04.2021

J U D G M E N T

SALAHUDDIN PANHWAR, J. Appellant has impugned judgment dated 12.10.2019 passed by learned 1st Additional Sessions Judge (Model Criminal Trial Court), Karachi South in S.C.No.2804/2014 arising out of FIR No.611/2013, under section 302/392/397/34 PPC, PS Darakhshan; whereby she was convicted for offence punishable under sections 302(b) PPC and sentenced to life imprisonment and to pay fine of Rs.200,000/- to the legal heirs of deceased under section 544-A Cr.P.C. and in default to suffer S.I. for six months more; as well convicted for offence punishable under section 397 PPC and sentenced to suffer SI for ten years and to pay fine of Rs.100,000/- and in default thereof to suffer SI for six months more; with benefit of section 382-B Cr.P.C.

2. Brief facts of prosecution case are that complainant Syed Imtiaz Hussain lodged FIR that his brother in law namely DSP Sagheer Ahmed Shaikh resident of House No.D-48, Darakhshan Villas, Phase-VI, DHA, Karachi, went to Canada for medical treatment and his family was residing at above address; that on 20.11.2013 complainant was present at his house when at about 1230 or 1245 hours, he received a phone call from his sister-in-law namely Amber Shaikh that a dacoity had been committed in her

house; on this information complainant alongwith his wife reached at aforesaid address where his sister in law stated that she had kept one driver Faraz Bhatti aged about 30/35 years and his wife Mst. Ruqiya (appellant) aged about 30/35 years as maid through police guard Hakim Ali; on 20.11.2013 at about 1100 hours Amber Shaikh, her niece Mst. Iffat Shahid and police guard Hakim Ali were available at the house when both the culprits Faraz Bhatti and his wife Ruqiya came at the house. Her niece was available at upper floor of the house and after some moments Mst. Ruqiya came at upper floor along with her husband Faraz Bhatti, who was having blood stained *churri* in his hand and his hands and clothes were also blood stained, then they both tied their hands and legs and wrapped their mouth with tape and took their wearing gold rings, chains and earrings on gunpoint; they also took 24 gold bangles, diamonds rings, diamonds set, gold sets, different prize bonds, foreign currency, one I-Pad, one I-Phone, three Nokia phones, one China phone, cash in PKR, and one official revolver belonging to her husband from *Almirahs* of the bedroom. Thereafter, Faraz put blood stained *churri* on neck of Iffat and told that they have slaughtered their police guard Hakim and if she shows any cleverness, they would also kill her and thereafter they fled away while taking key of their vehicle. Thereafter they untied themselves and informed the complainant. They searched Hakim and found his dead body in store of ground floor, his neck was found cut and blood was available on ground. During investigation, on 27.06.2014 from 0030 to 0140 hours accused Faraz Bhatti and Mst. Razia were arrested from Bus Stop at Main Khayaban-e-Shamsheer Crossing, Street 26, Phase-V, DHA, Karachi alongwith some robbed articles vide memo produced at exhibit 9/A. On 02.07.2014 accused Faraz Bhatti led the police party to his house wherefrom he voluntarily produced robbed Nokia mobile phone and I-Pad Nexus 5. On 05.07.2014 accused Mst. Razia @ Ruqiya got her statement

recorded before the learned Judicial Magistrate concerned. After completion of investigation, challan was submitted against the accused in Court of law for their trial showing accused Zahid Hussain as absconder under section 512 Cr.P.C with the allegation that accused Faraz Bhatti had given robbed cash amount of Rs.5,00,000/- to him.

3. Prosecution examined PW-1/ASIP Muhammad Ramzan at exhibit 7 who produced departure entry at exhibit 7/A, inquest report and memo of inspection of dead body of the deceased at exhibits 7/B & 07/C respectively, his request letter to MLO at exhibit 7/D, road certificate at exhibit 7/E, receipt for handing over the dead body at exhibit 7/F, complainants statement under section 154 Cr.P.C at exhibit 7/G, arrival entry at exhibit 7/H and FIR at exhibit 7/I; PW-2/Complainant Syed Imtiaz Hussain at exhibit 8 who produced memo of site inspection, copies of FIR, its entry registered at PS City Court for burning of the case property in Malkhana of City Court at exhibits 8/A to 8/C respectively; PW-3/SIP Muhammad Rasheed at exhibit 9 who produced memo of arrest of the accused persons and memo of recovery of robbed articles on pointing of accused Faraz Bhatti at exhibits 9/A and 9/B; PW-4/the then learned Judicial Magistrate Mr. Noor Muhammad Kalmati at exhibit 11 who produced application moved by I/O for recording of statement of Mst. Razia and her statement at exhibit 11/A and 11/B; PW-05/eye witness Mst. Iffat Shaheen at exhibit 13; PW-06/MLO Dr. Jagdesh Kumar at exhibit 14 who produced postmortem report and the certificate of cause of death of the deceased at exhibits 14/A & 14/B; PW-07/investigation officer DSP Muhammad Mubeen at exhibit 15 who produced sketch of the place of incident, photographs of place of incident, 9 photographs of the deceased, details of CNICs of accused Faraz Bhatti and Mst. Razia Bibi, application moved to SSP for collection CDR of PC Hakim, Mst. Amber Shaikh, accused

Faraz and Mst. Razia, application moved to SSP investigation for publication in newspaper against accused Faraz bhatti and Mst. Razia, publication to newspaper Daily Kawish Dated 12.12.2013, in Daily Dawn Dated 13.12.2013 and in Daily Jung dated 12.12.2013 and chemical report at exhibits 15/A to 15/X respectively; PW-8 I/O DSP Muhammad Mubeen. Thereafter statements of accused Faraz Bhatti and Mst. Razia were recorded separately under section 342 Cr.P.C. at exhibits 17 and 18 wherein they denied the allegations against them and claimed trial. Neither they examined themselves on oath U/s 340 (2) Cr.P.C, nor led any evidence in their defence.

4. Learned trial court framed and answered the issues as under:-

1	Whether on 20.11.2013 at between 1100 to 1245 hours, inside Bungalow No.D-48, Darakhshan Villas, Phase-06, DHA, Karachi, deceased police guard Hakim Ali sustained knife (Churi) injuries due to which he died his unnatural death?	In affirmative
2	Whether on the aforesaid date, time and place, present accused Faraz Bhatti S/o Hameed Bhatti and accused Mst. Razia @ Ruqiya D/o Ghulam Hussain W/o Faraz Bhatti duly armed with deadly weapons and in furtherance of their common intention committed murder of deceased police guard Hakim Ali, while causing him knife (Churi) injuries?	In affirmative
3	Whether on the aforesaid date, time and place, present accused Faraz Bhatti S/o Hameed Bhatti and accused Mst. Razia @ Ruqiya D/o Ghulam Hussain W/o Faraz Bhatti duly armed with deadly weapons and in furtherance of their common intention put PWs Mst. Iffat Shaheen and Mst. Amber Afreen Shaikh under fear of death and grievous hurt on force of weapons and robbed away gold rings, chains, earrings (Bunday), 24 gold bangles, diamond rings, diamond set, gold sets, different price bonds, foreign currency, one I-pad, one -phone, three Nokia phones, one china phone, Pakistani cash and official revolver, as alleged?	In affirmative
	What offence, if any, has been committed by the preset both accused?	Answered accordingly.
	What should the order be?	Both accused convicted u/s 265-H(2) Cr.P.C.

5. Learned counsel for appellant contended that appellant has been falsely implicated in the case; that though it is alleged in FIR that Mst. Amber Shaikh was an eyewitness and victim as well she is said to have informed the complainant about commission of the crime as alleged but she was not examined by the prosecution at trial while one "Riffat Shaheen" was examined at trial who was not the victim/eyewitness but some other person as the name of the victim shown in the FIR is "Iffat Shahid" therefore alleged incident of robbery is not proved; that there is no private and independent associated to see the alleged recovery of robbed articles which speaks of the malafide on part of the police; that there is no eye witness of murder of the deceased which is unseen incident and it can only be proved through circumstantial evidence, which could not be brought by the prosecution against the appellant therefore failure of prosecution to establish its case beyond reasonable doubt entitles the appellant for her acquittal; that the alleged confessional statement is defective as it has been admitted by the then learned Judicial Magistrate during his cross examination that he had not provided any time to the accused for reflection and he had recorded her statement as witness and not as an accused; leaned counsel while pointing out the defects in prosecution evidence has argued that PW-2 Complainant Syed Imtiaz Hussain admitted in his cross examination that during inspection of dead body of deceased no churri was recovered in his presence as well there is no mention of case property of this case in roznamcha entry; that PW-5 Mst. Iffat Shaheen admitted that she did not see the commission of murder of deceased; that PW-8 I/O DSP Muhammad Mubeen admitted in cross examination that recovered robbed articles and churri were not present in court on that day and that he has not produced any proof to show that case property was returned to its owner by the court; that PW-8 also admitted that he did not remember the date of production of said case

property before the court of learned ADJ, he also admitted that none of the PWs stated before him that they had seen the commission of the murder of deceased; that evidence that prosecution is able to bring on record suffers from material contradictions hence not reliable; that appellant was not afforded with the chance at the time of trial to record her statement according to real facts; that the prosecution has miserably failed to prove the case against appellant/accused hence prayed she is entitled for acquittal.

6. In contra, learned DPG argued that prosecution has established that appellant/present accused alongwith co-accused Faraz Bhatti committed murder of police guard Hakim Ali; put Amber Shaikh and Iffat Shahid under fear of death and grievous hurt on the show of weapon and committed dacoity whereby taking away huge number of valuables, cash and official revolver, later on robbed articles were recovered from present appellant as well at the time of her arrested alongwith co-accused; that co-accused Faraz Bhatti voluntarily produced one mobile phone and I-Pad from his house; he emphasized that appellant has also got recorded her confessional statement before learned Judicial Magistrate; that eyewitness and victim Iffat Shahid fully implicated the accused with commission of crime; that the judgment of the trial court is well reasoned and in accordance with law hence appeal is liable to be dismissed.

7. I have heard the respective sides and have also examined the available material *muntily*. Per judgment (page-21), the prosecution in order to discharge its burden relied on certain pieces of evidences. The relevant portion reads as :-

'Perusal of evidence brought on record by the prosecution shows that in order to prove the charge against the accused, the prosecution has mainly relied upon evidence of eye witness Mst. Riffat Shaheen (Iffat Shahid), recovery of crime weapon (blood stained knife 'churri'), tape and tape of Khaki color from crime scene, recovery of the robbed articles from the both present accused and statement of

accused Mst. Razia alias Ruqiya under section 164 Cr.P.C, therefore, these pieces of evidence are discussed separately.'

The learned trial court believed the evidence of witness Mst. Riffat Shaheen (Iffat Shahid) although it was claimed by defence that she is not the one who was named as witness in column of witnesses in charge sheet. To such plea, the learned trial court responded as :-

'As per contention of learned defence, PW-06 Mst. Riffat Shaheen daughter of Syed Shahid Hussain is not the same witness, who is named in the FIR and in the list of witnesses of charge sheet, as in calendar of the witnesses, her name is mentioned as Mst. Iffat Shahid wife of Saeed Nizami, but the lady who appeared before this Court is Riffat Shaheen daughter of Syed Shahid Hussain, who failed to produce here identity card to prove her identity, but it is pertinent to clarify that during deposition of PW-06 Mst. Riffat Shaheen daughter of Syed Shahid Hussain recorded at Exh.13, her name seems to be a typographical mistake as on the said deposition, the said witness had made signature, which clearly can be read as 'IFFAT'. Therefore, image of her evidence for clarification of her signature as 'Iffat' on the deposition is pasted below'

I am surprised to such approach of the learned trial court because it is not the 'signature' which matters but the person (witness) and it is *first* responsibility of the prosecution to examine the very person, named as witness in charge sheet, and then it is equal responsibility of the Court to satisfy itself about identity of the person before recording its evidence. Any departure thereto shall fail the purpose and object of term '*witness*' of the '*oral evidence*'. The Article 71 of Qanun-e-Shahadat Order, 1984 makes it clear that oral evidence must be direct and should be of the *witness* who says he saw it. The relevant portion of referred article reads as :-

'71. Oral evidence must be direct. Oral evidence must, must in all cases whatever, be direct ; that is to say :-

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it ;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it ;'

Thus, I do not find any legal justification to accept the person as '*witness*' merely referring to her '*signature*' alone.

8. Be that as it may, while referring to '*signature*' alone as sufficient proof of identity of the person the learned trial court completely failed in appreciating that the defence *did* object to identification of such a witness while posing the question as :

'I have not brought my CNIC today'.

Needless to add that demand of '*CNIC*' is always for purpose of examining the '*identity*' of the person. Even otherwise, the learned trial court also failed in appreciating that in the column of witnesses of charge sheet the details of such witness was :-

'Mst. Iffat Shahid w/o Saeed Nizami r/o plot No.C/3, Street No.29, Toheed Commercial Area, Karachi'

but she while deposing in Court (under Oath) answered regarding her residence as :

'My address House No.C-3, Block 05, Defence Phase V Karachi is mentioned in my CNIC, and presently, I am residing at the same address.'

A bare perusal of two shall leave nothing ambiguous that the lady, produced, can't be the same '*witness*' as neither she ever claimed to be wife of '*Saeed Nizami*' as normally a married lady does, as was done by the lady while letting her name known to investigating officer nor she (lady examined in court) claimed to have *ever* resided at the place, shown in list of witnesses. I would not hesitate in adding that in the matter of capital punishment wherein the principle shall always remain that benefit of doubts shall always fall in the lap of the accused and not of the prosecution..

The said witness in her examination-in-chief claimed that :-

'.... Thereafter she called her husband namely **Faraz**, who used to work as driver of my Phupho. Husband of maid servant Ruqaiya came inside the bedroom and **put a blood stained 'Churri' on my neck.** Thereafter, they tied my hands and feed and also tied my mouth with tapped solution. My puse was also along with me, which

contained amount of Rs.17000/- I was also wearing two silver rings in one hand and two diamond rings in other hand. Accused Ruqaiya put off my rings from my hands and also took out amount from my purse, which also contained one diamond set, which was also taken out by the accused persons. Thereafter, accused Ruqaiya and Faraz dragged me to the master bedroom, where my Phupho were sleeping. When she saw me she started to cry, whereon accused Faraz threaten her and directed her to keep quite. He also shows knife to her and threaten here that **they had already committed murder of security guard and if shed id not keep quite he would also commit her murder....** Thereafter, I untied my self and my Phupho, who then caled Imtiaz Uncle and narrated the incident to hi. I did not go down the stairs, but Imtiaz uncle informed us that the Security Guard namely Hakim was lying injured and his neck was cut.'

It becomes quite clear and obvious that said PW *did* communicate whole facts to PW-2 Syed Imtiaz Hussain *even* that of murder and robbery committed by the *specific persons* but surprisingly the Syed Imtiaz Hussain (PW-2) while giving answers / information (s) to first police official i.e PW-1 ASI Muhammad Ramzan *did* not disclose such names, as is evident from relevant portions of the PW-1 ASI Muhammad Ramzan and PW-2 Syed Imtiaz Hussain which are :-

PW-1 ASI Muhamamd Ramzan

'I see Ex.7/A and say that it only refers to dacoity. ... It is a fact that **names of accused nowhere transpires in 174 Cr.P.C. proceedings.** It is a fact that contents of Ex.7/C reveals that two culprits caused dacoity **but their names are not mentioned therein.** '

PW-2 Syed Imtiaz Hussain

'It is correct that in my statement U/s 154 Cr.P.C it is mentioned that only information of robbery was given to me by Mst. Amber Shaikh. **It is correct that I also informed police about the robbery only and not about the murder of deceased.** It is correct that in colum No. ___ inquest report produced at Ex.8/B **names of accused persons is not mentioned specifically.** It is correct that during inspection of dead body of deceased Churi wwere recovered in my presence. It is correct that ame of accused Faraz does not transpire in memo of inspection of dead body produced as Exh.7/C. **ASI Ramzan reached at place of incident at about 1300/1345 Hours. About one hour or one and half hour was consumed to completing the proceeding U/s 174 Cr.P.C.'**

The above, *prima facie*, makes it clear that the version of the PW-Riffat Shaheen (Iffat Shahid) was / is not finding support from the evidences of said witnesses but also from the proceedings, so completed within one or

one and half hour time by ASI Muhammad Ramzan (PW-1). I have to insist that proceedings U/s 174 Cr.PC could only follow under circumstances, detailed by provision *itself*, which are discussed in the case of Muhammad Rafique alias Feeqa v. State (2019 SCMR 1068) as :-

'8. The time-tested procedure set in place for the preservation of crime evidence under the Cr.P. C and the Police Rules, 1934(Rules) is essentially for its prompt recovery and safe custody till its secure production in evidence during the trial. The enabling provisions of the Cr.P.C. and the Rules envisage a chain of safe police custody of recovered crime evidence, which not only ensures the preservation of the recovered evidence but also provides credence to the investigation carried out by the investigating officer. In regard to the unnatural death of a person, section 174 of the Cr.P.C, inter alias, provides that the competent police officer, on receiving information of a person having committed suicide, or having being killed by another, or having died under circumstances raising reasonable suspicion that some other person might have committed an offence, is to proceed to the place where the dead body is lying, and after making requisite investigation, prepare his report of the apparent cause of death, the nature of wounds, fractures, bruises and other marks of injury that are inflicted on the dead body, and also stating what weapon or instrument, if any, might have caused the same. In case the competent police officer has doubt about the cause of death, he shall under section 174(3) of Cr.P.C, forward the dead body along with the duly filled in prescribed form (Form No.25.39 of the Rules), to seek a written opinion of a Civil Surgeon or notified Medical officer, regarding the cause of death of the said dead person. The mode and manner in which the dead body is to be taken into custody, retained and then forward for the aid examination of the medical officer has been prescribed under Rule 25.37 of the Rules. The relevant provisions of the aforementioned laws read as under :-'

'10. Thus, once there is suspicion regarding the death of a person, the following essential steps follow : firstly, there is a complete chain of police custody of the dead body, right from the moment it is taken into custody until it is handed over to the relatives, or in case they are unknown, then till his burial ; secondly, post mortem examination of a dead person cannot be carried out without the authorization of competent police officer or the magistrate ; thirdly, post mortem of a deceased person can only be carried out by a notified government Medical Officer ; and finally, at the time of handing over the dead body by the police to the Medical Officer, all reports prepared by the investigating officer are also to be handed over to the said medical officer to assist his examination of the dead body.

11. It is usually the delay in the preparation of these police reports, which are required to be handed over to the medical

officer along with the dead body, that result in the consequential delay of the post mortem examination of the dead person. To repel any adverse inference for such a delay, the prosecution has to provide justifiable reasons therefor, which in the present case is trikingly wanting.'

9. If the death was committed during dacoity then it was never a case for proceeding u/s 174 Cr.P.C, particularly when the culprits of such murder were also known to the PW-2 Syed Imtiaz Hussain and PW-6 Riffat Shaheen (Iffat Shahid). Needless to add that detail in relevant column of the proceeding U/s 174 i.e Column-18, the PW-1 ASI Muhammad Ramzan himself stated as :-

'(18) Brief facts of the case.

Brief facts of the case are that I, the ASI Muhammad Ramzan being busy vide previous report No.27 daily dairy of P.S Darakshan and reached at Bungalow no.D-48 Darakshan Villas Phase-6 DHA Karachi where I met with Muhammad Arif s/o Meer Hussain r/o House No.27/7 Civil Line Karachi, who disclosed that their police guard is posted as constable in Sindh Police, whose name as Hakim Ali s/o Ghulam Qadir, **who was killed during dacoity and his dead body is available in the store room of above inside bungalow of place of occurrence.'**

Abnormal silence in disclosing the names of culprits was / is always reflecting seriously upon whole case of the prosecution, particularly when the same resulted in wrong proceeding U/s 174 Cr.PC but it was not properly appreciated by the learned trial court.

Though the said witness (PW-Riffat/Iffat) reiterated the prosecution case but surprisingly answered in her cross-examination that:

'... No police officer met to me immediately after the incident at the said bungalow. I do not know as to what proceeding was made by police at place of occurrence on the day of incident. **It is correct that no Churi were recovered in my presence.** It is correct that police did not record my statement immediately after they reached at place of incident. I did not give my statement to police in writing, but it was written by the I.O in his own hand writing on my narration. '

10. The learned trial court failed in appreciating that if the witness was available with Mst. Amber Sheikh and had not gone downstairs then how it could be believed that 'Churi', allegedly recovered from roof of Mst. Amber Sheikh, was not witnessed by her ?. Further, per PW-8 Muhammad Mubeen :-

'... I also recorded further statement of complainant at place of incident, so also I recorded statement U/s 161 Cr.P.C. of Mst. Iffat, Mst. Amber Shaikh and PW Arif at place of incident'

It is unbelievable that though number of police officers came at the spot, one for completing proceedings u/s 174 Cr.PC while other for investigation of the FIR but none met with the said PW who, otherwise, was one of the victims. Further, learned trial court believed the presence of the witness as natural while observing as :-

'The presence of PW-06 Mst. Iffat Shahid being niece and guest of Mst. Amber Shaikh at the place of incident is natural and cannot be doubted. ...'

The witness had claimed in her examination-in-chief that :

'This incident took place on 30.11.2013. On the same date I had gone to reside as guest in the house of my aunty (Phuphi) namely Amber Afreen Sheikh. On the same date around 1100 hours in day time my Phupho was sleeping her master bedroom, while I was sleeping on the other bedroom.'

The learned trial court failed in appreciating that the chance witness is the one, who, in normal course is not supposed to be present on the crime spot unless he/she offers cogent, convincing and believable explanation, justifying his presence, as held in the case of Mst. Rukhsana Begum & Ors v. Sajjad & Ors (2017 SCMR 596). It was further held in the same case that :-

'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.'

The learned trial court while answering to undeniable position that murder was unwitnessed, observed as :-

'So far the contention of learned defence counsel that there is no eye witness of the alleged murder is concerned, therefore, the allegation of murder and robbery against the accused persons cannot be proved by the prosecution is concerned, I am of the humble view that at the place of incident, there were only five persons available at the bungalow at the of occurrence i.e Mst. Amber Shaikh, owner of the house, PW-06 Mst. Iffat Shahid, security guard PC Hakim Ali and accused Faraz being driver of Mst. Amber Sheikh and his wife Mst. Ruqiya being made servant in the same bungalow. PW-06 Mst. Iffat Shahid, while security guard PC Hakim Ali is the deceased, however, remaining two persons are accused Faraz Bhatti and his wife Mst. Ruqiya and as per evidence of PW-06 Mst. Iffat Shahid, accused Faraz Bhatti put blood stained 'Churi' on her neck while committing robbery and extending threat that they had already committed murder of security guard Hakim Ali and if she did not keep quiet he would also commit her murder. Moreover, proximity of the time of incident of robbery as well as time of alleged murder shows that the murder of deceased has been committed in the sequence of commission of robbery, as the incident of alleged robbery is said to have been committed at about 1100 hours, which is the time of commission robbery. No other person is said to have been entered the place of incident from outside at the time of occurrence and presence of accused persons at the place of incident at the occurrence is very natural as both of them are said to be employees of Mst. Amber Shaikh, owner of the bungalow.'

The learned trial court failed in appreciating that both the accused persons had denied their status as servants at the bungalow, therefore, it was obligatory upon the prosecution to have *first* brought some material in support of their such claim. In this regard, what came on surface through cross-examination is :-

PW-02 Syed Imtiaz Hussain

'It is correct that driving licence of accused Faraz Bhatti was not recovered in my presence. It is correct that Mst. Amber Sheikh did not show me the driving license of accused Faraz. It is correct that in column No.--- inquest report produced at Ex.7/B name of accused persons is not mentioned specifically. ... It is correct that name of accused Faraz does not transpire in memo of inspection of dead body produced as Ex.7/C....**It is correct that I did not know accused Faraz Bhatti prior to this incident.**'

PW-06 Iffat Shahid

'It is correct that I have not produced any documentary proof to show that accused Faraz was working as Driver my my Phupho.'

PW-08 Inspector Muhammad Mubeen.

'It is correct that dring site inspection I could not find any documentary proof showing that accused Faraz Bhatti was driver of Mst. Amber Shaikh'

The above admission (s) always bring cloud over such claim of the prosecution, particularly when it is matter of record that the *first* informant namely **PW-2 Syed Imtiaz Hussain** stated in his cross-examination as :-

'I did not informed (inform) 15 police immediately after receiving phone from Mst. Amber. Vol. says that I came to place of incident first after receiving phone call. **It is correct that in my 154 Cr.P.C it is mentioned that only information of robbery was given to me by Mst. Amber Shaikhh.** ..It is correct that I also informed police about the robbery only and not about the murder of deceased. ... It is incorrect to say that Mst. Amber Sheikh informed that she had hired both the accused persons few days prior to incident. **Vol. says she inform me this fact when I went to visit her house on her phone call.**'

It is worth adding here that the said PW-2 Syed Imtiaz Hussai *admittedly* informed the police after meeting with both the witnesses i.e Mst. Amber Sheikh and Iffat Shahid yet while coming into *first* contact with ASI Muhammad Ramzan he (PW-2 Syed Imtiaz Hussain) did not name both accused persons for committing murder and robbery nor claimed that same were done by the **servants of Amber Sheikh**. The said PW-1 ASI Muhammad Ramzan admitted in his cross-examination as :-

'I see Ex.7/A and say that it only refers to dacoity. The place of occurrence from the PS is 2 t 2 ½ k.ms. **I arrived there at 1500 hours, met with Imtiaz who disclosed / narrated the facts prepared such mashirnama of dead body. It is a fact that names of accused nowhere transpires in 174 Cr.PC proceeding. It is a fact that Ex.7/C reveals that one of the Mashir was Imtiaz Hussain. It is a fact that contents of Ex.7/C reveals that two culprits caused dacoity but their names are not mentioned therein.**'

I am unable to appreciate that if the complainant Syed Imtiaz Hussain had learnt about the names of the accused persons as well their status as *servants of Amber Sheikh* then what had prevented him from not disclosing such fact

to the PW-1 ASI Muhammad Ramzan who, *undeniably*, reached at spot *first* and consumed more than 30 to 45 minutes there while completing formalities. This was never *properly* appreciated by the learned trial court while believing the subsequent rather *improved* version of the prosecution whereby names of the accused persons were *first* introduced couple with their status as *servants of Amber Sheikh*. There came nothing on record to prove that both accused persons were working as *servants* with Amber Sheikh hence without proof thereof it was never safe to believe such claim, particularly when, as discussed above, their names were subsequently introduced which could be nothing but an outcome of deliberation. Reliance is place on the case of *Mst. Yasmeen v. Javed & another* (2020 SCMR 505) wherein it is observed as :-

‘3. Even if delay in conducting the postmortem examination on the dead body of deceased, in the circumstances of the case, is ignored, the fact remains that in the relevant column of inquest report ‘brief istory of crime’ nothing is mentioned regarding facts of the case despite the claim of prosecution that matter was reported to police within three hours of the occurrence i.e in the intervening night of 19/20.02.2005 at 1.00 a.m (night). This circumstance alone casts serious doubt about the veracity of prosecution case against the respondent and the claim of the eye-witnesses Mst. Yasmeen (PW5) and Mst. Kabalo (PW6) to have witnessed the occurrence.’

The learned trial court also believed the recovery of crime weapon i.e ‘*churri*’ from the place of incident as corroboration to ocular account while observing as :-

‘The prosecution has also relied upon crime weapon i.e ‘Churri’ from the place of incident, which has been corroborated by complainant Imtiaz Hussain and investigating officer inspector Mubeen , so also it has been strngthened by PW-06 Mst. Iffat Shahid, while deposing that accused Faraz Bhatti put blood stained ‘Churri’ at her neck and also shown the said blood ‘Churri’ to Mst. Amber Sheikh, while committing robbery.’

Though, as cross-examination of the PW-8 Inspetor Muhammad Mubeen :-

‘It is correct that the recovery robbed articles and ‘Churri’ are not present in court today. Vol. say the robbed articles were returned to owner by the court, while the remaining case property was burnt in Fire incident of City Court Malkhana. It is correct that I have not

produced any proof to show that the case property was return (returned) to its owner by the court. It is correct that I have not produced the roznamcha entry and FIR and Roznamcha entry of Fire incident of City Court Malkhana. It is incorrect to say that the case property has never been produce (produced) before the court even prior to fire incident of City Court Malkhana. I do not remember the date of productino of said case property before the court of Learned IIIRD Additional Sessions Judge Karachi South. It is incorrect to say that as per case diaries i have never produce the case property before any court. Vol. say that it was produced by Mst. Amber Shaikh. It is incorrect to sayh that I am deposing falsely, as Mst. Amber Shaikh is not residing here.'

As per examination-in-chief of PW-2 Syed Imtiaz Hussain :-

'The case property of this case has been burnt in the fire incident of City Court Malkhana , regarding which FIR No.123/2018 and roznmacha entry No.06 dated 11.04.2018 have been lodged at P.S City Court which I produce at Ex.8/B and Ex.8/C respectively while the robbed jewelry items , wich was recovered are lying with Mst. Ambar Afrehn Shaikh, who has gone to United States of America.'

He, however, admitted in his cross-examination as :-

'It is correct that there is no mentioned of case property of this case in roznamcha entry produce at Ex.8/C. It is correct that neither I am signatory of author of documents produced at Ex.8/B and Ex.8/C.'

The above reproduction, *prima facie*, shows that the allegedly recovered 'Churri' was never produced in court nor was confronted to the accused persons hence no reliance case, *safely*, be placed on such a piece of evidence which was neither produced nor was confronted to the accused. Thus, approach of learned trial court for believing such piece of evidence, I am to insist, is not in accordance with settled principle of appreciation of evidences.

11. There had been another *serious* aspect in the instant matter i.e '*removal of the deadbody*' by ASI Muhammad Ramzan to hospital while claim of PW-8 Inspector Muhammad Mubeen to have seen the deadbody at time of site inspection. For this, the learned trial court responded as :-

'During argument, learned counsel for accused Faraz Bhatti raised contention that as per evidence of PW-01 ASI Muhammad Ramzan he initiated proceedings under section 174 Cr.P.C, and prepared memo of inspection of dead body and inquest report at the place of incident and shifted the dead body to JPMC through Cheepa ambulance, whereas according to evidence of PW-08/Investigting officer inspector Muhammad Mubeen, he found the dead body of PC Hakim Ali with cut neck in the store room of bungalow No.D-48, DarakshanVillas, DHA, Phase-V while there is much difference of

time between conducting proceedings under section 174 Cr.PC by ASI Muhamamd Ramzan and conducting site inspection by inspector Muhammad Mubeen , as proceeding under section 174 Cr.P.C were conducted at about 1510 hours, while the site inspection was conducted at 2230 hours, therefore, evidence of both the above named PW sis very much contradictory. But, I am afraid that I may not be in agreement with the said contention of learned defence counsel, as it is admitted by PW-01 ASIP Muhammad Ramzan in his evidence that he shifted the dead body to JPMC through Cheepa ambulance, which is evident from the letter submitted by ASIP Muhammad Ramzan to the MLO for conducting the post mortem of the deceased, which is produced at Exh.07/D. It is also admitted fact that PW-08 Inspector Muhammad Mubeen deposed in his evidence that during site inspection, he found the dead body of the deceased PC Hakim with cut neck in store room of said bungalow, but his such statement is not corroborated by memo of site inspection prdouced at Exh.8/A, meaning thereby the proceedings under section 174 Cr.P.C were conducted and the dead body of the deceased was shifted to Jinnah Hospital earlier than the site inspection and as per memo of site inspection produced at Exh.08/A, the dead body of deceased was not found at the place of incident, however, blood marks were found therel; **as such the statement of investigating officer inspector Muhammad Mubeen that he saw dead body of the deceased at the place of incident during site inspection might be thinking of misunderstanding or mixing of fact, due to lapse of time as the incident pertains to year 2013.**

Such approach of the learned trial court appears to be in complete disregard to what, in fact, was claimed by the PW-08 Inspector Muhammad Mubeen. The said PW not only had stated that he found the deadbody there but had also claimed to have taken as many as '*nine photographs of deadbody*' which, too, he produced during his examination-in-chief. The relevant portion thererof reads as :-

' ... During site inspection I found the dead body of deceased Hakim with cut neck in the stotre room of bungalow number D-48 Darakshan Villas DHA Phase VI. I also captured three photographs of place of incident which I produce at Ex.15/B, 15/C and 15/D respectively. **I also captured 09 photographs of deceased, which I produce at Ex.15/E, Ex.15/F, Ex.15/G, Ex.15/H, Ex.15/I, Ex.15/J, Ex.15/K, Ex.15/L, Ex.15/M respectively.**

These photographs are available on the file and a bare perusal thereof shows that the same were taken in the store-room as things appearing in such photographs prove so, therefore, the learned trial court was completely wrong while taking such admission of the PW-8 Inspector Muhammad Mubeen as *misunderstanding or mixing of fact*.

12. The above, I shall insist, casts serious doubt about the removal of the deadbody as well conduct of the postmortem at claimed time because as per PW-1 ASI Muhammad Ramzan :

‘..I after completion of formalities at hospital came to the place of occurrence viz Bungalow No.D-48, where I recorded 154 Cr.PC statement of Syed Imtiaz Hussain who was the cousin of owner of the bungalow and were not in Pakistan. I incorporated the contents of 154 Cr.P.C in roznamcha and thereby in the FIR book as verbatim. **After registration of FIR I handed over all the material articles viz. Clothes, documents, handed over to me by the MLO for further investigation.**’

The investigating officer was to appear when investigation was entrusted to him, as was admitted by him in his examination-in-chief, as :-

‘I am investigation officer of this case. On 20.11.2013 I was posted as Inspector / SIO of PS Darakshan Karachi. **On the same date I received FIR of this case, Proceeding U/s 174 Cr.PC, Sealed parcel of wearing clothes of deceased and Certificate of cause of death for the purpose of investigation at about 2100 Hours. Thereafter proceeded to visit the place of incident and conducted site inspection in presence of Imtiaz and Arif between 2100 Hours to 00200 Hours on 21.11.2013.**’

yet the deadbody was not only found by him but he (PW-8 Inspector Muhammad Mubeen) captured as many as 09 photographs of deadbody, lying in store-room. This, *prima facie*, was always creating a serious doubt towards the claims of the prosecution rather was reflecting that things were later arranged. Guidance is taken from the case of *Muhammad Rafique alias Feeqa v. State* 2019 SCMR 1068 wherein it is held as :-

‘7. Such unexplained delay in the post mortem of a deceased would surely put a prudent mind on guard to very cautiously assess and scrutinize the prosecution’s evidence. In such circumstances, the most natural inference would be that the delay so caused for preliminary investigation and prior consultation to nominate the accused and plant eye-witnesses of the crime. In similar circumstances, this Court, in the case of *Irshad Ahmed v. The State* (2011 SCMR 1190) observed that **the noticeable delay in post mortem examination of the dead body is generally suggestive of a real possibility that time had been consumed by the police in procuring and planting eye-witnesses before preparing police papers necessary for the same.** This view has been followed by this court

The learned trial court also believed recovery, allegedly effected from the possession of the accused, while observing as :-

‘...On this score PW-2/SIP Muahammad Rasheed examined at Ex.09, who deposed that on **27.06.2014, he was serving at PS Darakshan**, Investigatig officer inspector Muhammad Mubeen took him, SIP Amjad Pervaiz, ASi Muhammad Akram, ASI Imtiaz, PCYasir and PC Abdul Sattar left the PS for arrest of offenders and recovery of robbed articles. Inspector Muhammad Mubeen received spy information that accused of this crime namely Faraz Bhatti and Razia @ Ruqia were available at crossing of 26th Commercial Street Khayaban-e-Shamsher, DHA, Karachi. He further deposed that the spy informer informing them came to pointed place at about 0030 hours and identified both the above accused, who were caputred by them and during personal search of accused Faraz, inspector Muhamamd Mubeen recovered one 30bore pistol having five live rounds so also one blue color shopping bag containing one pair of gold earrings (Jhumkas), three pairs of gold earrings, one complete jewelry set with black stones, one ring of white gold, four rings of gold from pocket of his shirt and further he recovered copy of CNIC, one photograph of both accused and cash of Rs.1260/- from wallet of accused Faraz. He further deposed that on personal search of female accused Razia conducted by ASI Faiza of their police party, 14 gold bangles, one gold jewelry set and gold chain, her original CNIC, one Nokia mobile phone and cash of Rs.570/- lying in the hand bag with her were recovered. Inspector Muhammad Mubeen arrested both the accused under a memo while appointing him, SIP Amjad and private person Muhammad Arshad Ayub mashirs whereupon they all signed. Then, they took accused and recovered property to PS where inspector Mubeen joined them in this case, so also he lodged seperate case against accused Faraz for going armed without license. He further deposed that thereafter, on 02.07.2014, accused Faraz Bhatti led them headed by inspector Muhammad Mubeen to his house bearing No.737, bhitali Colony, Sector-E,Shamoon Paara Karachi wherefrom he produced one mobile phone of Nexus brand which was taken into custody under a memo, which he produced at Ex.09/B. He further deposed that the gold jewelry recovered from the accused has been released on Superdari, while mobile phone, one pistol and three live bullets and mobile phones were produced at article 1 to 14, which he identified to be the same’

The incident happened on **20.11.2013** while *surprisingly* both the accused persons were wondering *jointly* with robbed articles after more than **six (06) months** which is quite abnormal and against the conduct of a prudent mind. It was / is also unbelievable that the accused persons kept such *articles* with them. However, it is matter of record that robbed articles, allegedly recovered, from the possession of the accused persons, were never produced before the learned trial Court hence were never confronted to them yet the learned trial court believed such recovery for convicting the accused persons

on a capitable charge. Things not produced as *evidence* and not confronted to the accused during his / her examination under section 342 Cr.PC can't be used against the accused persons. Reliance is placed on the case of Qaddan & ors v. State (2017 SCMR 148), wherein legal position i.e :-

'3. ... The law is settled that a piece of evidence not put to an accused at the time of recording of his statement under section 342, Cr.P.C. cannot be considered against him.'

was affirmed. This legal position, however, was never appreciated by the learned trial court. Be that as it may, here one thing is quite surprising that the investigating officer had claimed in his examination-in-chief as :-

'.. Mst. Amber Shaikh provided cell phone numbers of accused Faraz Bhatti and Mst. Ruqaiya alias Razia. Thereafter, I collected copies of CNICs of accused Faraz Bhatti at Ex.15/N and Mst. Razia Bibi at Ex.15/O respectively. ... Thereafter I submitted application for publication in newspaper against accused Faraz Bhatti and Mst. Razia to SSP investigation which I produce at Ex.15-T. I also produce the such publication to newspaper Daily Kawish dated 12.12.2013 at Ex.15/U, in Daily Dawn dated 13.12.2013 as Ex.15-V and in Daily Jung dated 12.12.2013 at Ex.15/W...'

From above portion of examination-in-chief of said PW Inspector Muhammad Mubeen (I.O) it is evident that he shortly had laid his hands on CNIC of accused Faraz wherein his (*accused Faraz's*) address is mentioned as :-

'Taluka and District Maleer, E-H.No.737 Mohallah Bhattai Colony, Korangi Crossing, Sector Karachi, Taluka & district Maleer'

This is the same address on which the accused Faraz Bhatti and Razia alias Ruqayia were residing *even* at time of their address and even accused Faraz Bhatti led the police party there after his arrest, as is evident from evidence of PW-2 SI Muhammad Rasheed, which reads as :-

'.. Accused then led us to his house bearing No.737, Bhitai Colony, Karachi Crossing, Sector-E, Shamoan Padry. On his ringing bail mother of accused opened the door. Then accused led us to one room of house and opened middle drawer of TV trolley and took out one mobile phone of Nexus brand and handed to Inspector Mubeen while alleging that they had robbed it from the bungalow No....'

This shows that the accused Faraz continuously was residing there but the investigating officer, despite knowledge of such address (through obtained CNIC of accused Faraz, as claimed) never bothered to visit such place even. This, *even*, was not appreciated by learned trial court properly though was / is floating on surface. Even otherwise, the articles, so produced before trial court, including 30 bore pistol, bullets ets, were not the '**crime weapon**' nor were the '**incriminating piece of evidence of case**' hence recovery thereof, even if believed, can't advance the instant charge. Guidance in support to such conclusion is taken from the case of Sardar Bibi & another v. Munir Ahmed & Ors 2017 SCMR 344 (Rel. P-350) wherein it is held as :-

'Although, the High Court considered the recovery of pistol from Falak Sher as corroborative piece of evidence but we observe that in the FIR no specific weapon was shown in the hands of the appellant Falak Sher. Even no crime empty of 30 bore was recovered from the place of occurrence and there is no positive report of FSL regarding matching of any crime empty with the allegedly recovered pistol from Falak Sher. So the said recovery is inconsequential and cannot be considered as the corroborative piece of evidence. ...'

Since, the learned trial court *itself* excluded the alleged confession (164 Cr.P.C) statement of the accused Razia alias Ruqiya while hold it as :-

'... therefoe, in the above circumstances, statement under section 164 Cr.PC of accused Mst. Razia produced at Exh.11/B, would have no legal sanctity in eyes of law.'

Therefore, same needs no further discussion. However, what compells me to refer cross-examination of the learned Civil Judge & JM Mr. Noor Muhammad Kalmati (PW-5) is to make legal position clear. The relevant porition reads as :-

I recorded the statement of accused on the very same date on which the I.O submitted application for recording such statement. I had not provided any time to the accused for reflection. It is correct that I did not informed (inform) accused prior to recording her statement that if she gave any statement, the same can be used again (against) her. I did not asked (ask) any question from the accused during recording here statement under sectio 164 Cr.P.C. Vol. says I have recorded the statement of accused Mst. Ruqia under section 164 Cr.PC as witness

and not as an accused. It was in my knowledge that Mst. Ruqaiya was an accused in this case. Vol. says that under Rule 25.28 of Police Rule statement under section 164 cr.P.C. of an accused can be recorded during the investigation as a witness. It is incorrect to say that the statement of an accuse dis not to be recorded U/s 164 Cr.PC as a witness according to law. It is incorrect to say that I have violated and not followed the requirements of recording statement under section 164 Cr.P.C.'

The admission of said PW to *first* question makes it clear that he (Magistrate) was going to record statement of the **accused** and not of the **witness** therefore, the learned Magistrate was never left with any option to *strictly* follow the procedure, so guided under relevant rules and guidance, provided by this Court and Apex Court, hence the manner in which the learned Magistrate behaved and acted while recording statement of the accused under section 164 Cr.PC. is quite surprising and should not be repeated by those, performing such jurisdiction, as Magistrate. Reference to case of Azeem Khan & another v. Mujahid Khan & ors 2016 SCMR 274, being necessary is made hereunder:-

'15. 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 Investigation 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 then 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 was 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 the answers given, be recorded in the words spoken by him. The statement of accused be recorded by the Magistrate with his own hand and in case there is a genuine 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 understand and thereafter a certificate, as required under section 364, Cr.P.C with regard to 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 police uniform, or any other police official / office, because such careless dispensation would considerably diminish the voluntary nature of the confession, made by the accused.'

There is no other piece of evidence which the learned trial court discussed in support of his conclusion. The above pieces of evidence, as discussed, was / is full of dents hence such pieces of evidences were / are not strong enough to hold the conviction because any other view would fail the settled principle of law i.e 'If a single circumstance creates reasonable doubt in a prudent mind about the apprehension of guilt of an accuse,d then he/she shall be entitled to such benefit not as a matter of grace and concession, but as of right', as reiterated in the case of Asia Bibi v. State (PLD 2018 SC 64).

13. These are the reasons of the short order dated 15.04.2021 whererby the appeal was allowed ; judgment of trial court was set-aside and the appellant was acquitted of the charge.

J U D G E

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