

JUDGMENT SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Criminal Appeal No.S-152 of 2023

Criminal Appeal No.S-155 of 2023

Criminal Appeal No.S-156 of 2023

Criminal Jail Appeal No.S-154 of 2023

Appellants: Asadullah and Sajjad Ali [Criminal Appeal No.S-152 of 2023] through M/s. M M Aqil Awan, Hameedullah Dahri and Danish Rashid, Advocates.

Ashique Ali [Criminal Appeal No.S-155 of 2023 & Cr. Jail Appeal No.S-154 of 2023] through Mr. Irfan Khaskheli, Advocate.

Saleemullah [Criminal Appeal No.S-156 of 2023 & Cr. Jail Appeal No.S-154 of 2023] through Mr. Noorul Haque Qureshi advocate along with Mr. Saad Salman Ghani, Advocate.

Respondent: The State through Ms. Rameshan Oad, Assistant Prosecutor General Sindh.

Complainant: Mehboob Ali through Syed Shafique Ahmed Shah, Advocate.

Date of hearing: 25.01.2024 & 12.02.2024.

Date of Decision: 04.03.2024.

J U D G M E N T

Amjad Ali Sahito, J. Since the above named appellants have filed their respective appeals against their convictions and sentences by challenging the one and same judgment, as such, all these appeals are being disposed of by this single judgment.

2. In terms of impugned judgment dated 23.08.2023, passed by the learned trial Court/Additional Sessions Judge-I/MCTC, Matiari in S.C. No.23/2020, Crime No.75/2019 for the offences under sections 302, 201, 34 PPC registered at PS

Shahpur, the appellants were convicted under section 302 (b) PPC read with section 34 PPC as Ta'zir for committing murder of deceased Asif Ali and sentenced them to suffer Imprisonment for life and to pay compensation of Rs.200,000/- each as compensation under section 544-A Cr.P.C. to the legal heirs of deceased; in default whereof, to suffer S.I. for six months more. They were also convicted for the offence u/s 201 PPC read with section 34 PPC and sentenced them to suffer R.I. for seven years and to pay fine of Rs.50,000/- each; in default whereof, to suffer S.I. for two months more. However, both the sentences were ordered to run concurrently. Benefit of section 382-B Cr.P.C was extended to the appellants.

3. Briefly the facts of the case lodged on 01.08.2019 by the complainant namely Mehboob Ali at PS Shahpur alleging therein that his younger brother namely Asif Ali besides Zamindari was carrying the business of onion seed and used to visit Nasarpur and Hala for such business; and used to take the onion seed from merchant namely Ali Muhammad @ Alu Barejo at Nasarpur. As per complainant, on 29.07.2019 at 09.00 a.m. while his relative Ali Asghar and brother Asif Ali were available at their house, Asif Ali left the house by saying that he would go along with his friends from Sakrand towards Nasarpur to take the onion seed from Ali Muhammad. He proceeded to Sakrand towards his friends. At the evening time, complainant tried to contact with his brother Asif Ali on his cell numbers viz. 0300-0355984 & 0300-3766802, but his cell phone was found switched off. Subsequently the complainant made contact with Ali Muhammad @ Alu Barejo, who on query disclosed that at about 12:00 noon Asif Ali contacted him on mobile phone and told that he along with his friends was going to Jam Datar to see the land of Brohi community and then he would come to him. Said Ali Muhammad further informed the complainant that after some time he repeatedly dialed the cell number of Asif Ali but could not make any contact. On such disclosure, the complainant made search and also informed at PS Bachalpur

about the missing report of his brother. One day before lodging of the FIR, complainant came to know through social media about the recovery of an unidentified dead body by police of PS Shahpur. Accordingly, complainant approached PS Shahpur where saw the photographs of dead body of an unknown person who was identified as his brother namely Asif Ali. The complainant came to know that after postmortem the police handed over the dead body to Edhi Centre Khursheed Town Hyderabad who buried the same. Hence, instant case was lodged against unknown culprits.

4. After registration of FIR, the complainant filed application for handing over the dead body of his brother for burial, as such, on his application, the dead body of deceased who buried at Tando Yousif graveyard Hyderabad after exhumation was handed over to him. Police, visited place of wardat, prepared such memo, recorded 161 Cr.P.C. statements of P.Ws. Further statement of complainant was recorded on 04.08.2019 wherein he has nominated accused Saleemullah and Ashique Ali to be involved in the instant case, who were arrested by police on 07.08.2019. Again further statement of complainant Mehboob Ali was also recorded on 06.12.2019 whereby he also implicated accused Asadullah and Sajjad Ali. Investigating Officer collected provisional and final postmortem reports, Histopathology report and DNA report, chemical report regarding clothes of deceased etc, report of ETO concerned regarding car used in the crime, chemical report regarding iron wrench, prepared sketch of place of incident etc. and after completing the investigation of the case, the police report under section 173 Cr.P.C(challan) was submitted by the Investigating Officer against the accused before the court of concerned Magistrate showing the names of accused namely Asadullah and Sajjad Ali in column No.2 of the report. However the learned Magistrate did not agreed with the police report and took cognizance against all accused person including accused who have been shown in column No.2.

5. A formal charge framed against the accused was framed, to which they did not plead guilty and claimed their trial.

6. In order to establish its case, the prosecution has examined PW-1 complainant Mehboob Ali; PW-2 Ali Asghar; PW-3 Sadam Hussain; PW-4 Allah Obhayo (eyewitness); PW-5 Muhammad Ramzan; PW-6 Ali Muhammad @ Alu; PW-7 ASI Muhammad Ibrahim (First I.O.); PW-8 SHO Shah Zaman (Second I.O.); PW-9 P.C. Dhani Bux; PW-10 Ayaz Ali (mashir); PW-11 Tapedar Abdul Karim; PW-12 Dr. Zohaib Hassan. The prosecution witnesses produced numerous documents. Thereafter prosecution closed its side through statement.

7. Statements of the appellants were recorded under section 342 Cr. P.C, wherein they denied the prosecution allegations levelled against them and claimed their innocence and false implication due to matrimonial dispute. However, neither they examined themselves on oath nor led defense evidence.

8. Learned trial Court, after hearing the learned counsel for the parties and going through the material brought on record, awarded convictions and sentences to the appellants through the impugned judgment as stated above, which the present appellants have impugned before this Court by way of filing their respective appeals.

9. Learned counsel for appellant Saleemullah, who is main accused, has contended that the complainant is not eyewitness of the incident, however, he came to know through social media regarding recovery of an unidentified dead body by the police of PS Shahpur Darpur then through photograph he identified the same being his brother and received dead body from Edhi Centre Hyderabad (graveyard of Edhi); that as per PW Ali Asghar he made investigation from Sakrand and came to know that appellants Saleemullah and Ashique Ali in connivance with each other called deceased Asif Ali fraudulently on the pretext to purchase seed from Sakrand and then took him in

white colour Mehran car and on the way committed his murder, thrown his dead body at sugarcane crop on Nasarpur link road via Oderolal Station they also caused injuries to the deceased on his head and also strangulated him with towel. He further contended that police recorded further statement of complainant wherein he stated that on 30.11.2019 he was present at his village, where Allah Obhayo Bughio and Muhammad Ramzan Chandio came and disclosed that on 29.07.2019 at about 02.00 p.m. while were present at Nasarpur to purchase onion seed, they saw everyone accused Saleemullah, Ashiq Ali, Asadullah and Sajjad were extending harsh words with Asif Ali and accused Ashiq caused iron rod blows on the backside head of Asif Ali, who fell down on the ground, accused Saleemullah Strangulated Asif with towel while accused Asadullah caught hold Asif by his legs and accused Sajjad caught hold by his arms. He further contended that during search complainant party did not find any clue about people of Brohi community whose land was to be visited by deceased as per version of Ali Muhammad alias Aloo; that the complainant in his further statement dated 04.08.2019 has not disclosed the source of information regarding involvement of accused Saleemullah and Ashique Ali nor has disclosed the date, time and place of information; that Allah Obhayo and Muhammad did not meet with complainant till 30.11.2019 nor to any of his relative; that it has been admitted that sister of accused Sajjad Ali, who is cousin of accused Saleemullah is wife of complainant; that PW Ali Asghar admitted that he did not disclose the names of villagers who informed him about involvement of the accused in the murder of deceased Asif Ali neither before police nor in his 164 Cr.P.C. statement even he did not disclose the date, time, place as well as names of the villagers; that as per PW Saddam Hussain on 29.07.2019 he accompanied Hussain Bux went to meet Raees Ali Nawaz Chandio at his otaque in Sakrand and he found relative Asif Ali, Saleemullah and Ashique Ali Dahri already there at Siyal Hotel and it was 09.00 a.m. He also admitted that in his 161 and 164 Cr.P.C. statements he has not disclosed that he informed the

complainant or his relative about deceased in company of accused at Sakrand Siyal hotel, as such, question arises why he remained silent uptill 03.08.2019 and when he informed the complainant then why complainant produced him on 09.08.2019 and such delay is one of the aspects to create doubt in the story set up by the complainant. Learned counsel has further contended there is admission in the prosecution evidence regarding matrimonial relations between complainant and accused Saleemullah and Sajjad. Lastly, learned counsel has contended that there are material contradictions in the evidence of prosecution witnesses and it is the duty of prosecution to prove its case beyond reasonable shadow of doubt. In support of his contentions, he has relied upon the cases reported in 2001 SCMR 14, 2021 MLD 408, 2007 YLR 534 and 2008 YLR 1891.

10. Learned counsel for the appellant Ashique Ali in addition to the arguments as advanced by the learned counsel for the appellant Saleemullah has added that it has come on record that the recorded USB did not show the presence of accused Ashique Ali at the place of incident. He further added that the appellant Ashique Ali was implicated falsely despite fact that he was not aware of the commission of offence; that the alleged incident had taken place on 29.07.2019 however, FIR has been lodged on 01.08.2019 after two days unexplained delay; that further statement of complainant firstly was recorded on 04.08.2019 and secondly on 06.12.2019, as such, there is delay of four months and six days in between both the further statements of the complainant; that the accused are not nominated in the FIR; however, the names of appellant Saleemullah including appellant Ashique Ali is mentioned in the further statement of complainant recorded on 04.08.2019. He further contended that there are material discrepancies in the evidence of prosecution witnesses but the leaned trial Court has not considered the same. He further contended that as per evidence of complainant he contacted with Ali Muhammad @ Aloo on his cell phone and made query regarding arrival of his

brother Asif, who replied that Asif Ali made phone call to him at about 12:00 noon and told him that he along with his friends going to Sakrand, as such, it is astonishing to believe that a person who is otherwise with his relative as per the whole story but how he will say any person that he is along with his friends; that no source of information has been disclosed by the complainant; that the complainant admitted in his evidence that he did not see the blood stain on wheel pana; however, the Chemical Examiner has analyzed the said alleged incriminating article (wheel pana) and reported it stained with human blood. According to learned counsel, PW Allah Obhayo has contradicted with a person whom he was travelling about four hours to just see the incident as he has deposed that Ramzan accompanied with him to Nasarpur many times whereas, said Ramzan deposed that it was his first time to proceed with Allah Obhayo. However, PW Allah Obhayo was unaware about the routes and Ramzan guided him from place of incident upto the Khyber whereas, on the other hand Ramzan deposed that he does not know the routes leading to Nasarpur, when they returned back from Nasarpur to village Bachalpur, Allah Obhayo knew the routes. They deposed that they saw Asif Ali was in dead condition and accused were causing blows to dead body but Ramzan deposed that they talked with Asif and requested accused to stop. Learned counsel further contended that there are several contradictions in the evidence of PWs Allah Obhayo and Ramzan with regard to the meal, stay at hotel, taking tea or taking water but Allah Obhayo deposed that they directly reached at Nasarpur; both these witnesses took different position of accused and deceased Asif Ali at the place of incident. He further contended that PW ASI Muhammad Ibrahim deposed that on 29.07.2019 at 1615 hours HC Mazhar of PP workshop made phone calls to him and informed that dead body of one unknown person is lying at the land of Shahoo Barecho, however the person who firstly saw the dead body was not examined whereas, this witness in his cross-examination has admitted that he did not ask HC Mazhar to act as complainant of the case being the

informant; that inquest report clearly mentions that informer is HC Mazhar; that as per evidence of PW ASI Muhammad Ibrahim in his cross examination he admitted that they did not secure the crime weapon viz. wrench from the car at the time of arrest of accused till their shifting to police station, therefore, the crime weapon has been foisted; that he admitted that the memo of recovery did not show the crime weapon was bloodstained; but, expert report is in positive; that at the time of evidence, video recording of the accused was not sent to forensic expert for its verification even no record/entry was produced to show that the video was kept in safe custody even nothing has come on record to show that the contents available in the USB were recorded before any independent person; that neither the mobile phone nor the USB was sealed during investigating even there was no private person at the time of recording video. Learned counsel has further contended that PW Inspector Shah Zaman deposed that on the same day he took out accused Ashique from police lockup and interrogated him, who, during interrogation disclosed that the accused Saleemullah told him that he would kill the Asif, hence, he left accused Saleemullah at Hala and went away; that despite both the witnesses were resident of 150 kilometer away from the place of dead body, as such, how they travelled and became the witness but no CDR or any proof collected by the Investigating Officer in order to show their presence at the place of incident. He further contended that it has come on record that the crime weapon wheel pana as per evidence of PW Shah Zaman was washed with water despite that the expert report is in positive and the said PW did not find any availability of eyewitnesses Allah Obhayo and Ramzan with deceased at the place of incident. Learned counsel has also contended that the final postmortem report, certificate report was changed from incised wound to lacerated wound and the medical officer has deposed the duration between death and injury immediately while during between death and postmortem stated about 24 to 30 hours and the kind of weapon has been disclosed as sharp cutting and ligature material (ROMAL). Learned counsel further

contended that when a witness has been found false with regard to implication of one accused about whose participation, credibility of such witness regarding involvement of other accused in same occurrence would be irretrievably. Lastly, learned counsel has contended that this is an un-witnessed incident and the eyewitnesses have been managed only to implicate the appellant in this heinous offence, as such, the appellant is liable to be acquitted of the charge. In support of his contentions, he has relied upon 2008 SCMR 6, 2010 SCMR 385, 2017 SCMR 344 and 2019 SCMR 631.

11. Learned counsel for the appellants namely Asadullah and Sajjad Ali mainly contended that the appellants are innocent and have falsely been implicated in the instant case; that in fact there is no eyewitness of the incident and eyewitnesses are set up witnesses notwithstanding that the accused are not known to them previously yet they nominated them with their name and parentage, as such, it is a question how they know about the names and parentage of the accused persons; that the complainant himself deposed that at the time of leaving home the deceased had cash amount of Rs.150,000/- or Rs.200,000/- and alleged eyewitness Allah Obhayo in reply to a question stated that he and Muhammad Ramzan went to Nasarpur for purchase of onion seed and at that time he had a cash amount with him, this clearly connects the alleged eyewitnesses with the commission of crime; that despite the alleged witnesses having visiting terms with the complainant party they hidden themselves for about three months without disclosure about the incident and subsequently their stance created doubt; however, in reply to a question the alleged eyewitness Allah Obhayo stated that after this incident he remained ill for about three months as such could not disclose about incident to complainant party; even if it is believed then why the other alleged eyewitness remained mum for three months; that as per version of alleged eyewitnesses that they tried to save deceased Asif Ali but accused Sajjad Ali threatened them and pointed pistol, does not appeal to the

prudent mind that a person is being murdered by someone and the person passing there from is simply seeing them as a drama and did not try to save him or make huge and cry. He further contended that though as per statements of alleged eyewitnesses the accused persons were killing the deceased in daylight time; however, except them none of the nearby villages nor any passerby had seen the incident or heard hue and cry of the deceased, which makes the prosecution case highly doubtful. He further contended that the complainant had not alleged any motive against the appellants that as to why they had committed such a heinous crime. Learned counsel has also contended that even if it is presumed that the alleged involvement of the appellants Asadullah and Sajjad Ali, then both the co-accused did not implicate them in their recorded video/USB statements though the same is not admissible. Per learned counsel, even the CCTV recording of Hotel and Petrol Pump wherein the appellants are not present. The case is not based upon any direct evidence but in order to bring the alleged FIR to logical end, police in connivance with complainant has manipulated evidence that too of interested witnesses, chance witnesses because not a single independent witness is examined. The entire story is suspicious and without corroboration of version of the complainant, learned trial Court has grossly violated, ignored, miss-appreciated the principles regulating safe dispensation of criminal justice in consideration of legal status of FIR, supplementary statements of complainant, delayed statements of PWs and erred by awarding conviction and sentence to the appellants, as such, the impugned judgment is liable to set aside and appellants Asadullah and Sajjad Ali are liable to acquitted of the charge. In support of their contentions, learned counsel have relied upon the cases reported as PLD 1979 Lahore 263, PLD 1980 Peshawar 25, PLD 1992 Supreme Court 570, PLD 2000 Lahore 216, PLD 2002 Lahore 110, PLD 2019 Supreme Court 64, PLJ 1980 Supreme Court 197, PLJ 1980 Cr. C (Peshawar) 338, PLJ 1988 Cr. C (Karachi) 545, 1988 SCMR 570, 1995 SCMR 1350, 1996 SCMR 1553, 2004 SCMR 1185, 2008 SCMR 6, 2012 SCMR 419,

2017 SCMR 486, NLR 2000 Criminal 357, 2014 YLR 877 and 2014 P Cr.LJ 206.

12. Conversely, learned counsel for the complainant and learned A.P.G. have supported the impugned judgment. Learned counsel for the complainant further added that prosecution has proved its case from all corners. The evidence of PWs with regard to involvement of accused has not been shattered. The appellants Saleemullah and Ashique Ali both have admitted their guilt and in this regard their video statements were recorded, which is part and parcel of record. He further added that initially an application under Article 164 of Qanun-e-Shahadat Order, 1984 for sending the USBs to the expert for opinion and verification of the voice of the accused was filed before the learned trial Court and since the said application was dismissed, as such, complainant filed Criminal Revision Application before this Court, which was allowed, hence, the I.O. was directed to collect the USBs for sending to the expert for verification and report, which were collected and examined by the Forensic Agency wherein after forensic video analysis, no editing features were observed in the visual contents; and the said report has produced by the Investigating Officer. He also added that the eyewitnesses have also fully implicated the accused and their version has also been corroborated by the chemical examiner report, therefore, if even there are minor discrepancies in the evidence of prosecution witnesses, the same have no importance as they do not go to the root of the prosecution story in presence of truthfulness ocular account as well as medical account. Learned counsel further added that the there is no element of false implication of the appellants as if the complainant had to involve them falsely, he should have directly involved them at the time of registration of FIR whereas the discrepancies, if any, in medical evidence relating to nature of injuries do not negate the substantive evidence. He also added that the prosecution witnesses have fully implicated the appellants chain-to-chain despite the appellants tried to conceal themselves from their

involvement by committing murder of deceased. He further added that mere relation of between the parties alone cannot support the plea of accused especially in the cases of capital punishments and the circumstances of last seen are absolutely against the accused. He, therefore, prayed for dismissal of the instant appeal by relying upon the cases reported as 2019 SCMR 1224, 2019 SCMR 2039, 2023 SCMR 900, 2023 SC,R 1375,2020 PCr.LJ Note 99, 2021 PCr.LJ 689, 2023 PCr.LJ Note 5,2022 YLR Note 109, 2002 YLR Note 173, 2022 YLR 324, 2023 YLR Note 42, 2023 YLR 1204, 2023 YLR 1311, 2023 MLD 156 and 2023 MLD 1677.

13. I have heard the learned counsel for the parties and perused the material available on record including the case law cited at bar. On evaluation of the material brought on the record, it appears that the case of prosecution mainly depends upon two point's i-e admissibility of further statement of the complainant at later stage and extra judicial confession of appellants namely Saleemullah and Ashique Ali apart from other factors.

Point No.1

What is the value of further statement under section 162 Cr.P.C. in the eyes of law and how it can be used against accused?

14. Any statement or further statement of the first informant recorded during the investigation by police would neither be equated with First Information Report nor read as part of it.¹ It is also settled proposition of law that further statement has no value in the eyes of law.² Recording supplementary statement would be an important factor which is likely to give rise to interference that second version contained in it was introduced by the prosecution after deliberation and if it is it will adversely affect the prosecution case.³ As far as the legality of supplementary statement of the complainant is concerned, it is suffice to observe here that the same has got no sanctity in the

¹1995 S C M R 1350, 2003 SCMR 1419, 2023 P.Cr.LJ 1146, 2019 YLR 441, 2019 MLD 1821, 2006 MLD 235

² 2019 MLD 973, CrI. Misc. Appln. No.102 of 2011, Sindh High Court Larkana Bench

³2003 SCMR 1419

eye of law. The value of supplementary statement or further statement is not more than a statement recorded under section 161, Cr.P.C.⁴ When a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility will become doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest casted serious doubt on the veracity of such witness.⁵ *No doubt further statement recorded by the Investigating Officer has no value in the eyes of law until and unless it is corroborated by other evidence; however, the same opens room for the Investigating Officer to conduct further investigation.*

Point No.2

What is mode and method of recording of statement under section 164 Cr.P.C. What is the evidentiary value of Extra judicial confession of the appellants namely Saleemullah and Ashique Ali apart from other factors, and Judicial confession. Describe the mode and admissibility of modern devices under section 164 of Qanoon-e-Shahadat Order, 1984.

15. The incident is taken place on 29.07.2019 while it was reported on 01.08.2019 after delay of two days. The first further statement of complainant was recorded on 04.08.2019 wherein he has stated that on 29.07.2019 his brother Asif Ali Dahri was killed by some unknown culprits and thrown his dead body in the watercourse/nali and lodged instant case, as such, he and Asghar Dahri had been inquiring and came to know that accused Saleemullah and Ashique Ali with consultation to each other called his brother Asif Ali at Sakrand on the pretext to facilitate in purchase of seeds and proceeded in a white Mehran Car from Sakrand and killed him. The second further statement of the complainant was recorded on 06.12.2019 after four months and 6 days of the first statement, wherein he has stated the search history and disclosed that on 30.11.2019 PWs Allah

⁴2021 M L D 408

⁵ 2022 P.Cr.LJ Note 77, 2011 P Cr. LJ 1320

Obhayo Bughio and Muhammad Ramzan Chandio came to him and stated that on 29.07.2019 at about 2 O'clock they had proceeded there for purpose of onion-seeds and saw that the appellants were exchanging harsh words with Asif Ali. He further disclosed that Ashique Ali by taking iron rod in hand caused blow to Asif Ali on the back side of his head, so Asif fallen down while Saleemullah by wrapping towel in the neck of Asif was strangulating him; Asadullah was holding Asif from legs while Sajjad was holding from arms.

16. Admittedly the complainant/PW-1 Mehboob Ali and PW-2 Ali Asghar are not eyewitnesses of the incident. Whereas, PW-4 Allah Obhayo Bughio and PW-5 Muhammad Ramzan Chandio are stated to be eyewitnesses/chance witnesses of the incident, who have deposed that they have seen that the appellants were exchanging harsh words with deceased Asif Ali and appellant Ashique Ali had caused iron rod blow to Asif on back side of his head, who fallen down while Saleemullah by wrapping towel on the neck of Asif had strangulated him; whereas, Asadullah was holding from his legs and Sajjad was holding from his arms. Whereas, the PW Saddam Hussain is only witness to establish last seen evidence, who deposed that he had seen deceased Asif Ali in the company of accused Saleemullah and Ashique Dahri at Siyal Hotel situated at bypass Sakrand. According to him deceased Asif Ali offered tea which was refused on account of paucity of time. However, on 03.08.2019 he informed the complainant that he had seen deceased Asif Ali with accused Saleemullah and Ashique.

17. The case in hand was investigated by two Investigating Officers. First I.O./PW-7 ASI Muhammad Ibrahim and the other was PW-8 Inspector Shah Zaman. As per evidence of first I.O. on 29.07.2019, he came to know through phone call of H.C. Mazhar of PP Workshop about the dead body of an unknown person lying at the land of ShahooBarejo, therefore, he reached there, secured blood stained soil and sealed the same, brought the dead body at Taluka Hospital Matiari and issued

such letter to Medical Officer for D.N.A. test and postmortem; however, since due non-availability of electricity, the postmortem could not take place there. As such, he shifted dead body at Hyderabad hospital where postmortem was conducted and clothes of deceased were given to him. On 31.07.2018, he shown photographs of deceased to complainant, who identified him to be his brother Asif. The other Investigating Officer Inspector Shah Zaman in his evidence stated that after lodgment of FIR on 01.08.2019, he recorded statements of Ali Asghar and Ali Muhammad in terms of section 161 Cr.P.C. On 04.08.2019 complainant came at PS and disclosed that he came to know that his brother was murdered by accused Ashique and Saleemullah. He recorded further statement of the complainant and produced the same as Ex.11/D. On 07.08.2019 he arrested both the accused persons along with the car which was used in commission of offence under mashirnama and same was produced as Ex.18/D accused. He/I.O. Shah Zaman further deposed that *“accused Saleemullah during interrogation disclosed that on 29.07.2019, I called Asif at Siyal Hotel on the pretext of onion seed and by that time accused Ashiq was present with them. Accused further disclosed that he went to his house and brought his Mehran car thereafter took Asif and on the way administered intoxicant pill in the tea and on link road leading from Oderolal to Nasarpur they caused wheel PANA on the head of Asif and strangulated him and committed his murder. Accused further disclosed that car standing at PS is same which was used by him in commission of offence and wheel PANA is lying in said car. I recorded such interrogation of accused in my mobile phone. Thereafter accused Saleemullah led us to the car and got recovered wheel PANA from the car. I sealed the wheel PANA and prepared such memo in presence of ASI Ibrahim and ASI Nawabuddin Ex.17/M. Accused Saleemullah further disclosed that he is ready to show the place of incident hence I along with my staff and accused Saleemullah under custody left PS and came at link road Nasarpur to Oderolal where accused got stopped the vehicle and led us near sugarcane crop into ditch and disclosed*

that at same place they threw the dead body of Asif. I prepared such memo in presence of mashirs ASI Ibrahim and ASI Nawabuddin... On the same date I took out accused Ashiq from police lockup and interrogated him who during interrogation disclosed that accused Saleemullah told him that he would kill Asif hence he left accused Saleemullah at Hala and went away. I recorded such statement in my mobile phone.... I got saved statements of accused Saleemullah and Ashiq into one USB and prepared such memo in presence of ASI Ibrahim and ASI Nawabuddin and produced the same as Ex.18/E. On 09.08.2019 I along with my staff left PS on my private car and came at PS Sakrand where kept such entry and came at Jalalani petrol pump near Siyal Hotel. I informed about it to complainant who along with Ayaz and Ghulam Shabbir came there. We met with Manager of Pump namely Arbab Ali Brohi and I asked to show CCTV of 29.07.2019 as such he showed us the same and we found that deceased Asif along with Ashiq came at pump and they both sat in one Mehran car of white colour. We got said CCTV and saved in USB.... On 09.08.2019 complainant disclosed that he came to know through some persons that accused Saleemullah and Ashiq were sitting with deceased Asif at Siyal Hotel and complainant produced said persons namely Hussain Chandio and Saddam Hussain before me...On 22.08.2019 I produced PWs namely Asghar, Sadam and Hussain Chandio before concerned Magistrate where their 164 Cr.P.C. were recorded.” The I.O. further conducted investigation of the case, dispatched the case property to chemical examiner, got FSL report in respect of Mehran Car. He produced the report of chemical examiner as Ex.18/G. However, during investigation, I.O. came to know accused Sajjad was present at Sakrand while accused Asadullah was present in the village on 29.07.2019, as such, he kept their names in column No.2 of the final report.

18. Now it is very essential to state here the video statements of appellants Saleemullah and Ashique which was recorded by the I.O. of the case. In his video statement, appellant

Saleemullah has stated that deceased Asif Ali was his friend and they managed a program to obtain seed of onion. On the day of incident, the appellants Saleemullah and Ashique Ali along with deceased Asif Ali rushed at Siyal Hotel, whereby they had taken tea and then appellant brought white colored Mehran Car wherein they boarded and slowly proceeded. At Khadahar they had also taken tea, where appellant Saleemullah mixed the intoxicating tablets in the tea of deceased Asif Ali and then proceeded and arrived at Hala. Appellant Ashique Ali was sitting on front seat while deceased Asif Ali sat at rear seat of the Car. At Hala they had also taken cold drink. On question of police from appellant Saleemullah as to whether appellant Ashique Ali was aware of his plan, to which he replied that he was unaware but he told him at Hala that he would commit murder of deceased Asif Ali. However, on hearing so, appellant Ashique Ali went away from Hala. Then appellant Saleemullah and deceased Asif Ali proceeded ahead. Deceased inquired about Ashique Ali, to which appellant Saleemullah narrated him that due to emergency he had gone to his village. Due to intoxication, once deceased vomited on the way and had become tired. They reached at Khyber and rain started. Then appellant alighted from Car at deserted/empty place, to which deceased inquired from him, what is doing? He replied that he is checking the tire of vehicle. Thereafter he took wheel wrench (wheel Pano) and caused its blow upon the head of deceased Asif Ali from the digi side of car, who came out from Car. As per appellant Saleemullah he caused 2/3 or blows to the deceased Asif Ali but could not fight due to state of intoxication then he strangulated him with towel (Roomal) and placed on the rear seat of the Car. There was also heavy rain, as such, nobody was available. Thereafter, proceeded ahead and thrown the dead body in the Naali where on both sides sugarcane and banana crops were available. In his video statement, appellant Saleemullah further stated that thereafter he took mobile phone and purse of the deceased; and thrown mobile phone at some distance while threw the purse of deceased in a Branch situated at road leads towards Matiari.

Thereafter, he went to his village. Per him, appellant Ashique made a call to him perhaps after 2/3 days and he met with him. He also admits in his video statement the handing over of the crime weapon viz. wheel wrench (wheel pana) to the police. The appellant disclosed the reason of causing death of deceased Asif Ali some dispute over financial matters. Appellant Ashique Ali also stated in his video statement the same line and stated that after knowing the intention of appellant Saleemullah for committing murder of deceased Asif Ali, he slipped away from Hala.

19. After having look at the above statements recorded through video there is still one more interpretation that should not be omitted. The version of complainant in his first further statement recorded on 04.08.2019 is fully supported by the extra-judicial confession of the appellants Saleemullah and Ashique Ali coupled with the medical evidence. However, the involvement of rest of the appellants namely Asadullah and Sajjad Ali after keeping the statements of appellants Saleemullah and Ashique into consideration have become dubious especially keeping in view the investigation carried out by the Investigating Officer from every angle possible and ensured that he did his due persistent efforts as impartial with the sole aim to discover the truth. In his investigation, the I.O. of the case had not implicated them. The basis of involvement of these two appellants namely Asadullah and Ashique Ali is statements of PWs Allah Obhayo Bughio and Muhammad Ramzan Chandio; however, they have contradicted each other and even they could not disclose about incident to complainant party up till three months. After keeping themselves silent for three months, they came to picture without furnishing tangible reasons for such long space, as such, their evidence cannot be relied especially when the complainant has firstly implicated two other appellants who have also confessed their guilt as stated above. So for the medical version in respect of injuries is concerned, the discrepancies, if any, in medical evidence relating to nature of injuries do not negate the

unnatural death of deceased Asif Ali. If the video statement of appellant Saleemullah is kept in juxtaposition to the medical evidence, it would clear the mode how the deceased was killed.

20. The video statements of appellants Saleemullah and Ashique Ali could not be of any legal benefit to the accused unless it was properly produced before the Court and its genuineness was established and then the same was proved in accordance with law for it to be treated as evidence in the case. In this regard, reliance is placed in the case of ISHTIAQ AHMED MIRZA and others v. FEDERATION OF PAKISTAN and other (PLD 2019 SC 675) it is appropriate to reproduce the relevant Para of the judgment which reads as under:-

Art. 164---Punjab Forensic Science Agency Act (XIII of 2007), S.9(3)---Audio tape or video, proving of--- Admissibility in evidence---Requirements for admissibility of an audio tape or video in evidence before a court of law and the mode and manner of proving the same before the court stated.

Following are the requirements for admissibility of an audio tape or video in evidence before a court of law and the mode and manner of proving the same before the court:

- (i) No audio tape or video could be relied upon by a court until the same was proved to be genuine and not tampered with or doctored.
- (ii) A forensic report prepared by an analyst of the Provincial Forensic Science Agency in respect of an audio tape or video was per se admissible in evidence in view of the provisions of section 9(3) of the Punjab Forensic Science Agency Act, 2007.
- (iii) Under Article 164 of the Qanun-e-Shahadat Order, 1984 it laid in the discretion of a court to allow any evidence becoming available through an audio tape or video to be produced.
- (iv) Even where a court allowed an audio tape or video to be produced in evidence, such audio tape or video had to be proved in accordance with the law of evidence.
- (v) Accuracy of the recording must be proved and satisfactory evidence, direct or circumstantial, had to be produced so as to rule out any possibility of tampering with the record.
- (vi) An audio tape or video sought to be produced in evidence must be the actual record of the conversation as and when it was made or of the event as and when it took place.

- (vii) The person recording the conversation or event had to be produced.
- (viii) The person recording the conversation or event must produce the audio tape or video himself.
- (ix) The audio tape or video must be played in the court.
- (x) An audio tape or video produced before a court as evidence ought to be clearly audible or viewable.
- (xi) The person recording the conversation or event must identify the voice of the person speaking or the person seen or the voice or person seen may be identified by any other person who recognized such voice or person.
- (xii) Any other person present at the time of making of the conversation or taking place of the event may also testify in support of the conversation heard in the audio tape or the event shown in the video.
- (xiii) The voices recorded or the persons shown must be properly identified.
- (xiv) The evidence sought to be produced through an audio tape or video had to be relevant to the controversy and otherwise admissible.
- (xv) Safe custody of the audio tape or video after its preparation till production before the court must be proved.
- (xvi) The transcript of the audio tape or video must have been prepared under independent supervision and control.
- (xvii) The person recording an audio tape or video may be a person whose part of routine duties was recording of an audio tape or video and he should not be a person who has recorded the audio tape or video for the purpose of laying a trap to procure evidence.
- (xviii) The source of an audio tape or video becoming available had to be disclosed.
- (xix) The date of acquiring the audio tape or video by the person producing it before the court ought to be disclosed by such person.
- (xx) An audio tape or video produced at a late stage of a judicial proceeding may be looked at with suspicion.
- (xxi) A formal application had to be filed before the court by the person desiring an audio tape or video to be brought on the record of the case as evidence.

21. The present case was involving the capital punishment and the entire evidence is based upon the

extra-judicial confession of Appellants Saleemullah and Aishique Ali recorded by the Investigating Officer and the same is required to be considered with utmost caution and care. In the instant case, the prosecution has relied upon the video recording in which both the appellants are narrating the story how the deceased Asif Ali lost his life/murdered, hence, it is appropriate to discuss whether the evidence recorded through the modern device is an admission piece of evidence or not. It is, therefore, appropriate to reproduce article 164 of Qanoon-e-Shahadat, Order 1984.

164. Production of evidence that has become available because of modern devices, etc. In such cases, as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.

22. A bare reading of article 164 makes it quite clear that the Courts not only may allow any evidence, became available because of modern devices or techniques but can also consider the same. At this point. I would like to write here paragraph/passage taken from the book of “**Electronic Evidence**” Second Edition by Stephen Mason.

“10.46. Audiotapes were also accepted as a discoverable document in *Grant v. Southwestern and Country Properties Ltd*, in which the meaning of a document was defined by its quality to convey information, as determined by Walton J at 198: „I conclude that a tape recording, provided of course that what is recorded is indeed information-relevant sounds of some description is a document.” Television film is also considered a document, as is the output of facsimile transmissions, data stored on a computer (in this instance, a database) constitute a document for the purposes of the obligation to discover under the provisions of Order 24 of the Rules of the Supreme Court, and a label on a bottle containing a specimen of blood provided by the accused/ the material may sometimes determine the admissibility of the evidence, but the definition is considered wide enough to bring any medium into its ambit without causing difficulties. The term

document is something upon which information is stored. This must be correct, because if the information is not stored, the content is not available, and therefore, remains oral evidence.”

“10.91. Surveillance cameras are very much part of life in the twenty-first century, the foundations of which began in the latter decades of the twentieth century. Evidence of images from security cameras can be very helpful in identifying the perpetrators of crimes, and the enhancement of the images, together with the use of more advanced techniques such as facial mapping, can help to identify parties to an offence. Such evidence has been admitted in English Courts, mainly in criminal cases.”

The above book is available at the given below website:-

[“http://humanities-digital-library.org/index.php/hdl/catalog/view/electronicvidence/16/93-1”](http://humanities-digital-library.org/index.php/hdl/catalog/view/electronicvidence/16/93-1)

23. As a proof of genuineness of such video, it is incumbent upon the prosecution to examine the person who recorded the video to testify the same. It is also incumbent upon the Trial Court to provide fair and reasonable opportunity of defence to accused, which is also a basic and foremost prerequisite of administration of criminal justice. In the instant case, the video statements were produced before the Court in shape of USB Ex-17/O by the PW-08 Inspector Shah Zaman (Ex-18) which were examined by the Punjab Forensic Science Agency wherein after forensic video analysis, no editing features were observed in the visual contents; and the said report was produced as Ex.18/C by the Investigating Officer after observing all formalities coupled with testifying the video. Inspector/SHO Shah Zaman also deposed that during investigation he has collected CC TV footage of the accused person from Manager of petrol pump. Thus, it can safely be said that evidence of DVD cassette/video recording, produced in trial Court, is admissible in evidence under Article 164 of Qanoon-e-Shahadat, hence, was relevant for proving claimed fact. Guidance is taken from the case of **Asfandyar & another**

v. Kamran & another 2016 SCMR 2084 wherein it is observed as:-

*“No doubt the trial Court, under section 164 of the Order, 1984, may allow to produce the said footage of C.C.T.V but it is incumbent upon the defence to prove the same in accordance with the provisions of the Order, 1984. The defence had ample opportunity to produce in his defence, the concerned person who had prepared the said footage from the C.C.T.V system in order to prove the same. In that eventuality, the adverse party would be given an opportunity to cross-examine the said witness regarding the genuineness or otherwise of the said document. **Any document brought on record could not be treated as proved until the same is proved strictly in accordance with the provisions contained in the Order, 1984.** While discussing these aspects of the case, the High Court restricted the admissibility only to the extent of Article 79 of the order, 1984 whereas there are certain other provisions / Articles in the Order, 1984 for proving the documents which are procured through the modern devices and techniques. Mere producing any footage of C.C.T.V as a piece of evidence in the Court is not sufficient to be relied upon unless and until the same is proved to be genuine. **In order to prove the genuineness of such footage it is incumbent upon the defence or prosecution to examine the person who prepared such footage from the C.C.T.V system**”*

Reliance is also placed on the case of **Sikandar Lashari v. The State. (2020 YLR 2543)** wherein the divisional bench of this court has held that;-

“17. The Video CD of conversation between SSP Pir Fareed Jan Sirhindi and Sikandar Ali Lashari was played in the trial Court which fact has not been denied by the learned counsel for the both appellants. For our satisfaction, we have also seen the same video CD footage in chamber and also compared the statement with the transcript produced in Urdu language in trial Court. The picture was clear and voice was clearly audible and not lost or distorted by other sounds or disturbance. The video does not demonstrate or indicate any coercion or compulsion rather Sikandar Ali Lashari was sitting in a very comfortable and congenial manner, drinking juice and voluntarily talking to SSP without any pressure even sometimes he suggested SSP to record what he is saying.”

“19. According to Article 42 of the Qanun-e-Shahdat Order, 1984, a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise or secrecy, or in consequences of a deception practiced on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him. Whereas, under Article 43 it is expounded that when more person 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 person making it; and (b) the Court may take into consideration such confession as circumstantial evidence against such other person. Attached “explanation” cabarets that “Offence”, as used in this Article, includes the abetment of, or attempt to commit, the offence. Whereas Article 164 of Qanun-e-Shahadat Order 1984 envisages that in such cases as the court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques”.

24. The prosecution evidence also finds corroboration from the medical evidence concerning the case of death and time of the incident. It is evident from the evidence of medical officer Dr. Zuhaib Hassan (Ex-22), who received the dead body of the deceased for postmortem examination. He started the postmortem at 03.30 pm and completed at 05.30PM. On examination, he found five following injuries:

“I found five injuries out of them injury No.1 was incised wound measuring 2.8 c.m. 02. C.m. x scalp deep over left parietal region without bone exposed. Injury No.2 was incised wound measuring about 2.5 x 0.4 s.m. over left parietal region posterior-lateral to injury No.1. Injury No.3 was incised wound measuring about 0.5 c.m. x 0.5 c.m. over left temporo-parietal region without bone exposed. Injury No.4 was incised wound measuring about 2 c.m x 0.2 c.m. above left mastoid bone without bone exposed. Injury No.5 was incised wound measuring about 3.5 x 0.8 c.m. over right occipital region without bone exposed. The duration between death and injury was

immediately and duration between death and post mortem started was about 24 to 30 hours. The weapon used was sharp cutting and ligature material (ROOMAL). The injuries were ante-mortem in nature. The body was stained with mud. I preserved nails, teeth and scalp hairs from root for DNA profile for identification. I also taken visceras for chemical analysis to detect any poison or toxic substance”.

I kept the opinion reserved for want of receiving reports. I handed over the dead body and clothes of deceased to ASI Muhammad Ibrahim under receipt. I advised the SHO to collect the preserved articles for reports. I issued provisional post mortem report in respect of unknown deceased that I produce as Ex-22/C and say that it is same, correct and bears my signature. I produce receipt in respect of delivery of dead body and clothes as Ex-22/D. After receipt of reports of Histopathology and chemical examiner and DNA test report, I issued final post mortem report in respect of deceased whereby opined that cause of death was due to asphyxia (strangulation) and head injury neck were compressed and caused death. I produce final post mortem report as Ex-22/E Histopathology as Ex-22/F and say it is same. I produce photocopy of DNA test report as Exx-22/G. DNA report shows that according to nails, the deceased was identified as Asif S/o Muhammad Suleman Dahri and conclusion shows that Mst. Allah Wasai W/o Muhammad Suleman is biological mother of deceased male Asif. I see chemical examiner report at Ex-18/G and say that it is same, correct and bears my signature. (Note: at this stage all the learned defense counsel raised objection that photocopy of DNA test report has been exhibited instead of original and photocopy is not admissible. Learned defense counsel further raised objection that copies of Histopathology report and DNA were not supplied to them. The objections raised by learned defense counsel will be decided at the time of final arguments.

25. From the external as well as an internal examination on the dead body of deceased Asif Ali he/Doctor opined that *opined* that cause of death was due to asphyxia (strangulation) and head injury neck were

compressed and caused death, which is sufficient to say that the cause of death was unnatural and thus, this also corroborates the evidence furnished by the prosecution witnesses; The ocular evidence also finds corroboration from the medical evidence that the death of the deceased was unnatural. Hence, another piece of evidence connecting the appellant with the commission of the offence. Further, the I.O. of the case has sent the articles to chemical analyzer viz. Director Laboratories & Chemical Examiner to the Government of Sindh, Karachi received a report with stained human blood also supported the version of the complainant.

26. Going back to the case of appellants Asadullah and Sajjad Ali, as discussed above, the evidence brought by the prosecution in respect of their involvement has not been proved against them as it is settled principle of law that the prosecution has to prove its case beyond shadow of doubt. However, the prosecution has also failed to prove its case beyond reasonable shadow of doubt against the appellants Asadullah and Sajjad Ali. It is also well settled principle of law that for giving benefit of doubt to an accused, it is not necessary that there should be many circumstances creating doubts but if there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right. **[MOHAMMAD MANSHA v. The STATE [2018 SCMR 772].**

27. As a result of what has been discussed above, the instant appeal is **allowed**. The conviction and sentence awarded to the appellant are set aside and the impugned judgment to the extent of appellants namely Asadullah and Sajjad Ali is set aside. They are acquitted of the charge by extending them the benefit of the doubt. Accordingly, **Criminal Appeal No.S-152 of 2023 stands allowed**. The appellants namely Asadullah and Sajjad Ali are ordered to be released forthwith if not required in any other

custody case While, the impugned judgment is maintained to the extent of conviction and sentence awarded to the appellant namely Saleemullah. Accordingly, **Criminal Appeal No.S-156 of 2023 stands dismissed.**

28. So far role of the appellant namely Ashique Ali is concerned, I am of the considered view that as per video his video statement as well as statement of the appellant Saleemullah as mentioned above, the appellant Ashique Ali initially was unaware of the planning of appellant Saleemullah and as soon as he came to know this fact, he went away, therefore, he cannot be said to have share his common intention for the murder of deceased Asif Ali. He did not play any part in commission of the murder of deceased, as such, he cannot be saddled with the responsibility of the same. In existing position of affairs, I am of the opinion that his conviction and sentence for the offence punishable u/s 302 (b) PPC cannot sustain and he can only he held guilty for the concealment of evidence punishable under section 201 PPC. Therefore, the impugned judgment to the extent of awarding sentence u/s 302 (b) PPC read with section 34 PPC to appellant Ashique Ali is set aside and his conviction and sentence for the offence u/s 201 PPC awarded by the learned trial Court is maintained. Accordingly, **Criminal Appeal No.S-155 of 2023 stands disposed of** in above terms. **Criminal Jail Appeal No.S-154 of 2023also stand disposed of** in the above terms.

JUDGE