

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Appeal No.126 of 2016

Confirmation Case No.03 of 2016

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

Appellant: Muhammad Nadeem son of Muhammad Zia, through Mr. Muhammad Ashraf Kazi, Advocate and Mr. Irshad Ahmed Jatoi Advocate

Respondent: The State through Farman Ali Kanasro Addl PG and Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh

The complainant: Through Mr. Amir Azam, Advocate

Dates of hearing: 15.01.2019 and 21-01-2019.

Dated of Judgment 30 -01-2019

J U D G M E N T

Mohammad Karim Khan Agha, J.- Muhammad Nadeem son of Muhammad Zia, appellant, was tried by learned Sessions Judge, Central at Karachi for offences under Sections 302/34 PPC registered at PS Rizvia Society, Karachi. After full-dressed trial, vide judgment dated 15.03.2016, the appellant was convicted under sections 302/34 PPC and awarded death sentence as well as to pay an amount of Rs.5,00,000/- as compensation under Section 544-A Cr.P.C. to the legal heirs of deceased, in case of default in payment of same, he shall suffer further S.I. for six months (the impugned judgment). A Reference under Section 374 Cr.PC was made to the this Court for confirmation of the death sentence awarded to appellant/accused Muhammad Nadeem.

2. Brief facts of the prosecution case as per the FIR are that on 25.11.2009 at about 1600 hours SIP Syed Abbas Ali recorded the statement of complainant Zubair Ahmed Siddiqui son of Muhammad Ahmed Siddiqui u/s.154 Cr.PC at Abbasi Shaheed Hospital wherein he has stated that he is student of M.Com and on 25.11.2009 at 1200 hours the police of PS Rizvia Society informed him on telephone that the dead body of his brother Shoaib Ahmed Siddiqui (Shoaib), aged about 25/26 years has

4

been recovered from Car No.ALK-708, maker Suzuki, VXR Alto, blue colour from a vacant plot near Al-Bashir Corner, Jahangirabad Nazimabad, Karachi. On such information, he reached at Abbasi Shaheed Hospital and found the dead body of his brother in the mortuary. On inquiry, a friend of his brother Zohaib ur Rehman disclosed that on 24.11.2009 at about 4:00 p.m. Shoaib took the aforementioned car from his friend Wasiq and along with Nadeem went to the house of Farheen situated in Nazimabad No.1, Karachi for the purpose of his marriage proposal. At about 3:20 a.m. Shoaib informed Zohaib ur Rehman on phone that he is coming back after meeting with the brother of Farheen and further informed that he proposed Farheen. Thereafter Shoaib was out of contact. The complainant suspected that Farheen, her brother Asad and others committed murder of his brother Shoaib in the car by hanging with the seatbelt of said car and set him on fire. SIP Syed Abbas Ali on the basis of aforesaid statement of complainant registered FIR against Farheen, her brother Asad and others.

3. After completing formalities SIP Syed Abbas Ali handed over the investigation to SIP Mohammad Ishaque. During investigation Investigating Officer arrested accused Nadeem and accused Khurram Akram who facilitated / instigated Nadeem in the commission of the above crime. After completing usual investigation I.O. submitted charge sheet under the above referred sections.

4. The trial court framed a formal charge against the accused persons at Ex.3 under Section 302/34 PPC to which they both pleaded not guilty and claimed to be tried.

5. At the trial, prosecution examined PW-1 complainant Zubair Ahmed Siddiqui as Ex.4 who produced statement under Section 154 Cr.PC as Ex.4/A, receipt of handing over dead body as Ex.4/B, application of complainant addressed to SIO, PS Rizvia Society as Ex.4/C. Prosecution, further to prove its case examined PW-2 Ameer Mughal as Ex 5 . PW-3 Dr. Shiraz Ali Khawaja was examined as Ex.6 who produced police letter for post-mortem as Ex.7, post-mortem report as Ex.8 and photocopy of cause of death as Ex.9 . PW-4 Muhammad Ammad was examined as Ex.10, PW-5 SI Syed Abbas Ali was examined as Ex.11 who

6

produced memo of inspection of place of incident as Ex.12, inquest report as Ex.13, FIR as Ex.14 and arrival entry as Ex.15. PW-6 Muhammad Tariq Khan was examined as Ex.16. PW-7 Zohaib ur Rehman was examined as Ex.17 who produced memo of arrest of accused Khurram Akram as Ex.18. PW-8 Ali Raza was examined as Ex.19 who produced memo of pointation of place of incident as Ex.20. PW-9 Noman Ahmed Siddiqui was examined as Ex.21 who produced memo of arrest and personal search of accused Muhammad Nadeem as Ex.22. PW-10 Muhammad Amir was examined as Ex.38. PW-11 Muhammad Ishaque was examined as Ex.39 who produced photographs as Ex.40, sketch of crime scene as Ex.41. Letter for chemical examination as Ex.42, notice to accused Nadeem under Section 160 Cr.PC as Ex.43, Rozenamcha Entries regarding interrogation and admission of guilt by accused Nadeem as Ex.44 and Ex.45 request letter for CRO and photocopy of CRO of accused Nadeem as Ex.46 and Ex.47, CRO of deceased Shoaib Ahmed Siddiqui as Ex.48, departure entry No.29 as Ex.49 arrival entry as Ex.50, chemical examiner report as Ex.51 corrigendum in respect of Articles No.3 & 4 as Ex.52 and application of brother of deceased addressed to SIP North Nazimabad, Karachi as Ex.53 and interrogation reports of Farheen and Asad as Ex.54 and 55.

6. Statement of accused Nadeem was recorded under section 342, Cr.PC at Ex. 57. The Accused denied the prosecution allegations, claimed himself to be innocent and stated that the deceased himself volunteered accused Khurram Akram as his culprit before dying. He did not examine himself on oath nor examined any witness in his defence.

7. Learned Sessions Judge, Central, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 15.03.2016, convicted and sentenced the appellant as stated above, hence this appeal has been filed.

8. The facts of the case as well as evidence produced before the trial Court find an elaborate mention in the impugned judgment dated 15.03.2016 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. In a nut shell the case of the prosecution initially seems to be that Shoaib (the deceased) went along with the accused Nadeem in a car borrowed from Shoaib's friend Wasiq on 24-11-2009 in order to meet Ms Farheen (who was Nadeem's cousin) who he wanted to make a marriage

4

proposal. The deceased was seen at 10pm on 24-11-2009 by PW 6 Tariq Khan with Nadeem outside a petrol pump filling up Wasiq's car. Thereafter Shoaib's friends PW's 4 Mohammed Amaand, PW 7 Zohaibur Rehman Khan and PW 8 Ali Raza tried to find and contact Shoaib who they managed to reach on his mobile phone at around 2 am and lastly at about 3.20am when Shoaib told them that he was with Nadeem in Nazimabad and would be returning back soon. PW 2 Ameer Mughal who was a water tanker driver saw and spoke to accused Nadeem at about 4.30 am on 25-11-2009 in the Jahangirabad area which was close to the place of incident whilst driving his tanker and offered him a lift home which Nadeem declined. That the police found Wasiq's car abandoned at about 8am burnt with the dead body of Shoaib also burnt with the seat belt around his neck in the Jahangirabad area who according to the post mortem carried out by PW 3 Dr. Shiraz had died on account on strangulation and also had burns on his body. That when Nadeem was summoned to the police station he admitted to the murder of Shoaib to the police and took them to the place of the murder where the burnt out car was found. That based on the last seen evidence and this extra judicial confession to the police according to the prosecution Nadeem had murdered Shoaib in the car and then set fire to him on account of the later discovered motive that Khurram Akram the absconding co accused owed Shoaib money and whose associates had told Shoaib not to chase up for the return of the money or else he would be killed and that Nadeem was one such associate of Khurram Akram. In order to prove its case the prosecution relied on the evidence of the PW's and numerous documents which were exhibited in evidence at trial.

10. In a nut shell the plea of Nadeem was that he was completely innocent and that the case had been falsified against him because he refused to pay money to the complainant who was the brother of the deceased.

11. Learned advocate for the appellant Nadeem contended that it was a case of circumstantial evidence as there was no eye witness, that the appellant had not been named in the FIR; that the extra judicial confession made by the appellant before the police was inadmissible; that the last seen evidence was insufficient to convict the appellant as it had not been sufficiently corroborated; that the chemical report was contradictory to the

prosecution case as it had stated that the burning was caused by Kerosene and not by petrol whereas the last seen PW had seen the appellant with a bottle of petrol at a PSO petrol station when admittedly petrol stations only sold petrol and not Kerosene; that the medical evidence does not support the prosecution case as the time of death in the medical report does not tie in with the time of death as alleged by the prosecution; that the appellant taking the police to the place of the incident was irrelevant and thus for all the above reasons the appellant was entitled to be acquitted on the basis of the benefit of the doubt being extended to him. In support of his contentions he placed reliance on **Muhammad Abid v. The State** (PLD 2018 Supreme Court 813), **Hayatullah v. The State** (2018 SCMR 2092), **Nazar Muhammad & another v. The State** (SBLR 2018 Sindh 1662), **Abdul Sattar v. The State** (PLD 1976 Supreme Court 404) and **Parikh's Text Book of Medical Jurisprudence and Toxicology** by Dr. C.K. Parikh.

12. On the other hand, Mr. Farman Ali Kanasro Addl. PG and Mr. Muhammad Iqbal Awan, Deputy Prosecutor General contended that the last seen evidence and that of the tanker driver coupled with the phone call evidence of the PW's speaking to Shoaib shortly before his death and as corroborated by his extrajudicial confession was compelling evidence against the appellant. However when confronted by the court with the failure of the prosecution to call as PW's Farheen and Asad who had been named in the FIR to show that the appellant had not met them he conceded that this was a major defect in the prosecution case. Likewise the lack of motive and the car not being kept as case property and very fairly conceded by assisting the court and keeping these factors in mind and the totality of the evidence that the prosecution had failed to prove its case beyond a reasonable doubt. Learned counsel for the complainant supported this contention of the learned APG and DPG.

13. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law.

14. Before proceeding further it must be mentioned that during the course of the trial co-accused Khurram Akram absconded and thus the

trial proceeded only against the appellant Nadeem who as mentioned above was convicted by the impugned judgment and sentenced to death.

15. From the evidence in our view it seems to be an admitted position that Shoaib was found murdered by strangulation and burned in his friend's (wasiq's) car in the early morning of 25-11-09 in the Jahangirabad area of Nazimabad.

16. The issue before us therefore based on the evidence on record is who murdered Shoaib? Without belaboring the point it is a cardinal principle of criminal jurisprudence that the prosecution must prove its case beyond a reasonable doubt and it is not for the accused to disprove the case against him who may take as many defenses as he likes to the allegations against him and if there is any doubt in the prosecutions case the benefit must go to the accused. As was held in the case of **Tariq Pervez V/s. The State** (1995 SCMR 1345), wherein the Honourable Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single 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."

17. Admittedly there is no eye witness to Shoaib's murder which was committed during the night when it was dark.

18. The prosecution's case in our view seems to hinge on the following main elements (a) the last seen evidence and (b) the mobile phone calls between the friends of Shoaib and Shoaib during the early hours of 25-11-2009 and (c) the appellants extra judicial confession before the police and his pointation of the crime scene and (d) other circumstantial evidence.

Turning to the last seen evidence

19. With regard to the last seen evidence in the case of **Fayyaz Ahmed V State** (2017 SCMR 2026) at P.2030 the supreme court set out some of the fundamental principles which must be followed and the prosecution was obliged to fulfill the same which are set out below:

"7. The last seen evidence is one of such categories of evidence. In this category of cases some fundamental principles must be

followed and the Prosecution is under legal obligation to fulfill the same, some of which may be cited below:-

- (i) *There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the Prosecution.*
- (ii) *The proximity of the crime seen plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused and onus in this regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.*
- (iii) *The timing of that the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.*
- (iv) *There must be some reasons and objects on account of which the deceased accompanied the accused for accomplishment of the same towards a particular destination, otherwise giving company by the deceased to the accused would become a question mark.*
- (v) *Additionally there must be some motive on the part of the accused to kill the deceased otherwise the Prosecution has to furnish evidence that it was during the transit that something happened abnormal or unpleasant which motivated the accused in killing the deceased.*
- (vi) *The quick reporting of the matter without any undue delay is essential, otherwise the prosecution story would become doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person. **Beside the above, circumstantial evidence of last seen must be corroborated by independent evidence, coming from unimpeachable source because uncorroborated last seen evidence is a weak type of evidence in cases involving capital punishment.***
- (vii) *The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts, which may arise if it is not done in a proper and fair manner.*
- (viii) *The Court has also to seriously consider that whether the deceased was having any contributory role in the cause of his death inviting the trouble, if it was not a pre-planned and calculated murder." (bold added)*

4

20. The above fundamental principles were endorsed in the recent supreme court case of **Muhammad Abid V The State** (PLD 2018 SC 813) where it was held as under regarding last seen evidence or "last seen together" evidence at P.818 para 5 and 6 as under;

"5. Ocular account forming the last seen evidence is that the appellant was seen by PW-6 (Muhammad Naeem) at his shop with the victim at 2:15 pm on 05.09.2010 where he had come to rent a motorcycle and by PW-7 (Dildar Ahmed) at 2:20 pm on the same day when the appellant purchased petrol from his shop. The theory of last seen together is one where two persons are 'seen together' alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is short, presumption can be drawn that the person alive is the author of the other's death. Time gap between the sighting and the occurrence should be such as to rule out possibility of somebody else committing the crime. The circumstance of the deceased being last seen in the company of the accused is not by itself sufficient to sustain the charge of murder. There must be evidence to link the accused with the murder of his companion, such as incriminating facts as recovery, strong motive and the proximate time when they were last seen together and the time when the deceased was killed. Last seen evidence as circumstantial evidence must be incompatible with the innocence of the accused and should be accepted with great caution. It must be scrutinized minutely so that no plausible conclusion should be drawn therefrom except guilt of the accused'.

6. The foundation of the "last seen together" theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused 2. proximity of the crime scene 3. small time gap between the sighting and crime. 4. no possibility of third person interference 5. motive. 6. time of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime." (bold added).

21. Keeping in view the above principles the last seen evidence is provided by PW 6 Muhammed Tariq Khan who knew Shoaib and saw him at 10pm on 24-11-2009 at the PSO petrol pump adjacent to Sir Syed College sitting in the passenger seat of a blue Alto. They exchanged greetings/salams and Shoaib told him that Nadeem was taking petrol for his motor cycle. He also knew Nadeem and saw Nadeem with a plastic

bottle containing some petrol like liquid who he exchanged salams with before Nadeem drove away the car with Shoaib in the passenger seat. In our view no evidence has come on record to lead us to disbelieve this last seen evidence.

22. The next piece of evidence is that PW 2 Aneer Mughal who was a water tanker driver states in his evidence that at about 4.30am on 25-11-2009 he saw and spoke to Nadeem at Jehangirabad and offered him a lift home but Nadeem declined the lift as he had a motor cycle and was waiting for some one. Again in our view no evidence has come on record to lead us to disbelieve this evidence.

23. So far the prosecution has shown that Nadeem was with Shoaib at 10pm and that Nadeem was seen alone near the place of incident at 4am some 6 hours later.

24. In our view this last seen evidence alone is insufficient to convict Nadeem with the murder of Shoaib as there is an unaccounted for 6 hours when Shoaib was last seen with Nadeem and Nadeem was last seen alone in the vicinity of the murder scene which is sufficient time for them to have separated and leads us onto the mobile calls between the friends of Shoaib and Shoaib during the early hours of 25-11-2009 which the prosecution has used to corroborate the last seen evidence.

25. The question therefore is whether between 10pm on 24-11-2009 and 4.30am on 25-11-2009 Nadeem murdered Shoaib in the manner as alleged. The prosecution has tried to show that Shoaib was alive and with Nadeem up to at least 3.20am on 25-11-2009 (the day of the incident) through various PW's such as PW 4 Muhammed Ammad, PW 7 Zohaibur Rehman and PW 8 Ali Raza who give evidence that between 2.15am and 3.20 am they were in mobile phone contact with Shoaib who had told them that he was with Nadeem in Nazimabad where they were going to meet Asad the brother of Farheen the lady who Shoaib wished to propose to. We however have our reservations about such so called corroborative evidence. This is because (a) we find it rather strange that PW 4 Muhammed Ammad would be concerned about the whereabouts of Shoaib at 10pm when he knew from the previous day that Shoaib was going with Nadeem in Wasiq's car (who was not called as a PW) to

discuss his wedding proposal to Farheen with Asad the brother of Farheen or Farheen herself and that he and the other 2 aforementioned PW's were up till the early hours of the morning wanting to know where Shoaib was especially after Shoaib had already informed them where he was, who he was with and what they were doing. PW 8 Ali Raza also admitted in cross examination that they did not sit until 3 or 4 am at the Quetta Hotel often and that they usually sat until midnight. So why were they sitting so late at the Quetta hotel on this occasion? This does not particularly appeal to reason and (b) not once during all these phone calls with Shoaib, which in effect is hearsay evidence, did any of the aforesaid PW's ever speak to Nadeem who was apparently with Shoaib and whom they all knew which again does not appeal to reason. Thus they only have Shoaib's word that he was with Nadeem at 3.20 am on 25-11-2009 when Nadeem might well have left him by this time and Shoaib out of embarrassment e.g. Shoaib's proposal being rejected or any other reason he did not want to admit this to his friends who were calling him and (c) significantly Shoaib's mobile phone was not recovered and there are no CDR records in evidence to show that Shoaib was actually called by any of the aforesaid 3 PW's who allegedly called Shoaib in the early hours of 25-11-2009.

26. Thus, in our view the last seen evidence has not been adequately corroborated by another independent source of evidence such as the alleged telephone calls.

27. It is true that Nadeem might have been spotted at around 4.30am in the Jehangirabad area near the place of incident by PW 2 Aneer Mughal but this may be because he and Shoaib had quarreled or for any other reason Nadeem got out of the car and left Shoaib alone in the car which may have occurred at any time after 10pm and 4.30am between 24/25-11-2009. It is also unclear at what precise time the murder actually took place which may well have been after 4.30am on 25-11-2009 when Nadeem was seen by tanker driver PW 2 Aneer Mughal. According to PW 5 ASI Syed Abbas Ali at 11am he received information that a suspected car was standing near Al Shabbir Corner Jehangirabad which was apparently a built up residential area and as such it would seem odd that no one from the area contacted the police to report a car on fire which would have stood out in the darkness of the night. Even the post mortem finds the

duration of death to be within 12 hours from 3pm being the time when the post mortem was completed which means that Shoaib could have been murdered at any time between 3am and 3pm which shows that the majority of the hours in which death may have occurred was after 4.30am. Keeping in view that some of the PW's allegedly spoke to Shoaib at 3.20 am and Nadeem was seen by the tanker driver at 4.30 am this only gives Nadeem a window of one hour to strangle and murder Shoaib and set him and the car on fire and move away from the scene of the murder which short space of time creates doubt. As such in our view it cannot be conclusively said based on the last seen evidence that Shoaib and Nadeem had not parted company before Shoaib's murder.

28. In addition, Nadeem had no motive to murder Shoaib. As per the FIR the main suspects were Asad and Farhan whom Shoaib wanted to propose to. Interestingly the interrogation report of Farhan confirms that she was in contact with Shoaib and was expecting a matrimonial proposal yet both she and her brother Asad, despite not being adequately able to account for his movements on the night of the murder and the place of the murder being close to Asad's house and who appears to be an equally strong suspect in the murder of Shoaib have been let off and were not even called as PW's. There was no mention in the FIR of Nadeem as a suspect. There is no documentary or other evidence to show that Nadeem owed Shoaib money which Shoaib was now pressing for and as such Nadeem had no motive to murder Shoaib. Even otherwise the application for protection by Shoaib on which the alleged new motive is based does not name Nadeem at all. The application/complaint states that Khurram Akram and his associates (who are named in the complaint/application) are threatening Shoaib not to ask for the return of his money or he will be killed and NOT Nadeem. Furthermore, nothing has come on record to show conclusively any nexus/link between co-accused Khurram Akram and Nadeem in terms of any business relationship which they may have had with each other or in respect of Nadeem with Shoaib. Even otherwise it does not particularly appeal to reason that Nadeem would murder Shoaib that night as Nadeem knew that he had been seen with Shoaib at 10pm on the night of the murder by PW 6 Muhammed Tariq Khan who he had spoken to at the PSO station and that Nadeem's friends especially Wasiq and the other PW's referred to above who were trying to contact

him by mobile phone in the early hours of 25th November knew that Nadeem was driving Shoaib to meet with Asad or Farhan concerning his marriage proposal. Thus, Nadeem would have known that he would have been the obvious suspect for the murder of Shoaib and as such his murdering Shoaib on that night keeping in view these facts which were within his knowledge does not appeal to reason.

29. This leads us to the next issue as to whether Nadeem's extra judicial confession before the police is of any assistance to the prosecution case.

30. It is settled law that for an extrajudicial confession to be relied upon extreme caution must be exercised and that it must be supported by some unimpeachable corroborative evidence in order to bring home a conviction. In the case of **Sajid Mumtaz V Basharat** (2006 SCMR 231) it was held as under at P.238 Para 17:

"17. Last but not the least are the extra-judicial confessions of all the accused, out of whom those of Basharat and Mst. Naghma are joint one. This requires somewhat detailed discussion. This Court and its predecessor Court (Federal Court) have elaborately laid down the law regarding extra-judicial confessions starting from Ahmed v. The Crown PLD 1951 FC 103-107 up to the latest. Extra-judicial confession has always been taken with a pinch of salt. In Ahmed v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial confession, the Court must inquire into all material points and surrounding circumstances to "satisfy itself fully that the confession cannot but be true." As, an extra-judicial confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial confession is made must be kept in view, that joint confession cannot be sued against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule prescribed by this Court.

19.

20.

21. 4

him by mobile phone in the early hours of 25th November knew that Nadeem was driving Shoaib to meet with Asad or Farhan concerning his marriage proposal. Thus, Nadeem would have known that he would have been the obvious suspect for the murder of Shoaib and as such his murdering Shoaib on that night keeping in view these facts which were within his knowledge does not appeal to reason.

29. This leads us to the next issue as to whether Nadeem's extra judicial confession before the police is of any assistance to the prosecution case.

30. It is settled law that for an extrajudicial confession to be relied upon extreme caution must be exercised and that it must be supported by some unimpeachable corroborative evidence in order to bring home a conviction. In the case of **Sajid Mumtaz V Basharat** (2006 SCMR 231) it was held as under at P.238 Para 17:

"17. Last but not the least are the extra-judicial confessions of all the accused, out of whom those of Basharat and Mst. Naghma are joint one. This requires somewhat detailed discussion. This Court and its predecessor Court (Federal Court) have elaborately laid down the law regarding extra-judicial confessions starting from Ahmed v. The Crown PLD 1951 FC 103-107 up to the latest. Extra-judicial confession has always been taken with a pinch of salt. In Ahmed v. The Crown, it was observed that in this country (as a whole) extra-judicial confession must be received with utmost caution. Further, it was observed from time to time, that before acting upon a retracted extra-judicial confession, the Court must inquire into all material points and surrounding circumstances to "satisfy itself fully that the confession cannot but be true." As, an extra-judicial confession is not a direct evidence, it must be corroborated in material particulars before being made the basis of conviction.

18. It has been further held that the status of the person before whom the extra-judicial confession is made must be kept in view, that joint confession cannot be sued against either of them and that it is always a weak type of evidence which can easily be procured whenever direct evidence is not available. Exercise of utmost care and caution has always been the rule prescribed by this Court.

19.

20.

21. 4

22. As observed by the Federal Court, we would reiterate especially referring to this part of the country, that extra-judicial confessions have almost become a norm when the prosecution cannot otherwise succeed. Rather, it may be observed with concern as well as with regret that when the Investigating Officer fails to properly investigate the case, he resorts to padding and concoctions like extra-judicial confessions. Such confession by now, have become the signs of incompetent investigation. A judicial mind, before relying upon such weak type of evidence, capable of being effortlessly procured must ask a few questions like why the accused should at all confess, what is the time lag between the occurrence and the confession, whether the accused had been fully trapped during investigation before making the confession, what is the nature and gravity of the offence involved, what is the relationship or friendship of the witnesses with the maker of confession and what, above all is the position or authority held by the witness". (bold added)

31. The prosecution case is that the extrajudicial confession of Nadeem corroborated by the last seen evidence and the fact that the appellant took the police to where the place of incident occurred is sufficient to convict him.

32. In our view taking the police to the place of the incident might have been a piece of corroborative evidence if the place of incident and body and the cause and manner of death had not already been found and that the appellant was the only one who knew where the scene of incident was and where the body had been hidden. However in this case the place of incident, body and cause of death had already been found and uncovered by the police and thus in our view this extra judicial confession before the police and taking the police to the place of incident is of no assistance to the prosecution based on the particular facts and circumstances of this case as the extrajudicial confession could easily have been concocted by the police.

33. It should also be noted that the IO also failed to uncover any other potentially corroborative evidence from the appellant. For example, no mobile phone was recovered from him, the CDR of Shoaib and the other PW's who state that they were in contact with Shoaib has not been checked, the clothes of Nadeem were not tested for any Kerosene which may have fallen on them, any toxic chemical produced by the smoke

which may have been found in his clothes, no blood on his clothes, no toxicology test was carried out on Shoaib to see if he had any sleep inducing chemicals in his blood, it has not come in evidence that the battery wires of the car were disconnected as claimed by Nadeem in his alleged extrajudicial confession before the police as the car was not even made case property etc

34. As a matter of law we are cognizant of the fact that it is difficult to prove a case based on circumstantial evidence and that great care and caution must be shown in such cases. We have taken this legal aspect into account whilst deciding this case. For example in the case of **Azeem Khan and another v. Mujahid Khan and others** (2016 SCMR 274) at P.290 Para's 31 and 32 it was held as under:-

"31. As discussed earlier, the entire case of the prosecution is based on circumstantial evidence. The principle of law, consistently laid down by this Court is, that different pieces of such evidence have to make one chain, an unbroken one where one end of it touches the dead body and the other the neck of the accused. In case of any missing link in the chain, the whole chain is broken and no conviction can be recorded in crimes entailing capital punishment. This principle is fully attracted to the facts and circumstances of the present case." (bold added)

"32.....In cases of circumstantial evidence, the Courts are to take extraordinary care and caution before relying on the same. Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and narrowly examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused. If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice." (bold added)

4

35. Thus in our view even when taking the prosecution case as a whole, and at its best, in terms of last seen evidence, extra judicial confession of the accused before the police and taking of the police to the scene of the incident, the phone calls and other circumstantial evidence we do not consider that the prosecution has been able to prove its case against the appellant beyond a reasonable doubt (as admitted by the learned APG and counsel for the complainant) and that under such circumstances as mentioned above the appellant is entitled to the benefit of the doubt. Thus, we, by extending the benefit of the doubt to the appellant set aside the impugned judgment and acquit him of the charge. The confirmation reference is answered in the negative and the appellant shall be released forthwith unless he is wanted in any other custody case.

36. The appeal is disposed of in the above terms.