

IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT

JUSTICE IQBAL HAMEEDUR RAHMAN, CHIEF JUSTICE
JUSTICE KHADIM HUSSAIN M. SHAIKH, JUDGE

CRIMINALAPPEAL NO.02-I OF 2024

Khayal Bacha son of Habib,
Resident of Ibrahim Khan Kalay, Mardan.
(Presently confined at Central Prison, Mardan)

Appellant...

VERSUS

1. Ijaz Hussain son of Muhammad Hussain
Resident of Gumba Sook Skardo, Village Shigre Kala, Tehsil Gumba,
District Skardo.

2. The State

Respondents...

Counsel for the Appellant	:	Mr. Astaghfirullah, Advocate
Counsel for the Respondent No.1	:	Raja Siafullah Khalid, Advocate
Counsel for the State	:	Mr. Anees Muhammad Shahzad, Advocate on behalf of A.G., KP
FIR No., Date & Police Station	:	23/2023, dated 16.02.2023 Levy Post, Fazal Subhan Shaheed Thana District Malakand.
Date of Impugned Judgment	:	21.12.2023.
Date of Institution	:	15.01.2024.
Dates of Hearing	:	27.05.2024.
Date of Judgment	:	12.06.2024

JUDGMENT

IQBAL HAMEEDUR RAHMAN-CJ. Khayal Bacha-appellant was tried in case F.I.R No. 23 of 2023 registered at Levy Post, Fazal Subhan Shaheed Thana, District Malakand, in which charge was framed

under section 17 (4) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (Hereinafter called The Ordinance) and Sections 302, 427, 468/471 of the Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called The Code) and section 15 read with section 19 of The Khyber Pakhtunkhwa Arms Act, 2013 (Hereinafter called the Arms Act of 2013) and after conclusion of trial, the above named appellant was convicted by the learned Additional Sessions Judge/MCTC, Malakand at Batkhela, through judgment dated 21st of December, 2023, under Section 302 (b) of The Code, awarded him sentence of rigorous imprisonment for life, requiring him to pay compensation to the tune of Rs.10,00,000/- (ten hundred thousand) to be reimbursed among the legal heirs of Ilyas Hussain Ali Madad (deceased) under section 544-A of the Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called the Act V of 1898). In case of default in payment of compensation, the same was ordered to be recovered as arrears of land revenue from the estate of the appellant and if the same was not recoverable, the appellant had to further undergo simple imprisonment for six months.

i. Concluding about the proof of charge under section 17(4) of The Ordinance, the appellant was awarded sentence of rigorous life imprisonment alongwith fine of Rs.1,00,000/- (one hundred thousand) in default whereof to further undergo simple imprisonment for three months.

ii. Formulating opinion about the proof of offences Sections 468/471 of The Code, the appellant was awarded sentence of three years imprisonment for each of the offence under Section 468 and 471 of The Code with fine of Rs.50,000/- (fifty thousand) each of the above offences and in default of payment of fine to further undergo simple imprisonment for two months for each of the fine.

iii. In addition to above, the appellant was also convicted under section 19 of the Arms Act of 2023 and sentenced to pay fine of Rs.3000/- in default whereof to further undergo simple imprisonment for one month. However, the appellant was acquitted from the charge under section 15 of the Arms Act of 2013.

iv. Granting benefit of Section 382-B of the Act V of 1898, it was further held that the sentences awarded shall run concurrently.

2. The appellant being dissatisfied with the conviction and sentences awarded to him has preferred appeal claiming acquittal while setting aside the judgment impugned.

3. It was an un-seen and un-witnessed occurrence. Murasila (Ex.PA/1) was drafted by Investigating Head Constable-Obaid Khan in view of information furnished to him regarding unidentified bullets riddled dead body which was identified through the driving license to be that of Ilyas Hussain Ali Madad, lying near Saddam Crush Plant at University Road, who mentioned the features of the dead body in the said Murasila, also prepared injury sheet (Ex.PW-

16/1), inquest report (Ex.PW-16/2), recovered 04 empties of pistol which were sealed in Parcel No.1 and Parcel No.2 (Ex.PB) and secured blood through cotton which was sealed in Parcel No.2 (Ex.PC) which were taken into possession vide Ex.PW-7/1. The Crime Report (Ex.PA) was recorded by Ijaz Ahmed, M.H.C. (PW-5) on 16th February, 2023 at 19:20 hours. Dead body was escorted to Civil Hospital Thana through Hazrat Bilal Constable-6225 (not produced) in the ambulance of Rescue-1122 for autopsy, which was conducted by Dr. Habib Khan (PW-4) and the post mortem report is (Ex.PW-4/1). The Medical Officer opined that the deceased died due to wounds as mentioned in Post-Mortem report.

4. Since the assailants were unknown, therefore, there was no development in the investigation till the time of formal arrest of the appellant on 6th of March, 2023 vide memo (Ex.PW-16/30). However, after the arrest of appellant, it was revealed in the investigation that deceased Ilyas Hussain Ali Madad, real brother of Ijaz Hussain (PW-14), in pursuance of conspiracy, was engaged by Khayal Bacha, the appellant, under the pretext of negotiation regarding sale and purchase of vehicles, taken to Chakdara, Batkhela, where he was done to death while snatching the TZ Prado.

5. Since the appellant did not plead guilty to the charge, therefore, prosecution produced 16 witnesses including Syed Mansoor Shah Bukhari, Senior Civil Judge (PW-3), Dr. Habib Khan (PW-4), Juma

Said (PW-12), Sajid Hussain last seen witness (PW-13), Ijaz Hussain, brother of deceased (PW-14) and Obaid Khan, IHC (PW-16).

6. The appellant in his statement recorded under section 342 of the Act V of 1898 denied the whole incriminating evidence put to him and while pleading false implication claimed acquittal.

7. Conclusion of trial as observed earlier resulted in recording of conviction and awarding sentences to the appellant, the detail of which has been given in para (1) of the judgment.

8. Learned counsel for the appellant contended that the assailants, who committed the murder of deceased at unknown time while, the matter was reported on 16.02.2023 at 19:20 hours and no one was nominated in the crime report. Moreover, no incriminating articles including belongings of deceased were recovered from the possession of the appellant or on his pointation and there is no judicial or extra judicial confession of the appellant. Prosecution witnesses were examined under 161 and 164 of the Act V of 1898 after visit of IHC-Obaid Khan to Skardu. Making reference to the investigation, it was contended that the said IHC-Obaid Khan (PW-16) had no legal power or legal authority to investigate the murder case in view of second proviso to sub-Section (3) of Section 26 of Police Act, 2017, KPK and visit of IHC-Obaid Khan to Skardu for the purpose of investigation does not appeal to prudent mind as the occurrence had taken place at University Road, Batkhela, Malakand and recoveries were also made

in that area. Continuing the arguments, it was contended that TZ Prado was recovered from Motorway police, who handed over the same to IHC-Obaid Khan but it was not recovered from the possession of or on the pointation of the appellant, besides, the places of recovery of vehicle and dead body are different. Drawing our attention to the Call Data Record (CDR) (Ex.PW-2/1), it was submitted no call has been made from the number of accused to the deceased and info list containing name and CNIC produced by PW-2 is mere information regarding ownership of the SIM numbers of deceased and appellant. Though, on the day of occurrence the deceased was in contact with many other people but they were not interrogated as to why they were in touch with deceased on telephone. Referring to sending of two empties which were sent to the FSL were returned and after recovery of .30 bore pistol, two empties were again sent along with pistol to the FSL but there is no mention of return of two empties which were earlier sent to the FSL, while the magazine of .30 bore pistol recovered from appellant was not examined by FSL. It was further submitted that it is the case of circumstantial evidence in which no evidence is against the appellant and the Hon'ble Supreme Court has held that in circumstantial case, evidence can be fabricated easily. To substantiate the contention, it was highlighted that no report of CCTV Video footage from Motorway officials Swat was placed in this case by the IHC-Obaid

Khan in order to conceal the identity of real culprits and it is surprising that the appellant after commission of murder snatched TZ Prado which was on the same day found abandoned on Motorway after crossing Chakdara Toll Plaza. Further argued with reference to evidentiary value of the identification parade, it was submitted that the appellant was shown to the witnesses and his photos were also sent to them by the IHC-Obaid Khan prior to identification parade. In this regard PW-13 Sajid Hussain admitted that prior to identification parade IHC-Obaid Khan had already his mobile phone number. Summing up the arguments, it was submitted that the learned trial Court considered and appreciated the inadmissible, un-corroborated, un impeachable and planted evidence of prosecution, which had no evidentiary value as it was fabricated and tailored one and by no stretch of imagination can be used in capital charge but the learned trial Court convicted the appellant on the basis of scattered pieces of evidence. Relying upon the Ratio expounded in that in "KASHIF ALI alias KALU vs. The STATE and another" (2022 SCMR 1515), "BASHIR MUHAMMAD KHAN vs. The STATE" (2022 SCMR 986) it was submitted that in view of glaring contradictions, benefit of doubt has to be extended to appellant not as a matter of grace and concession but as a matter of right.

9. Contrarily, learned counsel for the respondent No.1 contended that accused was lastly seen in the company of deceased at Fizagat

Hotel by PW-13 Sajid Hussain. Making reference to the call made from suspected SIM number i.e. 0345-9217263 which was used by the accused Khayal Bacha to SIM No.0344-5577595 which was in the name of deceased Ilyas Hussain Ali Madad and motive behind the occurrence was snatching TZ Prado from the deceased. Regarding recovery of four empties from the place of occurrence, it was contended that the said empties matched with pistol of the accused. Citing the statement of Tehmid Gul PW-2, it was contended that not giving IMEI Number of Mobile Q-116 may be an inadvertent mistake. It was also submitted that the appellant has not claimed enmity for false implication by the prosecution while making his statement under section 342 of the Act V of 1898 and in response to the question as to why this case was lodged against him and why the PWS deposed against him, the accused/appellant could not give plausible or rational reply but simply claimed innocence. Concluding the arguments, it was submitted that the prosecution has proved its case beyond the shadow of doubt as the defence could not point out any dent in the prosecution evidence. Hence, the appellant is not entitled to any relief.

10. Learned State counsel while endorsing the judgment of the learned trial Court and adopting the arguments of learned counsel for the respondent No.1 also contended that it is a case of circumstantial evidence and no chain connecting the guilt of accused to the neck of

deceased is broken. Further contended that the empties recovered from the place of occurrence were matched with the pistol of the appellant whose license was in his name and according to medical report, the marks of blackening shows that deceased was fired at close range. He finally submitted that the appellant has rightly been convicted and awarded sentence.

11. Conscious consideration has been given to the arguments advanced while scanning evidence adduced by the prosecution.

12. It was an unseen occurrence. Crime Report (Ex.PA) was lodged against un-identified assailant(s). After lapse of seven days of the occurrence, on 23rd of February, 2023, Ijaz Hussain, brother of the deceased (PW-14) recorded statement under Section 161 of the Act V of 1898 wherein he charged unknown assailant(s) for murder of his brother. However, he implicated the appellant on 6th of March, 2023, by way of supplementary statement recorded under Section 164 of the Act V of 1898 for commission of murder of deceased Ilyas Hussain Ali Madad by the Appellant-Khayal Bacha and snatching TZ Prado which was abandoned at Swat Motorway. But admittedly the said supplementary statement was not exhibited in evidence. It is desirable to add here that Ijaz Hussain, brother of the deceased while appearing as PW-14 deposed that:

"بعد ازاں مجھے لیوی والوں کی تفتیش کے دوران معلوم ہوا کہ برادر ام ملزم خیال باچہ ولد حبیب سکھ ابراہیم خیل کلے مردان حال حسن ابدال راولپنڈی نے موضع فضا گٹ

سوات سے برادر ام کی ملکیتی گاڑی NCP پراٹو TZ میں
تھانہ گاؤں ضلع ملاکنڈ آیا تھا اور بمقام یونیورسٹی روڈ ملزم
منکوہ خیال باچہ نے برادر ام سے گاڑی چھین کر بذریعہ
اسلحہ آتشین سے فائرنگ کر کے قتل کیا تھا اور ملزم نے
اسی گاڑی پراٹو TZ کو نمبر پلیٹ لگا کر براستہ سوات
موٹروے بطرف مردان فرار ہوا تھا۔ "

During his cross-examination he also admitted that "*It is correct that during the course of investigation it was the levy officials who told me that one Khayal Bacha has murdered my brother*".

In the light of above, implication of appellant by way of supplementary statement on behalf of Ijaz Hussain, brother of the deceased (PW-14) cannot advance the plea of prosecution even to connect the said appellant in the commission of crime. The said statement got no legal value and sanctity being hearsay, as such nomination of the appellant/Khayal Bacha in supplementary statement cannot be taken into consideration. Article 71 of Qanun-e-Shahadat Order, 1984 (President Order No.10 of 1984) (Hereinafter called Order X of 1984) conveys that only direct evidence is admissible whereas hearsay evidence is inadmissible. For ready reference the said article is reproduced hereunder:

"71. ORAL EVIDENCE MUST BE DIRECT: Oral evidence must, in all cases whatever be direct; that is to say:—

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

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

If it refers to a fact, which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he

perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treaties commonly offered for sale and the grounds on which such opinions are held, maybe proved by the production of such treaties if the author is dead, or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided further that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection:

Provided further that, if a witness is dead, or cannot be found or has become incapable of giving evidence, or his attendance cannot be procured without an amount of delay or expense which under the circumstances of the case the Court regards as unreasonable, a party shall have the right to produce, "shahada ala al-shahadah" (شهادة على شهادة) by which a witness can appoint two witnesses to depose on his behalf, except in the case of Hudood."

In this regard reliance is also placed upon the dictum laid down in "MUHAMMAD AZAM and another vs. KHALID MEHMOOD and another" (2013 P Cr. L J 36) that:

"9. According to the F.I.R. the complainant lodged the same after getting information from one Saleem about the death of Shaukat, deceased. He himself is not a witness of the occurrence. He was just an informer and his statement can be treated as hearsay evidence which cannot be treated as evidence in the eye of law. A reference is made to a case titled Arshad Mahmood v. Raja Muhammad Asghar and another [2008 SCR 345] in which it has been held as under:--

"8. According to prosecution the complainant, Arshad Mehmood, was not present at the place of occurrence, but when he appeared as a witness before the trial Court, he deposed that the accused Raja Muhammad Asghar fired bullet,

which hit Yasir. He also stated that it was told to him by his wife, therefore his evidence is a hearsay evidence. Now the question emerges whether his wife also stated before the Court that she narrated the whole story to her husband. If she would have deposed as such, only then the evidence of Arshad Mehmood would have been admissible as provided in Article 71 of Qanun-e-Shahadat. We have gone through the statements of Arshad Mehmood and Mst. Tazim Akhter, wife of Arshad Mehmood. Arshad Mehmood stated categorically that the story was narrated to him by his wife, but Mst. Tazim Akhter nowhere stated that she told or narrated the story to her husband, therefore, the evidence of Arshad Mehmood was not admissible because Article 71 of Qanun-e-Shahadat conveys that only direct evidence is admissible and it is mandatory to rely upon direct evidence and indirect evidence is not admissible."

and in the case of "SAJJAN SOLANGI vs. The STATE" (2019 SCMR 872) that:

"However both the witnesses claimed that even Muhammad Hassan Solangi at the spot told the same facts to them but it is prosecution's own case that these two witnesses were not the eye-witnesses and they deposed upon the information allegedly furnished by Muhammad Hassan Solangi. Admittedly, Muhammad Hassan Solangi was never produced by the prosecution in this case nor he was summoned as a C.W. to confirm the assertion made by these two witnesses who according to both the courts below are the witnesses of ocular account. According to the Qanun-e-Shahadat Order, 1984 the evidence of Sikandar Ali Malkani (PW-2) and Muhammad Nawaz (PW-3) is hearsay and hearsay evidence cannot be made basis for conviction."

Therefore, deposition of Ijaz Hussain, brother of deceased (PW-14) implicating the appellant through supplementary statement is nothing but hearsay, which cannot be taken into consideration nor acted upon. Even, the said supplementary statement was not exhibited in evidence.

13. Referring to the statement of Sajid Hussain, (PW-13) who had lastly seen the deceased with the appellant was heavily relied upon on behalf of the prosecution. Though the said witness has stated that he was working as tourist guide yet he could not explain his presence at parking area of Karakarum Hotel, Fizagat, Swat on the day of occurrence where he along with Ijaz Hussain son of Ahmed (not produced) and others had lastly seen the deceased negotiating for sale and purchase of vehicles. His statement under Section 161 of the Act V of 1898 was recorded eleven day after the occurrence on 27.02.2023 which reflects that he kept mum and did not disclose the fact of lastly seeing deceased in the company of the appellant to Ijaz Hussain, brother of the deceased (PW-14). He also got recorded his supplementary statement under Section 164 of the Act V of 1898 on 06.03.2023 but the same was not exhibited in the evidence. Delay of eleven days in recording his statement under Section 161 of the Act V of 1898 without any plausible explanation casts serious doubts on veracity of his statement. The Apex Court in case of "ABDUL KHALIQ Vs. THE STATE" (1996 SCMR 1553) has held that:

"There is no explanation furnished by the prosecution for examination of Mir Qalam after 20 days of the incident and for examination of Abdul Jabbar and Muhammad Shah after one month and three days of the incident. It is a settled position of law that late recording of 161, Cr.P.C. statement of a prosecution witness reduces its value to nil unless there is plausible explanation for such delay."

While deposing in his cross examination, Sajid Hussain (PW-13)

admitted that "I have not shown relevant entry in the register of Kura Kuram Hotel in order to establish my stay there. The witness volunteered that it is not my job and I.O had perused the CCTV Camera recording to rely on my presence at the relevant time."

Failure to produce proof of his stay in the Karakarum Hotel and non-production of CCTV Camera footage of the said hotel raises serious doubt and is sufficient is to disbelieve his evidence.

Even if, testimony of Sajid Hussain, (PW-13) is believed as gospel truth, there is gap of more than 9 hours between lastly seeing the deceased and his death that suggests possibility of deceased being killed by someone else which cannot be ruled out. Even otherwise, evidence of last seen requires corroboration which by itself is not sufficient to sustain charge of murder against the appellant. Reliance is placed on the dictum laid down in the case of "GHULAM MUSTAFA alias ZIAU Vs. THE STATE" (1991 PLD Supreme Court 718) and "REHMAT alias RHAMAN alias WARYAM alias BADSHAH Vs. THE STATE" (1977 PLD Supreme Court 515) holding that:

"On a balance of the decided cases it appears that the circumstance of the deceased having been last seen in the company of the accused is not by itself sufficient to sustain the charge of murder. Further evidence is required to link the accused with the murder of his companion such as incriminating recoveries at the instance of the accused, a strong motive or the proximity of the time when they were last seen together and the time when the deceased was killed. Only then will the accused be called upon to give an explanation of the demise of the person who was last seen alive in his

company."

Argument that Sajid Hussain (PW-13) and Ijaz Hussain, brother of deceased (PW-14) gave motive of snatching TZ Prado by the appellant would not advance the plea of prosecution in the absence of any credit worthy incriminating evidence, which the prosecution failed to prove.

14. Nomination of appellant in this case was made through suspected number which was installed in the suspected IMEI of mobile set wherein allegedly appellant Khayal Bacha used his SIM number. The learned trial Court in para 14 of impugned judgment has discussed that:

"14. Undeniably in the instant case, the CDR of the suspected SIM No. 0345-9217263 led to the nomination of the accused facing trial in the instant case. The said suspected cell number was spotted by the IO in the call history of mobile set of the deceased Ilyas Hussain and the CDR, EX-PW-2/1 also confirmed that the deceased was called on his cell number No.0344-5577595 from the suspected cell No.0345-9217263 on 16-02-2023 at 7:03:58 PM. (page-2 of CDR). The said suspected SIM No.0345-9217263 CDR also confirmed that the deceased was contacted on his cell NO.03445577595 at 07:03:58. The IMEI of the suspected SIM No. is 86557006013417 (page-05 of CDR). The previous CDR of the suspected No.0345-9217263 revealed that the said SIM was previously used in another mobile set bearing IMEI No.35718889434770 (page-07 of CDR) and there after it was used in mobile set bearing IMEI NO.35603394060254 till 25-07-2022 (page-12 of CDR). There after the suspected SIM No. 0345-9217263 was switched to IMEI No.85557006013417 till the date of alleged occurrence (page-14 of CDR) and on 18-02-2023, SIM No. 0340-7656735 was installed in the said mobile set. On 21-02-2023, SIM No.0348-1964978 was used in the mobile set having IMEI No. 85557006013417 (page-15 of CDR). The said SIM No. 0348-1964978 belonged to Zakir Hussain, PW-15. It was disclosed by Zakir Hussain, PW-15 that he had

exchanged his mobile set with Qari Younas for mobile set, Q-116 that was handed over to the IO.”

15. Adverting to evidence of Tehmid Gul, DFC/Computer Operator, who while appearing as PW-2, produced Call Data Record (CDR) and info list (Ex.PW-2/1) in respect of SIM numbers 0344-5577595 and 0355-5417440 which were in the name of deceased Ilyas Hussain Ali Madad, and a suspected SIM number 0345-9217263.

During his cross examination he also introduced SIM numbers 0340-8486930 and 9235541440 which were owned by the deceased. Whereas, Call Data Record of SIM number 0340-8486930 which was in the use deceased's wife in Skardu (Gilgit) was not available. One Shujaat Hussain, whose SIM number is 0343-0565529, made 17 outgoing and incoming calls to the deceased but the location of the abovementioned calls were different. Surprisingly, the said Shujaat Hussain, who was an important witness, who identified the dead body of deceased at the time of postmortem examination and thereafter received the dead body, could have brought facts of location and in whose company the deceased was travelling which might have been disclosed by the deceased to him, was not produced and given up by the prosecution putting serious dents to the case of prosecution. However, SIM number 0344-5516191 was in the use of appellant Khayal Bacha. The said PW-2 admitted that no call was received by the deceased from the above said SIM number of

appellant Khayal Bacha. It was further admitted by the said PW that suspected SIM number 03459217263 was in the name of Umara Khan whose CNIC number is 17101-0399898-3 and Farid Alam whose CNIC number is 15501-4140778-7. PW-2 further stated that as per information obtained from the system available to the office, the suspected number was in the use of Farid Alam but when details about the ownership of the said suspected SIM number was sought from the Cellular company on the basis of bio-metric verification, the Franchise furnished information that the said SIM number was in the name of Umara Khan. He further admitted that record of Franchise and record of bio-metric was not annexed with the CDR and handed over to the I.O. The said witness also added that the I.O. informed him that the said SIM number did not belong to Farid Alam as he sent e-mail to PTA and the Franchise concerned to verify the ownership of the SIM number but he did not annex the correspondence with the PTA and the Franchise with the CDR. It was also admitted by PW-2 that SIM number 0317-5555191 was in the name of Amir Gul whose CNIC number is 16101-6340377-1 which was used in the suspected IMEI number i.e.35718889434770. However, he admitted that SIM number of the appellant was installed in IMEI number 3571888943771. Strangely enough, he also admitted that SIM number 0317-5555191 in the name of Amir Gul and according to CDR, it was installed in the IMEI number 357188894347700. He further admitted

that according to CDR IMEI of both the above numbers were different. The PW-02 finally admitted that he in his statement under Section 161 of the Act V of 1898, had not given IMEI number of mobile set Q-116. In view of glaring contradiction regarding ownership of suspected SIM number and failure to produce its ownership proof and non-availability of telephonic contact between the deceased and the appellant, the CDR (Ex.PW-2/1) could not substantiate the case of prosecution, hence the same is liable to be discarded. Production of CDR in the absence of transcripts of the calls or end to end audio recording could not be considered/used as evidence worth reliance as held in "Mian KHALID PERVIZ Vs. The STATE through Special Prosecutor ANF and another" (2021 SCMR 522) that:

"Mere production of CDR DATA without transcripts of the calls or end to end audio recording cannot be considered/used as evidence worth reliance. Besides the call transcripts, it should also be established on the record that callers on both the ends were the same persons whose calls data is being used in evidence. While considering such type of evidence extra care is required to be taken by the Courts as advancement of science and technology, on the other hand, has also made it very convenient and easy to edit and make changes of one's choice as highlighted and discussed in the case of Ishtiaq Abmad Mirza supra. We also can lay hand on the case of Azeem Khan v. Mujahid Khan (2016 SCMR 274) in this regard. So, the CDR DATA produced by the said witnesses is of no help to the Appellant and cannot be termed as an evidence worth reliance to shatter the direct evidence adduced by the prosecution."

It was further held that Call Data Record in absence of any concrete

material, is not conclusive piece of evidence to ascertain the guilt or otherwise of the appellant. As held in "Mst. ASIYA VS the STATE" (2023 SCMR 383) that:

"This Court in a number of cases has held that in absence of any concrete material the Call Data Record is not a conclusive piece of evidence to ascertain the guilt or otherwise of an accused."

16. To prove the culpability of the appellant, prosecution relied upon proceedings of identification parade, conducted by Syed Mansoor Shah Bukhari, Senior Civil Judge, Malakand at Batkhela (PW-3), wherein Juma Said (PW-12), Sajid Hussain (PW-13), Ijaz Hussain son of Ahmed (not produced) and Hussain Ahmed identified the appellant. The Magistrate admitted in his cross examination that appellant raised objection that he was shown to witnesses prior to identification parade but the Magistrate did not further probe the matter nor did he give any finding on the said objection. The Magistrate also admitted on 09.03.2023 that the accused, who was un-muffled, was produced in his court for recording confessional statement and remained in the court with him for sufficient time for pondering. Hence, opportunity to see the appellant by the witnesses, who were also stated to be in the Court premises on 09.03.2023, cannot be ruled out. Sajid Hussain (PW-13) admitted in his cross-examination that I.O. was in the knowledge of his SIM number, therefore, there might be possibility of sharing photos of the appellant by IHC-Obaid Khan to Sajid Hussain.

17. We have noted certain legal infirmities in the proceeding of identification test. Perusal of copy of proceeding of identification test further reveals that total number of persons associated in the identification parade were 13 in number. However, the names and particulars of the dummies in order to suggest similarity of description do not find mentioned in the said report, which is another factor to rule out the report of identification parade from consideration. It is quite apparent, the principles laid down in the judgment of the Supreme Court have not been followed as such identification proceedings were not held in accordance with law. Reliance is placed upon the case law reported in "MUHAMMAD AYZAZ and others Vs. THE STATE" (2011 SCMR 769) wherein it has been held that:

"Likewise the absence of complete description of the dummies at the test identification parade without their addresses, their occupation and without any clue whether they were fellow prisoners or outsiders; the admitted dissimilarities in height, physique, features, complexion, appearance and dress of the dummies and the accused persons; the absence of any information whether the accused persons and the dummies were similar in the matters of beards or being clean-shaven; the absence of disclosure by the prosecution about the actual date of arrest of the three accused persons; the declared involvement of the three accused persons in case F.I.R. No.110 of 2002 of Police Station Pirwadhai and the possibility of the said accused persons having remained in police custody on account of the said Pirwadhai case prior to the identification; the absence of any finding and decision by the learned Magistrate supervising the identification parade contradicting the admitted assertion of the accused persons being in fetters at the time of the said identification; the mere alleged pointation of the three accused persons by the three P.Ws. without disclosing the connection in which

they had been identified or the role which each or anyone of them had played in the occurrence in question; the non-sealing" of the report of the said proceedings (Exh.PYY/1) and other relevant documents after the said report had been finalized on the day of the test identification and providing a copy thereof to the investigating officer before sealing the same on the next day; the four sheets of the said report being of a kind different from the last two sheets of the said report, were the kind of infirmities in the actual proceedings leading to the test identification of the accused persons which would render the said exercise also open to serious doubts."

Likewise in case of "IMRAN ASHRAF and 7 others Vs. THE STATE"

(2001 SCMR 424) it has been held that:

"The perusal of the proceedings of identification parade (Exh.PEE/4) supervised P.W. Irshad Mohiuddin, Judicial Magistrate, Multan reveal that it does not contain the names, parentage and addresses and occupation of each member of the parade, therefore, question would arise that who were those dummies, what were their features, with whom they were mixed up."

Another infirmity we have noted that in the report of identification test is that the Magistrate did not incorporate any report about verification of the period, if any, for which the appellant had remained in police custody and brought to the court. Besides, the Magistrate also omitted to comply requirement of giving certificate in the form prescribed by chapter H.C of volume 3 of Lahore High Court Rules and Order. Proceedings of identification test as reflected in memo (Ex:PW-3/2) and evidence of Syed Mansoor Shah Bukhari, Senior Civil Judge, Malakand (PW-3) clearly reveals legal infirmities, which are sufficient to brush aside the identification proceedings.

18. Another piece of evidence, which was relied upon by the prosecution is of Juma Said PW-12, vendor of fruit, beneath Motorway Bridge, Aladhand, where the appellant allegedly stayed after the occurrence, did not give exact date, time and general features of the appellant i.e. age, height, weight, and complexion in his statement under Section 161, 164 of the Act V of 1898 and at the time of identification parade. Since the said witness did not disclose exact date, time and general features of the appellant in his statement under Section 161, 164 of Act V of 1898, at the time of identification parade and while appearing as PW-12, his testimony got no evidentiary value and cannot be considered.

19. Similarly, Momin, (PW-10), who is plying taxi, who took the appellant in his taxi from Moza Bridge to Mardan and then with females to Hassan Abdal, did not mention general features of the appellant. He produced receipt of Geo Swat 2D Service dated 16.02.2023 (Ex.PW-10/1) wherein admittedly no name, parentage, address and CNIC number was written. Perusal of receipt (Ex:PW-10/1) reveals that there exist columns of name, address and CNIC of customer but the same were left blank. Hence, in absence of particulars of appellant's identity and his general features, his evidence does not inspire confidence.

20. Kamal Afsar PW-8, guard at safety fence at Chakdara Motorway, who earlier in his statement under Section 161 and 164 of

the Act V of 1898 stated that he while performing his duty as guard at Toll Plaza to Zulm Kot, found mobile set Q-116 of white colour which he gave to Muhammad Younis (PW-11).

Evidence of Kamal Afsar, who was declared hostile during trial while appearing as PW-8, and Muhammad Younis, (PW-11) who did not disclose IMEI number of Q-116 in their statements under section 161 and 164 of the Act V of 1898, cannot be relied upon. In the light of above, recovery of mobile Q-116 has not been substantially and corroboratively established during trial.

21. It is further to be noted that Muhammad Sherin PW-9, Manager Habib Hotel, Fizagat, Swat, where allegedly appellant stayed for three nights, produced four Photostat leaves of register of hotel (Ex.PW-9/1) wherein CNIC numbers of the appellant were shown different and column of date & time of arrival showed signs of tampering which create serious doubt and is sufficient to brush aside the same.

22. Referring to the evidence of the IHC-Obaid Khan (PW-16) and memos of pointation (Ex.PW-6/4 to Ex.PW-6/8) attempt was made to persuade us to act upon this evidence as a corroborative factor. On 07.03.2023, the appellant in the presence of IHC-Obaid Khan (PW-16) and Muhib Gul, IHC (PW-6) and constable Hazrat Bilal (given up) pointed the place of occurrence vide memo (Ex. PW-6/4), the place where the white-coloured mobile phone Q-116 was thrown memo

(Ex.PW-6/5) and place where TZ Prado was abandoned (Ex.PW-6/6). Objection was raised during trial regarding the admissibility of these documents but strangely enough the objection was neither decided at that time when it was raised nor later on. Being inadmissible evidence, no importance can be given to the memos (Ex.PW-6/4 to Ex.PW-6/6) and evidence of IHC-Obaid Khan (PW-16) and IHC-Muhib Gul (PW-6) to this extent. Likewise, on 08.03.2023, the appellant not only made pointation of car parking of Habib Hotel Fizagat, Swat where he met deceased vide memo (Ex.PW-6/7) but also pointed out Room No.20 of the said hotel where the appellant stayed for 3 nights through memo (Ex.PW-6/8). Since nothing was discovered in pursuance of the disclosures made by the appellant, evidence should not be permitted to be produced falling outside the domain of Article 40 of Order X of 1984.

23. Different type of recovery is another piece of evidence relied upon by prosecution to strengthen its case. Obaid Khan, IHC (PW-16) deposed that he recovered from TZ Prado, one empty of pistol, one magazine of pistol, blood stained swab of deceased, broken pieces of window-glass of TZ Prado, number plate, photo stat documents through memo Ex.PW-7/3 (Ex.PE, Ex.PF, Ex.PG, Ex.PH, Ex.PI, Ex.PW-16/5) and four empties of pistol vide memo (Ex.PW-7/1 Ex.PB).

Recovery was statedly effected on 16.02.2023 and production of said

evidence is an unsuccessful attempt to provide corroboration. Statedly, recovery of TZ Prado was effected on 16.02.2023 by the Motorway officials in the absence of appellant. The said vehicle was handed over to IHC-Obaid Khan (PW-16) in presence of Sub-Inspector Waheedullah and CU Waheedur Rehman through memo (Ex.PW-16/7) but the said S.I. Waheed Ullah and CU Waheedur Rehman were not produced. The said concealment of evidence is damaging the prosecution case, which creates doubt and the same goes in favour of the appellant, as such, the recovery in the absence of appellant cannot provide corroboration.

24. Admittedly, letters for provision of data/record of CCTV Camera (Ex.PW-16/15) and verification of finger prints taken from the TZ Prado (Ex.PW-16/23) were sent to the concerned offices but no verification report of suspected fingerprints and data/record of CCTV Cameras installed at Chakdara Tool Plaza was produced at the trial to substantiate the case of prosecution.

25. Recovery of weapon of offence i.e. .30 bore pistol bearing No.AJK55231 along with its license, 6 cartridges, one black-coloured magazine, one bag of black colour, one suite of clothes, one double adhesive tape, one smart mobile phone containing one Telenor SIM and one Zong SIM vide recovery memo (Ex.PW-16/30) at the time of arrest of the appellant was heavily relied upon by learned Counsel for the respondent. This aspect of evidence will also not improve the case

of prosecution for the reason that initially the empties which were recovered on 16.02.2023 from the spot, were sent to Forensic Science Laboratory on 17.02.2023 and returned with its report (Ex:PW-16/26) on 01.03.2023. Factum of sending empties and pistol together on 08.03.2023 cannot rule out the possibility of fabrication. IHC-Obaid Khan (PW-16) during his cross examination admitted that "No where it is stated in the FSL report that the empties after examination, which were earlier sent vide receipt No.72/1 dated 17-02-2023 was again sealed by the FSL Authority by affixing any stamp."

Even otherwise, recovery of weapons of offence coupled with positive reports of Forensic Science Laboratory (Ex.PW-16/26 and Ex.PW-16/52) is of little help to the prosecution in view of our discussion brushing aside the last seen evidence, Call Data Record and proceeding of identification test.

26. Similarly, positive Report of Chemical Examiner (Ex.PW-16/25) suggesting that last-worn clothes of deceased and one pair of brown colour boot were stained with human blood in the absence of any other evidence cannot prove guilt of appellant. Medical evidence having corroborative value by itself cannot disclose the identity of the assailants (See: "MUHAMMAD TASAWEER Vs. HAFIZ ZULKARNAIN and 2 others") (PLD 2009 SC 53):

"12. It is also settled law that medical evidence may confirm the ocular evidence with regard to the seat of the injury, nature of the injury, kind of weapon used in the occurrence' but it would not connect the accused

with the commission of the crime.”

and "ABDUL MAJEED Vs. MULAIZIM HUSSAIN and others” (PLD 2007 SC 637). Relevant portion of the case law, as under:

“But the learned High Court had also observed that the medical evidence is always a supporting evidence as medical evidence could not depict with regard to identification of the accused who had fired or hit the deceased by his weapon of offence.”

But there is no credit worthy evidence in view of discussion made to get corroboration from the evidence.

27. Learned counsel for the appellant drew our attention to investigation conducted by IHC-Obaid Khan (PW-16) who was complainant of this case as well and he being Investigation Head Constable (IHC) had no legal authority to investigate the murder case. The relevant second Proviso to sub-section (iii) of Section 26 of The Khyber Pakhtunkhwa Police Act, 2017 is reproduced hereunder:

“Provided further that cases of murder and such other offences as determined by Provincial Police Officer shall be investigated by an officer of the rank of Inspector and where an Inspector is not available, the investigation shall be conducted by an officer not below the rank of Sub-Inspector duly authorized by the District Police Officer.”

It is not understandable that why the instant murder case was investigated by a Head Constable in absence of explanation of compelling circumstances which clearly vitiate the investigation.

28. We have noted certain other legal infirmities in the judgment assailed. One of them is omission on the part of Trial Court to mention the provision of law under which conviction was recorded

and sentence was awarded. Making reference to the provision under which charge was framed, it was held that since evidence adduced though inspires confidence but cannot satisfy the yardstick contained in Section 17(4) of The Ordinance to record conviction, therefore, sentence of life imprisonment was awarded which cannot be imposed under the said provision.

29. Since, there is no direct evidence to connect the appellant in the commission of crime. Case of the prosecution rests upon circumstantial evidence. In the case of "IBRAHIM and others Vs. The STATE" (2009 SCMR 407) dealing with the yardstick, it was held that circumstantial evidence should be like a well knit chain whose one end should point to accused and the other to the deceased. Relevant portion of the case law is reproduced hereinbelow:

“Undeniably, it was an un-witnessed occurrence and the prosecution case rested on circumstantial evidence. It is well-settled that circumstantial evidence should be like a well knit chain whose one end should point to the accused and the other to the deceased.”

We may also advantageously make reference to the dictum laid down in "IMRAN alias DULLY and another Vs. The STATE and others" (2015 SCMR 155) that:

“5. By now, it is a consistent view that when any case rests entirely on circumstantial evidence then, each piece of evidence collected must provide all links making out one straight chain where on one end its noose fit in the neck of the accused and the other end touches the dead body. Any link missing from the chain would disconnect and break the whole chain to connect the one with the other and in that event conviction cannot be safely recorded and that too on a capital

charge. As was held in the case of Fazal Elahi (ibid) and in view of the changed social norms and standard of ethics of the society, to which the witnesses belong and also the questionable credibility of the investigating agency and its incompetency to professionally investigate such blind crimes, by now, the Courts have to exercise more and more cautions before accepting and resting its opinion of being guilty on a circumstantial evidence collected apparently in a dishonest, dubious and rough manner.”

and "HASHIM QASIM and another Vs. The STATE" (2017 SCMR 986), in which it has been held that circumstantial evidence sometimes may appear to be conclusive but must always be narrowly examined because such type of evidence sometimes may be fabricated. Relevant portion of the case law is reproduced as under:

“8. Keeping in view the above, the case of the prosecution appears to have been based entirely on circumstantial evidence. Placing reliance on circumstantial evidence, in cases involving capital punishment, the superior Courts since long have laid down stringent principles for accepting the same. It has been the consistent view that such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single chain, an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. Any missing link in the chain would destroy the whole and would render the same unreliable for recording a conviction on a capital charge. Reference is made to the cases of Muhammad Aslam v. The State (PLD 1992 SC 254) and Ch. Barkat Ali v. Major Karam Elahi Zia (1992 SCMR 1047).

9. In cases of circumstantial evidence, there are chances of procuring and fabricating evidence, therefore, Courts are required to take extra care and caution to narrowly examine such evidence with pure judicial approach to satisfy itself, about its intrinsic worth and reliability, also ensuring that no dishonesty was committed during the course of collecting such evidence by the Investigators. If there are apparent indications of designs on part of the investigating agency in the preparation of a case resting on circumstantial evidence, the court must be on its guard against the trap of being deliberately misled into a false inference. If the court fails to observe such care and

caution and hastily relies on such evidence, there would be a failure of justice. Reference may be made to the case of Fazal Elahi v. Crown (PLD 1953 FC 214) and of Lejzor v. The Queen (PLD 1952 PC 109), it was held therein with considerable emphasis that circumstantial evidence may sometimes appears to be conclusive but it must always be narrowly examined, if only because this count of evidence may be fabricated in order to cast suspicion on another, therefore, it is all the more necessary before drawing inference, if the accused's guilt from circumstantial evidence to be sure and that there are no other co-existing circumstances, which weaken or destroy the inference then, in that case alone it may be relied upon otherwise, not at all."

It is to be noted that conviction cannot be based on high probabilities.

Suspicion, however, strong cannot take the place of proof. Reliance is

placed upon "YASIN alias GHULAM MUSTAFA Vs. THE STATE"

(2008 SCMR 336). Relevant portion of the case law is as under:

"It is well-settled that suspicion howsoever strong it may be, by itself cannot take place of proof. This view receives support from the following reported judgments:--

(i) Bhugdomal Gangaram and others v. State of Gujarat 1984 PSC 640 (sic), (ii) State of U.P. v. Krishna Gopal and another 1988 MLD 1501 (sic) and (iii) Vijant Kumar and others v. State through Chief Ehtesab Commission, Islamabad and others PLD 2003 SC 56.

It is also an established principle of the administration of criminal justice that conviction cannot be based on any other type of evidence howsoever, convincing it may be, unless direct or substantive evidence is available. Even, guilt of an accused cannot be based merely on high probabilities that may be inferred from evidence in a particular case. In this view we are fortified by the following reported judgments:--

(i) Muhammad Luqman v. The State PLD 1970 SC 10, (ii) Muhammad Noor v. Member-I, Board of Revenue, Balochistan and others 1991 SCMR 463 and (iii) Qalb-e-Abbas alias Nehola v. The State 1997 SCMR 290."

30. Viewed from any angle, the evidence led by prosecution is neither trustworthy nor confidence inspiring, suffering from inherent defects, casting doubt about the veracity of prosecution stance, benefit

of which has to be extended in favour of appellant as a matter of right as argued on behalf of appellant in view of Rule of law expounded in "MAQSOOD AHMAD Vs. The STATE and others" (2017 MLD 1415), "HASHIM QASIM and another Vs. The STATE" (2017 SCMR 986), "MUKHTIAR HUSSAIN Vs. The STATE" (2017 MLD 745) and "PIRZADA alias PEER Vs. The STATE"(2017 PCr.LJ 605).

30. Pursuant to above, while accepting the appeal, setting-aside the judgment impugned, the appellant is hereby acquitted. He is in custody. He be released forthwith if not required in any other case.

IQBAL HAMEEDUR RAHMAN
CHIEF JUSTICE

KHADIM HUSSAIN M. SHAIKH
JUDGE

Announced on 12th June, 2024
at Islamabad.
*Ajmal/**

Approved for reporting.

Chief Justice