

IN THE FEDERAL SHARIAT COURT
(Appellate/Revisional Jurisdiction)

PRESENT:

MR. JUSTICE IQBAL HAMEEDUR RAHMAN, CHIEF JUSTICE
MR. JUSTICE KHADIM HUSSAIN M.SHAIKH
MR. JUSTICE DR. SYED MUHAMMAD ANWER

CRIMINAL APPEAL NO.01-P OF 2023

1. DILBAR SON OF DILAWAR, RESIDENT OF GUJAR ABAD, PESHAWAR.
2. ZAFAR SON OF SARDAR ALI, RESIDENT OF GHARIB ABAD, PHANDU, PESHAWAR
3. YOUNAS ALIAS MEGAY SON OF SANGEEN SHAH, RESIDENT OF AKHUNABAD, PESHAWAR.

APPELLANTS

VERSUS

1. THE STATE.
2. HIJRAT KHAN SON OF MASUM KHAN, RESIDENT OF SHAHEED ABAD # 2, PHANDU ROAD, PESHAWAR.

RESPONDENTS

CRIMINAL APPEAL NO.03-P OF 2023

IJAZ-UL-HAQ SON OF ZIA UL HAQ, RESIDENT OF CHUSTI ABAD, PESHAWAR.

APPELLANT

VERSUS

1. HIJRAT KHAN SON OF MASUM KHAN, RESIDENT OF SHAHEED ABAD # 2, PHANDU ROAD, PESHAWAR.
2. THE STATE.

RESPONDENTS

CRIMINAL APPEAL NO.04-P OF 2023

IJAZ-UL-HAQ SON OF ZIA UL HAQ, RESIDENT OF CHUSTI ABAD, PESHAWAR.

APPELLANT

VERSUS

1. HIJRAT KHAN SON OF MASUM KHAN, RESIDENT OF SHAHEED ABAD # 2, PHANDU ROAD, PESHAWAR.
2. THE STATE.

RESPONDENTS

CRIMINAL MURDER REFERENCE NO.01-P OF 2023

THE STATE.

APPELLANT

VERSUS

1. DILBAR SON OF DILAWAR, RESIDENT OF GUJAR ABAD, PESHAWAR.
2. IJAZ-UL-HAQ SON OF ZIA UL HAQ, RESIDENT OF CHUSTI ABAD, PESHAWAR.
3. ZAFAR SON OF SARDAR ALI, RESIDENT OF GHARIB ABAD, PHANDU, PESHAWAR

Criminal Appeal No.01-P of 2023 L/w
Criminal Appeal No.03-P of 2023
Criminal Appeal No.04-P of 2023
Criminal Murder Ref. No.01-P of 2023

-2-

4. YOUNAS ALIAS MEGAY SON OF SANGEEN SHAH, RESIDENT
OF AKHUNABAD, PESHAWAR.

RESPONDENTS

Counsel for the appellants in Cr.A.No.01-P of 2023 and Counsel for the appellant in Cr.A.Nos.03-P & 04-P of 2023	Mr. Hussain Ali, & Mr. M. Muazzam Butt, Advocates
Counsel for the State	Mr. Anees Muhammad Shahzad, Advocate on behalf of A.G. KPK.
FIR No., Date & P.S	1139/2019, 23.11.2019, Phandu, Peshawar.
Date of impugned judgments	04.03.2023
Date of Institutions	11.03.2023 & 15.03.2023
Date of Hearing	17.01.2024
Date of Judgment	04.06.2024

J U D G M E N T

KHADIM HUSSAIN M. SHAIKH –J. By means of captioned Criminal Appeal No.1-P of 2023 and Criminal Appeal No.3-P of 2023, appellants Dilbar, Zafar and Younas alias Megay and Ijaz ul Haq respectively have called in question Judgment dated 04.03.2023, passed by the learned Additional Sessions Judge-XIX, Peshawar in Sessions Case No.05/HC of 2019 re-The State Vs. Dilbar and others, emanating from Crime No.1139 of 2019 registered at Police Station Phandu District Peshawar, for offences under Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance, (VI) of 1979, (**“The Ordinance”**), and Section 412 of The Pakistan Penal Code, 1860 (XLV of 1860) (**“The Penal Code”**) whereby appellants, Dilbar, Zafar, Younas alias Megay and Ijaz ul Haq (**the appellants**) have been convicted for offences under Section 17(4) of The Ordinance and sentenced to death as Hadd penalty on account of murder of Ayaz during the course of robbery and they have also been directed to

pay compensation of Rs.400,000/- (one lac each) to the LRs of deceased Ayaz under Section 544-A of The Code of Criminal Procedure, (Act V of 1898) (“**The Code**”) in failing which to further undergo for a period of six months and they have further been convicted for offence under Section 412 of The Penal Code and sentenced to suffer 10 years simple imprisonment with fine of Rs.50,000/- each and in default whereof to suffer simple imprisonment for two months more, extending them benefit of Section 382-B of The Code and by means of captioned Criminal Appeal No.04-P of 2023 appellant Ijaz ul Haq has called in question Judgment dated 04.03.2023, passed by the learned Additional Sessions Judge-XIX Peshawar in Sessions case No.27/AA of 2019 arising out of the subject FIR No.1139 of 2019, whereby appellant Ijaz ul Haq (**the appellant**) has been convicted for offence under Section 15-AA of Arms Act and sentenced to suffer simple imprisonment for 03 (three) years and to pay fine of Rs.1,000/- and in default whereof to further suffer 10 days simple imprisonment, extending him benefit of Section 382-B of The Code. And whereas the learned trial Court has made the captioned Criminal Murder Reference No.01-P of 2023 in terms of Section 374 of The Code for confirmation of the death sentence awarded to the appellants.

2. Briefly, the facts of the prosecution case are that on 23.11.2019, complainant Hijrat Khan and his relative Ayaz Khan son of Aman Ullah, who was a flour dealer, were coming from Ghari Isa Khan and at about 2100 hours they reached near City Shadi Hall, when they saw three persons with muffled faces, chasing them on motorcycle, who intercepted and stopped them, the culprits pointing their pistols towards Ayaz, asked the latter to handover shopper containing cash, to which Ayaz demurred

whereupon one of the culprits fired, which hit Ayaz in his abdomen and he fell down. The culprit, who fired at Ayaz, snatched the shopper, containing cash amount of Rs.450,000/- from him and then all of them fled away towards Gunj. Complainant Hijrat Khan while was taking injured Ayaz to the hospital, the latter succumbed to his injuries near Ander Shehr. The complainant then brought the dead body of deceased Ayaz in Lady Reading Hospital (**LRH**), where after examination, the doctor on duty at LRH pronounced Ayaz dead. The complainant allegedly made report of the incident that was handed down as mursaila at 2140 hours on 23.11.2019 by ASI Izhar Ullah, the Incharge of community LRH, which was duly thumb impressed by complainant Hijrat Khan. The said mursaila was then sent through constable Yousaf to police station Phandu, where it was incorporated in book under Section 154 of The Code vide FIR No.1139 Ex.PA at 2220 hours and whereas dead body of Ayaz was sent under the escort of PC-1197 Ayaz to KMC hospital where its postmortem was conducted. The police arrested accused Ijaz ul Haq son of Zia ul Haq, Dilbar son of Dilawar and Zafar son of Sardar Ali and after usual investigation sent up them with the challan on 16.02.2020 to face their trial, showing appellant Younas alias Megay son of Sangeen Shah as absconder, who was later on arrested and was sent up with the supplementary challan to face his trial on 16.06.2020. After completing all the formalities, a formal charge against all the appellants in the main subject Sessions Case No.05/HC of 2019 and a formal charge against appellant Ijaz ul Haq in offshoot case i.e. Sessions Case No.27/AA of 2019 under Section 15-AA on 04.03.2021 were framed to which they pleaded not guilty and claimed their trials.

3. In order to prove its case, the prosecution examined in all 15 prosecution witnesses namely Inspector Wajid Shah Incharge of Narcotics Eradication Team, S.I Abdullah Jan of PS Phandu, ASI Izhar Ullah Khan of PS Phandu, ASI Naseem Khan, DFC Arif Ullah, ASI Noor Ali Shah, constable No.1197 Ayaz, Inspector Diyar Khan, complainant Hijrat Khan, Akbar Khan son of Amanullah, the brother of the deceased, Sanaullah son of Said Jan, Mr. Abdul Haleem, the learned Judicial Magistrate Peshawar, Investigating Officer Inspector Gul Dad Khan of P.S Phandu, Dr. Touqeer Farooq, Medical Officer, Khyber Pakhunkhwa Medical College (KMC) Hospital and HC No.5496 Gulfaraz as PWs No.1,2,3,4,5,6,7,7-A,8,9,10,11,12,13 and 13-A respectively and produced all the necessary documents including mursaila, FIR, inquest report, forensic laboratory reports, postmortem report, memos of recovery, memo of securing clothes of deceased Ayaz, arrest cards of the appellants, alleged confessional statements of appellants Ijaz ul Haq, Dilbar and Zafar under Section 164 of The Code etc and then the prosecution closed its side. Whereafter the statements of the appellants under Section 342 of The Code were recorded, wherein they denying the prosecution allegations and recovery of alleged crime weapons and alleged robbed money etc, professed their innocence. The appellants neither examined themselves on oath under Section 340(2) of The Code, nor did they examine any person as their defence witness. At the conclusion of the trial and after hearing the parties' counsel, the learned trial Court has convicted and sentenced the appellants vide impugned Judgments dated 04.03.2023 as discussed in paragraph-I *supra*.

4. The appellants being aggrieved by the impugned judgments dated 04.03.2023 have preferred the subject Criminal Appeals. The learned trial Court has also made the subject Criminal Murder Reference, for confirmation of the death sentence awarded to the appellants in terms of Section 374 of The Penal Code.

5. At the very outset, the learned counsels for the appellants have submitted that the appellants have filed Criminal Miscellaneous Applications Nos.9,10,11 and 12-I of 2023 for grant of permission to compound the offences and for acceptance of the compromise, which along with the affidavits and relevant record were transmitted to the learned trial Court with direction to probe into the veracity of the compromise; and, that the learned trial Court after conducting enquiry has furnished the requisite report. The learned counsels state that the parties having settled their differences, have come to compromise, whereby the legal heirs of deceased Ayaz have pardoned the appellants in the name of Allah without taking any amount or other things as *badal-i-sulh* and they pray for allowing permission to compound the offences and for acceptance of the compromise arrived at between the parties. On the other hand, the learned State counsel has submitted that there is absolutely no scope of compromise available for the parties in the cases like case one in hand involving murder of innocent person committed during the course of robbery on his showing slightest resistance to snatching of his cash amount by the appellants and he vehemently opposed the acceptance of compromise.

6. Patently, the subject offences involving Harrabah are not compoundable by virtue of the provisions as contemplated in Section 345

of The Code and the provisions as contained in Section 345(7) of The Code, hardly leave scope for any other interpretation except that a non-compoundable offence cannot be made compoundable by the Court. It is reiterated that the legislature has laid down the test for determining the classes of offences which concerns individuals only as distinguished from those which have reference to the interests of the State and against the society as a whole. Facing with such situation, the learned counsel for the appellants have frankly conceded that the subject offences involving Harrabah are not compoundable, contending that the purpose behind filling of the compromise application was to persuade the Court to take lenient view against the appellants on humanitarian ground, in the wake of compromise arrived at in between the parties. We are unable to subscribe ourselves to such an untenable contention of the learned counsels for the appellants for the simple reason that the provisions as contained in Section 345 and 345 (7) of The Code cannot be stretched too far by including the non-compoundable offences therein under the garb of humanitarian ground or any other extraneous consideration, and the offences like the offence involved in the case one in hand being against the society as a whole cannot be permitted to be compounded by any individual on any score whatsoever. The reliance in this context can be placed on in case of ***Muhammad Rawab Vs. The State reported as (2004 SCMR 1170)***. Under these circumstances, we proceeded to decide the captioned Criminal Appeals etc on merits in the wake of material brought on the record.

7. The learned counsels for the appellants, on merits of the case, have mainly contended that the names of the appellants are not mentioned in

the mursaila and FIR; that the police never visited the pointed places and all the memos/mashirnamas of recoveries etc were prepared by the police at police station Phandu; that there are material contradictions in the evidence led by the prosecution; that the alleged judicial confessions recorded before the Judicial Magistrate-IV Peshawar after 16 days of the arrest of appellants Dilbar, Zafar and Ijaz ul Haq is outcome of tortures; that the alleged confessional statements of the appellants have also not been recorded in accordance with the provisions of Sections 164 and 364 of The Code and principles laid down by the superior Courts; that no incriminating article whatsoever was recovered from on the pointation of the appellants, and, that the prosecution has failed to prove its case against the appellants beyond reasonable doubt and they have prayed that the Criminal Appeals may be allowed, the impugned judgments may be set-aside, and the appellants may be acquitted of the charges. The learned counsel for the appellants Dilbar, Zafar and Younas alias Megay has placed his reliance on the cases of ***Mukamil Shah and others Vs. Sami Ullah and others (2016 PCr.LJ 337)***, ***Wazir Muhammad alias Lal Muhammad Vs. The State (2018 YLR 1071)***, ***Abdul Waheed Vs. The State (2014 YLR 2026)***, ***The State through P.G. Sindhand others Vs. Ahmed Omer Shaikh and others (2021 SCMR 873)***, ***Akhtar Muhammad Vs. The State and others (2020 PCr.LJ 533)***, ***Akhtar Zaib Vs. The State (2019 PCr.LJ 1014)***, ***Adil Khan Vs. The State and another (2020 PCr.LJ 729)***, ***Amanatullah and another Vs. The State (1986 PCr.LJ 523)***, ***Azeem Khan and another Vs. Mujahid Khan and others (2016 SCMR 274)*** and ***Saleem Khan alias Gul Vs. The State and another (2020 YLR Note 98)***.

8. Mr. Anees Shahzad, the learned State counsel has mainly contended that the prosecution by examining 15 witnesses and producing all the necessary documents has proved its case against the appellants beyond any shadow of doubt; that pointed discrepancies and infirmities being minor in nature are ignorable; that the learned trial Court has rightly convicted and sentenced the appellants. The learned counsel for the State supporting the impugned conviction judgments prays for dismissal the captioned Criminal Appeals and confirmation of the death sentence awarded to the appellants.

9. We have considered the submissions of learned counsel for the parties and have gone through the evidence brought on the record with their assistance.

10. From a perusal of the record, it would be seen that the names of the appellants do not find place in the mursaila Ex.PA/1 and/or in FIR Ex.PA lodged on 23.11.2019 nor even descriptions such as structure, physique, complexion and height etc of the culprits, who committed the alleged crime, are mentioned therein; it was after more than 57 days of the incident, complainant Hijrat Khan (**PW.8 complainant**) and Akbar Khan (**PW.9**) named the appellants as accused on the basis of hearsay evidence in their further/supplementary statements under Sections 161 of The Code dated 20.01.2020 before the police and in their statements under Section 164 of The Code recorded before Judicial Magistrate-II Peshawar on 20.01.2020. It is reiterated that any supplementary statement or further statement of the complainant recorded during investigation by the police would neither be equated with FIR nor is read as a part of the FIR; but it is to be treated as statement under Section 161 of The Code, which can only be used by the

accused to contradict the witness. Reliance in this context is placed on the cases of **FALAK SHER ALIAS SHERU VERSUS THE STATE (1995 SCMR 1350)** and **KHALID JAVED AND ANOTHER VERSUS THE STATE (2003 SCMR 1419)**. Furthermore, Investigating Officer, Inspector Gul Dad Khan (**PW.12 Investigating Officer**), in his cross-examination has stated that **“I have recoded the statements under Section 161 Cr.P.C of PW Hijrat complainant and PW Akbar on 20.1.2020 and then on the same day produced the abovementioned PWs before the learned Judicial Magistrate for recording their 164 statements;”** a couple of days delay in statements of the PWs has been viewed with grave suspicion, and such an inordinate delay of more than 57 days in recording of the above statements of the PWs in this case in absence of any explanation, prima facie pointing out to fabrication of the prosecution case, being significant could not be lost sight of. Reliance in this context is placed on the case of **MUHAMMAD ASIF Vs. The STATE (2017 SCMR 486)**, the Hon’ble Supreme Court of Pakistan has held that:

“There is a long line of authorities/precedents of this Court and the High Courts that even one or two days unexplained delay in recording the statements of eye witnesses would be fatal and testimony of such witnesses cannot be safely relied upon”.

11. Per prosecution the incident was shown to have been taken place on 23.11.2019 at 2100 hours and after the incident PW.8 complainant took deceased Ayaz Khan in injured condition for the hospital, but injured Ayaz Khan succumbed to his injury and died on the way to the hospital; deceased Ayaz Khan was brought in Accident and Emergency department of Lady Reading Hospital with no pulse, respiratory and cardiac activity, where the doctor on duty after his examination pronounced him dead at

09:20 p.m. as is evident from the examination slip showing computerized invoice dated 23.11.2019 issued at 21:11:50 hours of the hospital available at page 93 of the paper book in Cr.A.No.1-P of 2023; according to PW.3 ASI Izhar Ullah he prepared inquest report produced by him at Ex.PW.3/1 at LRH and then dispatched the dead body of deceased Ayaz to KMC hospital for its postmortem, but the inquest report produced at Ex.PW.3/1 by him would reveal that it contains only the signature of PW.13 Dr. Touqeer Farooq, the Medical Officer, KMC hospital, who conducted postmortem of deceased Ayaz Khan, but it does not contain either the signature of PW.3 ASI Izhar Ullah and/or of two persons namely PW.9 Akbar Khan and Hazrat Muhammad, who are shown to have identified the dead body of deceased Ayaz Khan, being his relatives, it would further reveal that the said inquest report is also vague in nature lacking in material particulars relating to the time of its preparation and many columns thereof are left blank, that all shows that the aforesaid corpse proceedings were conducted in a slipshod manner without applying proper conscious mind; per prosecution the corpse of deceased Ayaz Khan was sent from LRH to KMC hospital for postmortem under the escort of constable No.1197 Ayaz Khan, after he was pronounced dead at 09:20 p.m, but no time of arrival of dead body at KMC hospital is shown either in postmortem report Ex.PM and/or even in the evidence of PW.13 Dr. Touqeer Farooq Medical Officer of KMC hospital, who conducted postmortem of deceased Ayaz Khan and whereas per constable No.1197 Ayaz Khan on 23.11.2019 ASI Izhar Ullah Khan handed over the dead body of deceased Ayaz to him for postmortem which he took to the KMC hospital at about 09:00 p.m. from the police station Phandu by deposing that **“on 23.11.2019 ASI handed**

over the dead body of deceased namely Muhammad Ayaz and directed me to take the same to KMC for postmortem” and in cross examination he stated that **“it was about 09:00 p.m I took the dead body to the KMC from the police station Phandu”**, although the dead body of deceased Ayaz Khan was ever taken to police station Phandu; according to PW.8 complainant and PW.9, deceased Ayaz had died while he was being taken to hospital from the place of incident and at about 09:20 p.m. Medical Officer in LRH hospital after examining deceased Ayaz Khan pronounced him dead as he was brought in the hospital with no pulse, respiratory and cardiac activity and no medical aid or treatment was provided to deceased Ayaz, but application for postmortem dated 23.11.2019 addressed to the Incharge postmortem KMC Peshawar available at Page 94 of paper book depicts that during the medical aid/medical treatment deceased Muhammad Ayaz Khan died, which has been admitted by PW.12 Investigating Officer by stating that **“I have seen application for postmortem report dated 23.11.2019 which states that during the medical aid/medical treatment deceased Muhammad Ayaz Khan died”**; postmortem report Ex.PM and evidence of PW.11 Dr. Touqeer Farooq, Medical Officer KMC depict that he started conducting postmortem of deceased Ayaz at 11:00 p.m. on 23.11.2019, but its finishing time is nowhere mentioned either in the postmortem report Ex.PM or even in the evidence of PW.11 Dr. Touqeer Farooq, Medical Officer KMC; per prosecution the report of the incident was made by PW.8 complainant through mursaila Ex.PA/1 on 23.11.2019 at 2140 hours handed down in LRH by PW.3 ASI Izhar Ullah Khan the Incharge of Police Post at LRH; the said mursaila then was sent by PW.3 ASI Izhar Ullah

Khan through constable-480 Yousaf to police station Phandu for its incorporation in book under Section 154 of The Code as an FIR; PW.3 ASI Izhar Ullah Khan supporting this aspect of the prosecution case, deposed that ***“on receiving information regarding the occurrence, I came to LRH where one Hijrat Khan (complainant) reported the matter to me, which was reduced to me in the shape of mursaila Ex.PA/1 which was thumb impressed by him as token of its correctness”***, but PW.8 complainant, in his evidence before the learned trial Court did not state about his making report through mursaila Ex.PA/1 in LRH to PW.3 ASI Izhar Ullah Khan and instead he claimed to have directly lodged FIR at police station Phandu by deposing that ***“I alongwith my relatives i.e. father, uncle and brothers of the deceased came to the police station Phandu, where I lodged the FIR and recorded my statement to the police. The FIR bears my thumb impression; it was 09.15/09.30 p.m when I reported the matter to the SHO in the police station Phandu”***, but the FIR produced at Ex.PA, shows that it was lodged at 2200 hours, by incorporating the mursaila Ex.PA/1 therein, which also does not reveal thumb impression of PW.8 complainant, who when was confronted to the mursaila Ex.PA/1, handed down in the hospital containing his thumb impression, has stated that ***“I have seen my thumb impression on report Ex.PA/1, which was taken from me on it by SHO in police station Phandu”***, and thereby PW.8 complainant, who, per prosecution, is the solitary witness, accompanying deceased Ayaz at the time of the occurrence, has completely belied such material aspects of the prosecution case relating to the reporting of the occurrence to the police through mursaila Ex.PA/1, which was culminated into the FIR Ex.PA, rendering the

story of occurrence narrated therein doubtful; PW.8 complainant in his statement before the learned trial Court, has stated that “**when (they) reached to the back of City Shadi Hall then three persons with muffled faces came behind them, who took out their pistols**” and he again stated that “**two persons took out their pistols, while the third had not; one person after demanding money from deceased Ayaz fired at him and took away the shopper which contained cash amount. The above three persons ran away and he shifted the deceased then injured to the hospital in his friend’s taxi motorcar**”, but neither pattern of that taxi motorcar or its registration number etc were disclosed during the investigation nor the name of taxi driver or friend of PW.8 complainant, was surfaced during the investigation and no one among them was cited or examined as witness despite the fact that the said taxi driver or PW.8 complainant’s friend, who having reached the place of incident immediately after the occurrence could throw some light as to what happened at the time of their arrival at the place of incident and subsequent events till reaching LRH; and, whereas PW.9, who happened to be the brother of deceased Ayaz on receiving information about the incident rushed to the LRH, also did not state about preparation of mursaila Ex.PA/1 in the hospital nor did he utter a single word about the taxi driver or about the taxi motorcar in which the dead body of deceased was brought in LRH and instead he deposed that “**I and my other relatives were with the dead body whereas my other relative Hijrat Khan had lodged the FIR**”; per PW.9 his deceased brother after unloading sacks of flour from his rickshaw in Toheed Abad Shaheed Colony while was coming back to home and when he reached City Shadi Hall he was intercepted by three persons

riding on motorcycle, they snatched amount of Rs.450,000/- from him and also fired at him; PW.9 has stated that he is not eye witness of the occurrence, but the said story was disclosed to him by his relative i.e. PW.8 complainant on telephone, but PW.8 complainant has not stated about unloading of flour from the rickshaw by the deceased although per prosecution he all along remained with deceased Ayaz from his shop till the dead body of deceased Ayaz Khan was brought at the hospital by him nor did he state about his stating so to PW.9 on a telephone to PW.9, as claimed by the latter in his evidence before the learned trial Court, even otherwise it was neither the case of prosecution that deceased Ayaz Khan after unloading flour from his rickshaw was returning when this incident took place nor that fact is deducible either from mursaila Ex.PA/1 and FIR Ex.PA, moreover, none of the official PWs including PW.12 Investigating Officer did utter a single word about that taxi motorcar or its driver etc and/or even about so-called rickshaw, which was also not secured or recovered by the police during the investigation.

12. Furthermore, PW.12 Investigating Officer claimed that PW.8 complainant had shown him the place of vardhat, but the latter did not state about his having shown the place of vardhat to the former and instead he has deposed that **“after lodging FIR, we went to the house of deceased Ayaz from the police station; after a while the dead body of deceased was brought from the mortuary of KMC; the brother of deceased namely Akbar came to spot at 09.00 p.m”**; and whereas PW.4 ASI Naseem Khan, the marginal witness, has stated that **“it was 2240 hours when they went to inspect the place of vardhat”**, but neither memo of the place of vardhat was shown prepared nor was produced in evidence.

However, site plan (sketch) of the place of vardhat produced at Ex.PB was claimed to have been prepared by PW.12 Investigating Officer on 23.11.2019, but the time of its preparation was neither shown therein nor was disclosed by the PW.12 Investigating Officer or any of the other PWs and that too was not shown prepared in presence of any mashir. Although the place of incident was claimed to have been inspected by PW.12 Investigating Officer on the same day of incident, but no empty shell was found or secured from the place of vardhat and thus, the ballistic expert report if any, about the working condition of the secured pistol (s) in view of the fact that no empty was secured from the place of vardhat, is inconsequential so far the question of use of the said weapons in the commission of the subject crime is concerned. PW.10 Sanallah, who claimed to have sold a mobile Samsung C-07 having IMEI No. 352207080393379/17, 352208080393377/17 on 24.11.2019 to an unknown boy, who per him is appellant Younas, and subsequently repurchased it from him on 05.12.2019, therefore, identification of appellant Younas through PW.10 Sanallah was essential, but no such identification parade was held, which is also admitted by PW.10 Sanallah in his cross examination by stating that ***“the boy who mentioned in my statement was not prior known to me. It is correct that IO did not conducted (sic) identification parade of accused Younas by me nor I personally know accused Younas”*** and that fact is also admitted by PW.12 Investigating Officer by stating that ***“no identification parade of all the accused has been conducted from the complainant or any person else; no identification in respect of the stolen/snatched money has been made from the complainant”***

13. Moreover, memos of collecting blood stains by means of cotton swabs Ex.PW.4/1 dated 23.11.2019 from the place of incident and securing blood stained clothes of deceased Ayaz produced at Ex.PW.4/2 dated 24.11.2019, were shown prepared in presence of mashirs constable-1286 Shoukat and ASI Naseem Khan; memo of securing pistol allegedly produced by Shah Faisal alias Faisal son of Ishaq Ullah Ex.PW.4/4 dated 09.01.2020; three memos of recovery of Rs.35,000/-, Rs.36,000/- and Rs.24,000/- dated 10.01.2020 produced at Ex.PW.4/6, Ex.PW.4/7 and Ex.PW.4/8 on the pointation of appellants Zafar, Dilbar and Ijaz ul Haq respectively were shown prepared in presences of mashirs ASI Ijaz Khan and ASI Naseem Khan; memo of recovery of Rs.40,000/- dated 13.06.2020 on the pointation of appellant Younas produced at Ex.PW.6/1 and memo of securing pistol 30 bore without number with 5 cartridges produced and handed over by Muharir ASI Noor Muhammad Khan to PW.12 Investigating Officer produced at Ex.PW.6/2 dated 13.06.2020, were shown prepared in presence of mashirs ASI Noor Ali Shah and HC-5496 Gulfaraz. And, thus all the aforesaid memos were shown to have been prepared in presence of police officials, neither any independent person was cited as mashir in any of the aforesaid memos nor any attempt was shown to have been made to associate any private person to witness the aforesaid recovery proceedings; moreover, from the perusal of all the aforesaid memos of recoveries it would reveal that the time of the alleged recoveries and/or time of preparation of the aforesaid memos was not mentioned in any of the memos; even the departure and the arrival entries, which were essentially to be kept in the relevant registers of Daily Diary, were also not made therein nor any entry of the Daily Diary/zimini was produced in

evidence to show that in fact the police had visited the aforesaid places where from the alleged recoveries were claimed to have been made. PW.9 has attempted to establish that the deceased was having exact amount of Rs.450,000/- at the time of incident by stating so first time in his statement before the learned trial Court recorded on 18.07.2022 i.e. nearly after 30 months of his statements under Sections 161 and 164 of The Code recorded on 20.01.2020 by deposing that **“the exact amount and other articles in the possession of my deceased brother are mentioned in the account book/ log book of our business. The Investigating Officer had verified the contents of the log book on the day of occurrence; volunteered the IO had taken the photo of the log book of the that day; I had showed the said register/log book dated 23.11.2019 to the IO; volunteered again that the said IO had called on the bread sellers named in the log book who had confirmed the truthfulness of the amount given to him”**, but PW.12 Investigating Officer did not utter even a single word about his having verified the contents of so-called business registers/log book nor did he state about his having called on the bread sellers named in the log book, even he has not stated about his having taken photos of the alleged registers/log book as claimed by PW.9 discussed *supra*.

14. Patently, there is no ocular evidence to connect the appellants with the subject crime, for, the complainant in his report neither mentioned name of the culprits nor their descriptions such as physiques, structure, complexion and height etc rather he stated therein that there were three culprits with their muffled faces, who intercepted him and deceased Ayaz while they were on their way to home on Phandu road near City Shadi Hall

and one of them while snatching shopping bag containing cash amount of Rs.450,000/- fired from his pistol at the abdomen of Ayaz, who sustained firearm injuries and later on he succumbed to his injuries; he also did not name any of the appellants in his evidence recorded before the learned trial Court and whereas the rest PW.9, who happened to be the brother of deceased Ayaz Khan and never claimed himself to be an eye witness of the occurrence, has admitted in his evidence that his evidence is based on hearsay by deposing that ***“I was not present at the seen (sic) of occurrence at all, the narrated story was hearsay as communicated to me by Hijrat Khan; it is correct that I was not present at the place of occurrence. Similarly, it is also correct that I have not seen the occurrence from my own eyes”.***

15. Apparently, the learned trial Court has convicted and sentenced the appellants on the basis of statements under Section 164 of The Code of PW.8 complainant, PW.9 Akbar Khan, PW Shah Faisal (not examined) and PW Qari Jawad (not examined), the alleged confessional statements of the three appellants, medical evidence, alleged recovery of snatched amount, alleged crime weapons and motorcycle purportedly used in the commission of the crime.

16. Manifestly, the purported statements under Section 164 of The Code of PW.8 complainant and PW.9 dated 20.01.2020 were recorded behind the back of three appellants Ijaz ul Haq, Dilbar and Zafar, **(the three appellants)**, despite their being in custody, without giving them any notice and/or affording them opportunity to cross examine the said PWs during recording of their alleged statements under Section 164 of The Code. This fact of the three appellants being in custody before recording the alleged

statements of the PW.8 complainant and PW.9 was also admitted by PW.12 Investigating Officer, stating that ***“it is correct that prior to recording of the statement of PWs Hijrat and Akbar the accused facing trial Younas, Dilbar and Zafar were arrested”***, but in fact two appellants Ijaz ul Haq and Zafar were shown arrested by the police on 07.01.2020, while appellant Dilbar was shown arrested on 08.01.2020 and whereas appellant Younas was arrested on 11.06.2020 vide cards of their arrest Ex.PW.12/4, Ex.PW.12/5 and Ex.PW.7/1 respectively. Sub-section (1-A) of Section 164 of The Code envisages that such statement be recorded by Magistrate in the presence of the accused, and the accused is given an opportunity of cross-examining the witness making the statement. The word *presence* used in the above provision of law implies actual physical presence of the accused at the time of recording of the statement of witness under Section 164 of The Code by affording him an opportunity of cross-examining the witness; further Section 265-J of The Code provides that the statement of a witness duly recorded under Section 164 of The Code, if it was made in the presence of the accused and if he had notice of it and was given an opportunity of cross-examining the witness, may, in the discretion of the Court, if such witness is produced and examined, be treated as evidence in the case for all purposes. Likewise, purported statement under Section 164 of The Code dated 09.01.2020 of PW Qari Jawad was recorded behind the back of the three appellants without giving them any notice and/or opportunity to cross examine him, even otherwise the said PW Qari Jawad, who allegedly handed over motorcycle Honda CC-125 to PW.12 Investigating Officer, stating that the said motorcycle was given by him to appellant Ijaz ul Haq on 23.11.2019, who returned it to him

on 24.11.2019, being a material witness was necessarily to be examined, but the prosecutor gave him up on the plea that he was not traceable, but there is nothing on the record to show that any sincere effort for procuring the attendance of the said PW Qari Jawad by issuing coercive process against him was made before giving him up by the prosecutor. In such view of the matter, the statements of PW.8 complainant, PW.9 and PW Qari Jawad (not examined) recorded under Section 164 of The Code in the absence of the three appellants without giving them notice and/or affording them an opportunity to cross-examine the said prosecution witnesses cannot be used against them as a piece of evidence. Moreover, PW.8 complainant did not utter a single word about his supplementary statement before PW.12 Investigating Officer and/or even about his having recorded statement under Section 164 of The Code before the learned Judicial Magistrate, even he also not implicated the appellants in any manner in the commission of the subject crime in his evidence recorded before the learned trial Court, and whereas PW.9 has stated in his evidence before the learned trial Court that ***“police started investigation and nabbed three accused who are facing trial, the fourth one was later on arrested. I was also collecting information and am sure that they have snatched amount and motorcycle from deceased and have shot dead my brother, the accused are also involved in such like cases”*** he, however, made several admissions adverse to the prosecution case and when he was confronted to his statements under Section 161 of The Code recorded before the police and under Section 164 of The Code recorded before Mr. Naveed Ullah learned Judicial Magistrate-II Peshawar available at Page 135 of paper book of Criminal Appeal No.1-P of 2023 he admitted

that ***“I have neither furnished the source of my satisfaction of involvement of the accused of commission of instant offence to the magistrate concerned nor I can before this Court. I have not stated before the Judicial Magistrate Peshawar that the accused are involved in such like cases, similarly no such information I can furnish before this Court; it is correct that the communication as alleged by me via telephone connectivity was not provided to the police from which it could be assumed that from his alleged number to my alleged number any contact was made; whatever happened about the alleged occurrence, I have not seen that, I have not witnesses (sic) that and I was not present at the seen (sic) of occurrence at all, the narrated story was hearsay as communicated to me by Hijrat Khan.”***, even otherwise the statements under Section 164 of The Code of PW.8 complainant and PW.9 recorded on 20.01.2020 i.e. after eight days of the alleged judicial confessions of the three appellants, besides being insignificant, were certainly ill-advised. Mr. Naveed Ullah learned Judicial Magistrate-II Peshawar, before whom, the aforesaid statements under Section 164 of The Code were recorded, was also neither arrayed as witness in the list of the witnesses in the challan nor was examined by the prosecution although his examination was essential so as to substantiate the recording of such statements of the PWs before him.

17. So far the alleged confessional statements of the three appellants is concerned, the circumstances under which they are recorded are to be examined carefully as for placing reliance on the confessional statement of an accused it is well settled principle of law that it should not only be true, voluntary and believable, but it should be without fear, favour or any

inducement and it must be consistent and coherent to the facts and the circumstances of the prosecution case; it is reiterated that the statement of an accused becomes confession only when it is recorded in compliance of provisions of Section 164 and 364 of The Code and necessary precautions and formalities are observed; the conviction can be based on sole confessional statement of accused provided the same is voluntary and true and necessary precautions and formalities are adhered to; the Court can accept a retracted confession after making inquiry into all the material points and surrounding circumstances and satisfying itself fully that the confession cannot be, but be true, and it is corroborated by clear, cogent and independent evidence; the corroboration of the retracted confession with the other pieces of evidence in the case that would establish the link of accused with the commission of offence with which he is charged; mere delay in recording confession, in principle, is not fatal to the prosecution when the confession is proved to be true and voluntary, but if there are circumstances which would cast shadow of doubt on its genuineness then it should be excluded from consideration and delay in recording of the judicial confession in such a case would be fatal.

18. On our own independent evaluation of the evidence brought on the record, we find that three appellants namely Ijaz ul Haq, Zafar and Dilbar, whose confessional statements were allegedly recorded, by denying the charge framed against them and pleading not guilty, had retracted their alleged confessional statements at the initial stage of their trial; the three appellants in their statements under Section 342 of The Code have also taken stance that they remained in wrongful confinement with the police of police station Phandu and such Habeas Corpus Petition dated 28.12.2019

was also filed by the relative of one of the appellants Ijaz ul Haq against his wrongful confinement from 25.12.2019; several suggestions in this regard have been made to PW.11 the learned Judicial Magistrate, who had recorded the alleged confessional statements of the three appellants on 11.01.2020 and to PW.12 Investigating Officer as well, to which they made several admissions, which are suggestive of the fact that the alleged confessional statements of the appellants have not been recorded in accordance with the mandatory provisions of Sections 164 and 364 of The Code and trend of cross-examination of the prosecution witnesses during the trial also depicts that the three appellants remained in wrongful confinement with the police before they were produced for their remand in police custody before PW.11 the learned Judicial Magistrate on 08.01.2020, for, the three appellants while answering question No.6 of the questionnaire relating to their alleged confessional statements recorded on 11.01.2020 have categorically stated that they remained in custody of the police for 16 days, while answering question No.5 of his statement under Section 342 of The Code, appellant Ijaz ul Haq has stated that ***“I was taken into custody and kept into illegal confinement since about 25.12.2019”***, likewise, appellant Dilbar while answering Question No.6 of his statement under Section 342 of The Code has stated that ***“in fact I was taken into illegal confinement by local police on 25.12.2019 and later on falsely implicated me in the instant case”*** and whereas appellant Zafar in his statement under Section 342 of The Code while answering Question No.5 has stated that ***“I was arrested by the local police before the date of arrest shown by the prosecution. I have been detained in illegal detention and wrongful confinement during which I***

was severely tortured to confess but I did not made (sic) any confession and the police has concocted my statement under Section 161 of The Code, if any, which is not admissible in law". PW.11 the learned Judicial Magistrate, who recorded the alleged confessional statements of the three appellants has admitted that **"it is correct that while replying to question No.6 accused Ijaz ul Haq had told me that he was in the custody of police for 16 days; I have personally written the figure 16 in my hand writing in reply to question No.6 of the questionnaire."**, similarly, the replies of question No.6 of the questionnaires Ex.PW.11/1 and Ex.PW.11/4 respectively of two appellants namely Zafar and Dilbar depict that both of them also claimed about their remaining in custody for 16 days; PW.12 Investigating Officer has admitted in his evidence that **"it is correct that generally illegal custody is also kind of torture; it is also correct that generally if a person remain in illegal custody then his confessional will not be a voluntary confession"**. It is also not disputed that Habeas Corpus Petition No.350/4 re: Zia ul Haq (father of accused Ijaz ul Haq) Vs. State was filed on 28.12.2019 and then another Habeas Corpus Petition No.08/04 re: Zia ul Haq (father of accused Ijaz ul Haq) Vs. P.S Gul Bahar, was instituted on 07.01.2020, whereafter the arrests of appellants Ijaz ul Haq, Zafar and Dilbar was formally shown by the police on 07.01.2020 and 08.01.2020 respectively, which is also admitted by PW.12 Investigating Officer, stating that **"it is correct that as per PW Hijrat and Akbar they have charged the accused Younas, Dilbar and Zafar at the instance and directions of the police; it is correct that I have not found any evidence against the accused facing trial in the instant case; it is correct that for the**

first time I mentioned the name of Ijaz ul Haq in the daily diary 25.12.2019; I had implicated the accused Ijaz ul Haq in the case through my daily diary of 25.12.2019 on the ground that Ijaz ul Haq used to play cricket with co-accused Younas”. In such view of the matter, the contention of the learned counsel for the appellants that the three appellants were already under wrongful confinement with the police from 25.12.2019 i.e. 13/14 days prior to their alleged date of arrests viz 07.01.2020 and 08.01.2020 carries weight; moreover, the three appellants were earlier produced for remand purpose on 08.01.2020 before PW.11 the learned Judicial Magistrate, but none among them had volunteered to confess his guilt. Under the given circumstances, it is quite unbelievable as to what prompted the three appellants to confess their guilt on their production before the same Magistrate i.e. PW.11 on 11.01.2020 after their remaining in police custody, leaving serious doubt about the alleged confessional statements of the three appellants being voluntary, genuine, true or believable.

19. Furthermore, the alleged confessional statements of the three appellants produced at Exs.PW.11/1 to PW.11/9 reveal that they besides being vague in nature, lacking in material particulars, are also self-destructive and contradictory to the prosecution case; for, the ages of the three appellants are not mentioned in the alleged confessional statements, and even the date and time of the incident was also not disclosed therein, per prosecution the alleged snatched money Rs.35,000/- Rs.36,000/- and Rs.24,000/- were recovered on the pointation of appellants Zafar, Dilbar and Ijaz ul Haq respectively from their respective houses on 10.01.2020 coupled with a licensed 30 bore pistol No. B6540 alongwith two magazine

and 10 live cartridges on the pointation of appellant Dilbar from his house in presence of police official mashirs namely ASI Ijaz Khan and ASI Naseem Khan vide recovery memos Ex.PW.4/6, Ex.PW.4/7 and Ex.PW.4/8 respectively, but the aforesaid alleged recoveries etc purportedly made on the pointation of the three appellants on 10.01.2020, have not been mentioned in the alleged confessional statements of the three appellants, although the same were recorded on the following day i.e. 11.01.2020, it is stated in the alleged confessional statement of appellant Ijaz ul Haq that ***“Younas and Zafar pointing pistols towards Ayaz, snatched money from Ayaz and in the meanwhile pistol in the hand of Zafar went off and the fire hit Ayaz, who fell down and then all the three accused namely Younas, Dilbar and Zafar riding on motorcycle went away and I ran away by foot”***, and in the end of the said alleged confession, appellant Ijaz ul Haq has pleaded his innocence by stating that ***“I am innocent”***, while appellant Dilbar is shown to have stated in his alleged confessional statement that ***“I, Zafar and Younas in the evening time reached on Jameel Chowk through motorcycle; Younas was to contact with Ijaz on cell phone; we reached Shaheed e Abad where I and Zafar pointed pistol on Ayaz and Younas asked us to snatch black bag; we snatched pointed bag and while we were leaving the pistol with Zafar due to defect went off, which hit Ayaz on his leg, who fell down then we all fled away”***; and whereas appellant Zafar is shown to have stated in his alleged confessional statement that ***“I and Dilbar pointing our pistols towards Ayaz, snatched cash amount from him and in the meanwhile Younas asked us to snatch black envelop from Ayaz and while we were leaving, the pistol being defective went off***

and a bullet hit on the foot of Ayaz and then we all fled away from the place of incident", but he did not state as to from his pistol the fire went off; it is stated in the alleged confessional statement of appellant Ijaz ul Haq that **"all the three accused namely Younas, Dilbar and Zafar riding on motorcycle went away and I ran away by foot"**, but that fact is also nowhere mentioned in the rest of the two alleged confessional statements of co-appellants Zafar and Dilbar; it is mentioned in the alleged confessional statement of appellant Ijaz ul Haq that **"I was standing separately at a place where light was available and whereas all the remaining accused namely Younas, Dilbar and Zafar were standing in the dark"**, but that fact is also nowhere mentioned in the alleged confessional statements of rest of the two co-appellants Zafar and Dilbar.

20. Apparently, PW.11 the learned Judicial Magistrate recorded the alleged confessional statements of the three appellants, in a slipshod manner dealing with this case in a casual and perfunctory way although it involves capital punishment, for, neither repeated time for reflection nor proper warnings as required by sub-section 3 of Section 164 of The Code and well settled principles laid down by the learned superior Courts for recording confessional statement of an accused, were given to the three appellants before recording their alleged confessional statements, furthermore, PW.12 Investigating Officer produced all the three appellants together before PW.11 the learned Judicial Magistrate for recording their confessional statements and the three certificates under Section 364 of The Code produced at Ex.PW.11/3, Ex.PW.11/6 and Ex.PW.11/9, depict that only 30 (thirty) minutes time was shown to have been given to all the three appellants altogether and their alleged confessional statements were

recorded in one go and that too in presence of their co-appellants, which rendered the alleged confessional statements involuntary and invalid on this score alone. PW.11 the learned Judicial Magistrate, recorded their alleged confessional statements each containing three pages by consuming only 20 minutes in each statement as is evident from the certificates appended on the foot of the alleged confessional statements. PW.11 the learned Judicial Magistrate in his evidence before the learned trial Court has admitted that ***“all the three accused were produced before me at about 1115 hrs alongwith confessional applications. I handed over all the three accused alongwith the Jail warrant to the Naib Qasid after 1250 hrs after completion of the statements”***, meaning thereby the entire exercise, which included reflection time and warnings given to all the three appellants and then recording their respective alleged confessional statements, containing three questionnaires, three confessional statements and three certificates under Section 364(3) of The Code appended thereto, was done only in 1-35 i.e. one hour and 35 minutes that being incomprehensible does not appeal; he has further admitted in his evidence that ***“after recording confessional statements, all accused named above were handed over to Naib Qasid of the Court sending them out of the Court to Judicial Lock up; it is correct that there is no record to suggest that my court had summoned the officers/police of jail to pass on judicial custody of accused persons to them; it is correct that I did not direct my Naib Qasid to summon or required (sic) jail police authority for handing over physical custody of accused to them; it is correct that the last word judicial lockup have not been recorded or written in my***

certificate; I handed over the accused to the Naib Qasid for their committal to judicial lockup”, and PW.12 Investigating Officer, who was present in the Court and was handed over custody of the three appellants for taking them to jail (Judicial Lockup) has stated that **“the accused were handed over to the Naib Qasid of the Court and under his supervision, I and other police contingents had taken them to the central jail Peshawar which I have mentioned in the zimini No.16 dated 11.01.2020; I have correctly mentioned in the zimini that I have taken the accused to the central jail Peshawar; I prevailed upon it in the process and took personally the physical custody of the accused Ijaz ul Haq for booking him in the Judicial lock up”,** meaning thereby the custody of all the three appellants after recording their alleged confessional statements was handed over to PW.12 Investigating Officer; even otherwise, zimini No.16 wherein the fact of taking custody from the Court of PW.11 the learned Judicial Magistrate and handing over their custody to the jail authority in central prison Peshawar despite being essential document to establish such aspect of the case, was not produced and exhibited in evidence by the prosecution.

21. Furthermore, the questionnaires with almost all the answers of the three appellants and the requisites certificates appended on the foot of all the three alleged confessional statements besides being vague are also typed ones and they from their face do not conform the requirements of law as contained in the provisions of Section 364 of The Code, which, needless to say, were enacted to safeguard the interest of the accused, the words and terms used therein are so clear and unambiguous, leaving no room of doubt that the answers given by the accused, are to be taken into

consideration and the expression every question put to him (accused) and every answer given by him (accused) shall be recorded in full as mandated by sub-section (1) of Section 364 of The Code, is of great importance, the confessional statement has to be read over to the accused to accord assurance that his words have been faithfully taken down, thereafter the signature of the accused be taken at the end of his statement in token of its correctness, making it conformable to what he declares to be the truth; sub-section (2) of Section 364 of The Code in unambiguous term requires and mandates that the learned Magistrate after examining the accused and recording his confessional statement has to certify under his own hand that the examination was taken in his presence and hearing and that the record contains full and true account of the statement made by the accused, while sub-section (3) of the Section 364 of The Code mandates that in case in which the examination of accused is not recorded by the Magistrate himself he shall be bound as the examination proceeds to make a memorandum thereof which shall be written and signed by the Magistrate with his own hand and shall be annexed to the record and if the Magistrate is unable to make a memorandum as required he shall record the reasons of such inability. It is worthwhile to mention here that words or terms used in the statute when are clear and unambiguous, the Court cannot go beyond them and is obliged to take them in their ordinary dictionary meaning and the interpretation to be adopted must be such as advances purpose of act rather than to defeat the object thereof. It is reiterated that it is the duty of a Judge to ensure that not only he dispenses justice, but what is equally of vital importance, that justice also seems to have been done and the law never allows the Judge to make departure from the mandatory procedure

and to ignore settled principle of law. The course adopted by PW.11 the learned Judicial Magistrate in recording the alleged confessional statements of the three appellants completely in negation of the mandate of the law, cannot be approved in view of the well settled law that where the law provides a procedure for doing a thing in particular method and manner that thing should be done in that prescribed manner and in no other way and if anything is done contrary to that manner, it shall be taken as if it has never been done. Reliance in this context is placed on the case of **MUHAMMAD ISMAIL V. STATE (2017 SCMR 713)**, the Hon'ble Supreme Court of Pakistan has held that:-

"It is a bedrock principle of law that, once a Statute or rule directs that a particular act must be performed and shall be construed in a particular way then, acting contrary to that is impliedly prohibited. That means, doing of something contrary to the requirements of law and rules, is impliedly prohibited."

Under these circumstances, the alleged confessional statements purported to be of the three appellants namely Dilbar, Ijaz ul Haq and Zafar besides being involuntary, untrue and unbelievable, have also not been recorded in accordance with the law and thus are of no help to the prosecution, which deserve to be excluded from consideration.

22. As far as the medical evidence is concerned, PW.13 Dr. Touqeer Farooq, M.O. KMC, who conducted postmortem of deceased Ayaz had found two injuries on his person i.e. ***Firearm entry wound 01x01cm in size, on outer side of left thigh, 15cm below iliac spine, 25cm above knee joint. Firearm exit wound 1x1cm, on medial side of left thigh, 10cm below left groin***, but according to PW.8 complainant the deceased

had sustained pistol shot injury at the hands of one of the culprits on his abdomen, while per alleged confessional statement of appellant Dilbar the fire had hit deceased Ayaz Khan on his leg and whereas per alleged confessional statement of appellant Zafar the fire had hit deceased Ayaz Khan on his foot and thus the medical evidence has belied the prosecution version relating to the seat of injury sustained by deceased Ayaz Khan at the hands of culprits. In any case the medical evidence is a mere opinion of an expert and is confirmatory in nature and not corroboratory except those observations of the medico-legal officer which were based on physical examination which served as a corroboratory piece of evidence and that at the best would confirm the eye witness(s) account with regard to the seat and nature of injury, kind of weapon used in the occurrence, but could not identify the accused and thus the medical evidence is also of no help to the prosecution for connecting the appellants with the commission of the offence.

23. In so far as the recovery of currency notes alleged to be the snatched money is concerned, it is the matter of record that the alleged currency notes were not recovered from the possession of any of the appellants, but the same were shown to have been secured from their respective houses wherein several other inmates of the house are also undoubtedly living and the same are located in thickly populated area and under the circumstances it was bounden duty of PW.12 Investigating Officer to have made efforts for associating independent persons from the locality to act as mashirs for that PW.12 Investigating Officer was obliged to have called some independent persons and persuaded them to act as mashirs and in case of failure of his efforts, he should have mentioned

such facts in police diary, but nothing alike was done by him, therefore, it can safely be said that PW.12 Investigating Officer has not made honest efforts to procure the association of independent persons to act as mashirs, more particularly, when the police party headed by PW.12 Investigating Officer allegedly went to the pointed places from the police station with an advanced aim for the purpose of recovery; moreover, there were no specific marks of identification i.e. numbers and denominations of the stolen currency notes nor was there any affixed seal thereon that could in any way render help in their precise identification. And thus, by no stretch of imagination, the alleged secured currency notes, which are of common pattern and without numbers and denomination, can be termed to be the robbed money. It is further added that neither the time of departure of the police party headed by PW.12 Investigating Officer from police station Phandu for the purpose of alleged recoveries was disclosed nor the time of recovery of the alleged currency notes etc and/or preparation of memos of recoveries Ex.PW.4/6, Ex.PW.4/7 and Ex.PW.4/8, is mentioned therein; and, even roznamcha entries, which could establish the departure of the police party and their returned to police station were neither shown kept in the Daily Diary nor were produced during the trial. Failure of the prosecution to place in its evidence the entries of DD/Zimini/roznamcha with regards to the proceedings of the police party towards the pointed places create serious doubt on the prosecution case, for, it is for the prosecution always to establish the departure of the police from the relevant police station, when they set out to the pointed place and non-production of such vital documents surely creates serious doubt in relation to the genuineness of the prosecution story with regards to the alleged

recoveries. PW.6 mashir ASI Noor Ali Shah, who claimed himself to be the marginal witness to the recovery memo Ex.PW.6/2 vide which the Muharir ASI Noor Muhammad handed over a pistol of 30 bore without number to the Investigating Officer, which is the case property of case emanating from FIR No.377 dated 11.06.2020 for offence punishable under Section 15-AA, in his cross examination admitted that ***“it is correct to suggest that 30 bore pistol and five cartridges were not recovery form (sic) accused in my presence”***, however, ***“it were handed over to Investigating Officer by Muharir Noor Muhammad in my presence”*** and PW.12 Investigating Officer has also stated that ***“vide recovery memo already exhibited at Ex.PW.6/2, I took into possession 30 bore pistol which was handed over to me by Noor Muhammad Khan Muharir/ASI in case FIR No. 377 dated 11-06.2020 under Section 15-AA of police station Phandu in the instant case”***, but it is strange enough that no such memo relating to the alleged recovery of the said 30 bore pistol and five live cartridges from appellant Younas, was produced in evidence nor was shown to have been prepared; even Muharir Noor Muhammad, who allegedly handed over the said pistol to PW.12 Investigating Officer and could throw some light on the very vital question as to how he came into possession of that pistol etc, was neither arrayed as witness in the list of witnesses mentioned in the challan nor was examined by the prosecution; none of the mashirs in whose presence appellant Younas was allegedly arrested and 30 bore pistol and five live cartridges were allegedly secured from him, was examined, even PW.7 Inspector Diyar Khan, who allegedly arrested appellant Younas did not utter a single word about the recovery of the alleged 30 bore pistol and five live cartridges from appellant Younas. And,

thus the prosecution has failed to prove the recovery of the aforesaid pistol and cartridges etc from the possession of appellant Younas. Even otherwise, mere recovery of the said weapon would also hardly help the prosecution for the reason that there is absolutely no evidence brought on record to even remotely suggest that the said pistol was used as the crime weapon in the commission of the crime, more particularly when no empty shell, with which it could be matched, was secured from the place of incident.

24. As far as the conviction and sentence awarded to appellant Ijaz ul Haq **(the appellant)** for offence under Section 15-AA is concerned, offshoot case i.e. Sessions case No.27/AA of 2019 re-The State Vs. Ijaz ul Haq for offence under Section 15-AA appears to have been formed out by making alterations and additions in the photocopy of challan of the main case based on crime No.1139 of P.S Phandu, it further reveals that a separate formal charge was framed against appellant Ijaz ul Haq in that offshoot case, whereafter without recording any evidence in that case, the learned trial Court passed the impugned judgment by placing copies of the depositions of the PWs recorded in the main case, in the case file of the said offshoot case and gave finding of the guilt on the purported statement under Section 164 of The Code and affidavit of PW Shah Faisal, who was neither examined by the prosecution nor his purported statement under Section 164 of The Code and affidavit were produced and exhibited in evidence, even copies whereof were not provided to appellant Ijaz ul Haq, in complete negation of the principle of fair trial and due process as mandated by Article 10-A of The Constitution of Islamic Republic of Pakistan, 1973. Even otherwise, the pistol and five live cartridges in

question were not recovered from the possession of the appellant, but one Shah Faisal, who allegedly handed over unlicensed 30 bore pistol with five live cartridges to PW.12 Investigating Officer stating that the said 30 bore pistol was given by him to the appellant, who after keeping it with himself for two weeks got it returned to him, being a material witness was necessarily to be examined, but the prosecutor and learned counsel for the complainant by filing joint statement before learned trial Court gave him up on the plea that he had been won over, although there is nothing on the record to show the said witness had been won over and therefore it can be said that he did not appear before the learned trial Court. Needless to say that a mere declaration of the prosecutor would not be enough to abandon to such a material witness on that stance of his having been won over, for, if the witness, after appearance, does not support the prosecution, he can be declared hostile on such stance of witness's having been won over and subjected to cross examination by the prosecutor to find out the truth, but the prosecution did not adopt such procedure for the reasons based known to it, although the prosecution was under its duty to prove its case beyond any shadow of doubt on the basis of best possible evidence. In such view of the matter, an adverse interference in this regard, could legitimately be drawn, under the illustration (g) to article 129 of the Qanun-e-Shahadat Order, against the prosecution; there was also absolutely no evidence to convict the appellant on the charge of keeping unlicensed weapon in his possession which was never recovered from his possession or on his pointation; even otherwise it is rather difficult to believe that witness Shah Faisal (given up) had lent unlicensed pistol to the appellant, who by committing offence, had returned it to him after two weeks. Further it is also

strange enough that Shah Faisal, who was found in possession of unlicensed pistol, which he handed over to the PW.12 Investigating Officer in police station on 09.01.2020, was deserved to be dealt with in accordance with the law by trying him for offence punishable under Section 15-AA, was allowed to go escort free and instead the appellant, who by no stretch of imagination could be made liable for offence punishable under Section 15-AA has been convicted and sentenced by the learned trial Judge without applying his judicious mind only on the basis of an affidavit dated 09.01.2020 purportedly attested by oath commissioner and so-called statement under Section 164 of The Code dated 09.01.2020 both of Shah Faisal recorded before learned Judicial Magistrate-II Peshawar namely Naveed Ullah Gigyani, which from their face, are of no legal value in the eyes of law, for, there is no provision in the Criminal Procedure Code, which authorizes an oath commissioner to record such affidavit, the subject matter of which is evidence in a pending criminal case, there are only three Sections in The Code i.e. Sections 74, 526 and 539-A, according to which a fact may be got proved by an affidavit, even in that case, affidavit if any, attested by oath commissioner cannot be admitted in evidence without confronting it not only to its maker at the trial, but also to the oath commissioner, who purportedly attested that affidavit. Finding of guilt on the basis of even a valid statement recorded under Section 164 of The Code could not be made unless such statement was proved to be true by adducing evidence of the nature before the learned trial Court for the simple reason that such statement of the PW cannot be actuated for comparison with the statement of a person made on oath before the learned trial Court and subjected to cross examination in accordance with

law, what to say about the aforesaid statement purported to be of PW Shah Faisal (not examined), which is of no legal value in the eye of law.

25. In view of what has been stated above, it is crystal clear that there is absolutely no evidence worth consideration against the appellants to connect them with the offences alleged against them and the prosecution case is full of doubts. And, thus, the prosecution has miserably failed to prove its case against the appellants beyond a reasonable doubt, benefit thereof is to be extended to the appellants not as a matter of grace or concession, but as matter of right. Reliance in this context is placed on the cases of ***GHULAM QADIR AND 2 OTHERS Vs. THE STATE (2008 SCMR 1221)*** and ***MUHAMMAD MANSHA Vs. THE STATE (2018 SCMR 772)***.

26. Patently, the aforesaid material and glaring contradictions, infirmities; admissions adverse to the prosecution case; and, dishonest and deliberate improvements in the statements of the prosecution witnesses during the trial to strengthen the prosecution case, which did go to the root of the case, rendering it highly doubtful, were not at all attended to by the trial Court while passing the impugned judgments dated 04.03.2023, convicting and sentencing the appellants, although the learned trial Court was obliged to take into consideration the material placed before it for arriving at the conclusion as to whether a fact was proved or not. And, thus, the conviction and sentences awarded to the appellants cannot sustain, therefore, all the three captioned Criminal Appeals are allowed and conviction and sentences awarded to appellants **Dilbar, Zafar, Ijaz ul Haq and Younas alias Megay** as discussed in paragraph-I supra, vide impugned judgments dated 04.03.2023, are set-aside and the said appellants are acquitted of the charges and they are directed to be

Criminal Appeal No.01-P of 2023 L/w
Criminal Appeal No.03-P of 2023
Criminal Appeal No.04-P of 2023
Criminal Murder Ref. No.01-P of 2023

-40-

released forthwith, if their custody is not required in any other case.

Accordingly, the captioned Criminal Murder Reference is answered in ***negative***.

27. In view of our observations discussed in paragraph No.5 *supra*, Criminal Miscellaneous Applications Nos.9-I of 2023,10-I of 2023,11-I of 2023 and 12-I of 2023, are dismissed.

(JUSTICE KHADIM HUSSAIN M.SHAIKH)
JUDGE

(JUSTICE IQBAL HAMEEDUR RAHMAN)
CHIEF JUSTICE

(JUSTICE DR. SYED MUHAMMAD ANWER)
JUDGE

Islamabad
04.06.2024
Khurram