

*Judgment Sheet*

**PESHAWAR HIGH COURT, D.I.KHAN BENCH**  
(Judicial Department)

Cr.A. No.05-D/2019.

Irfan Ali  
Vs.  
The State & another.

**JUDGMENT**

Date of hearing: **27.9.2021.**

For Appellant: **Sheikh Muhammad Adeel &  
Ms. Sania Noor, Advocates.**

For State: **Mr. Kamran Hayat Miankhel,  
Addl: A.G.**

For Respondent: **Malik Hidayatullah Utrah,  
Advocate.**

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**SAHIBZADA ASADULLAH, J.-** Impugned here in this appeal is the judgment dated 03.12.2018, rendered by learned Additional Sessions Judge, Paharpur, whereby the appellant was convicted under section 302(b) of Pakistan Penal Code and sentenced to life imprisonment with Rs.50,000/-, (Fifty Thousand) as compensation to be paid to the legal heirs of deceased in terms of section 544-A Cr.P.C. or in default thereof, to further undergo six months simple imprisonment. He was further convicted under Section 404 PPC and sentenced to suffer three years rigorous imprisonment with a fine of Rs.5,000/- or in default thereof, to

further suffer seven days simple imprisonment. Both the sentences were ordered to run concurrently, however, Benefit of section 382-B, Cr.P.C was also extended to the convict. The complainant Muhammad Ameer, being aggrieved from the impugned judgment has also filed Cr.R. No. 04-D/2019, for enhancement of sentence of appellant. Since both the matters are the outcome of one and the same judgment, therefore, same are to be decided through this common judgment.

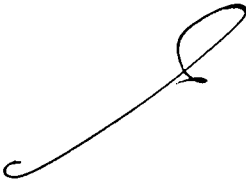
2. The prosecution story as disclosed in the first information report, registered on the basis of *murasila*, is that on 29.01.2017 at 14:30 hours, complainant Muhammad Ameer (PW-7), while present with the dead-body of his son Ghulam Abbas, reported the matter on the spot to Fazal Hussain Shah ASHO (PW-1), to the effect that his son Ghulam Abbas used to ply Qingqi Rickshaw from village Bangrri to Nowshehra Morr; that on 26.01.2017, at morning, his afore-named son took his Qingqi Rickshaw from the house to earn his livelihood but did not return till evening; that they searched for him and also contacted on his cellular phone but with no response as his cell phone was off; that after three

days, one Malik Zubair Jai informed them that the dead body of his son was lying in his fields, in response whereof, he rushed to the spot where he found the dead body of his son Ghulam Abbas, with blood oozed from his nose and mouth, his hands were fastened behind with rope and another rope was also tied around his neck. He charged unknown accused for commission of the offence. Subsequently, during investigation the accused were charged.

3. Since one of the accused was juvenile, therefore, separate challans were submitted against them before learned trial Court where at the commencement of trial, the prosecution produced and examined as many as fourteen witnesses, whereafter, statement of the accused under section 342 Cr.P.C, was recorded wherein he professed innocence and false implication, however, neither he wished to be examined on oath as provided under section 340(2) Cr.P.C, nor opted to produce defence evidence. Learned trial Court, after hearing arguments from both the sides, vide the impugned judgment dated 03.12.2018, convicted the appellant and sentenced him, as mentioned in the earlier part of the judgment, which has been assailed by the appellant through the

instant appeal, whereas the complainant has filed the connected criminal revision for enhancement of sentence.

4. We have heard learned counsel representing the appellant, Additional Advocate-General assisted by learned private counsel at length and with their valuable assistance, the record was gone through.



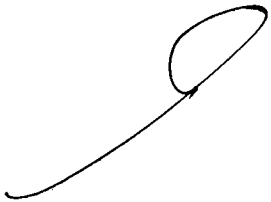
5. The deceased a poor rickshaw driver left his house for his livelihood, but did not return. His family searched him in the area but could not succeed. It was on 29.01.2017, when the complainant i.e. father of the deceased received information regarding the death of his son, whose dead body was left abandoned in the fields of one Malik Zubair Jai. On receiving information, the complainant reached to the spot where he found the dead body of his deceased son with a rope tied around his neck and his hands fastened behind, with clotted blood on his face and marks of violence on his body. The information was received by the local police, who attracted to the spot and the matter was reported by the complainant. The complainant, while reporting the matter, disclosed that it was on 26.01.2017, that his son (the deceased) left

the house with his Qingqi Rickshaw to earn livelihood. As the incident was un-witnessed, so the report was made against the unknown accused. The injury sheet and inquest report were prepared and the dead body was dispatched to the hospital for postmortem examination. The Investigating Officer attracted to the spot where he prepared the site plan and also effected recoveries from the place of incident including clotted blood, one pair of boot black in colour, belonging to the deceased alongwith a sock. The Investigating Officer also secured the foot and boot prints from the spot with the help of plaster of paris. He also received the postmortem report alongwith injury sheet and inquest report of the deceased, one plastic rope stained with blood, one blood stained blue colour shirt and a bunyan of brown colour, stripe printed, having brown colour, belonging to the deceased.

6. The Investigating Officer kept on investigating the case where he arrested different suspects and it was on 08.02.2017, that the appellant surfaced as accused when a mould collected from the spot matched with his foot while in police lockup. After gaining personal satisfaction, the complainant

charged the appellant/convicts on 08.02.2017, by recording his statement under section 164, Cr.P.C. The appellant/convicts were taken into custody and it was on their pointation that the Qingqi Rickshaw was recovered from Tank, having been parked in the shop of one Zia ur Rehman. The matter went on investigated and it was during the investigation that the appellant/ convicts, allegedly disclosed that how the rickshaw was snatched and the deceased was done to death. During the process of investigation, the Investigating Officer initially recorded statements of two witnesses, namely Sher Nawaz son of Ayaz Khan, resident of Basti Ali Abad, Paharpur and also of one Ajab Khan son of Abdullah Khan, resident of village Abizar, District Tank, alongwith Zia ur Rehman son of Mutee Ullah, resident of Ladha, Kanigurram, Tehsil Ladha, South Waziristan Agency, in respect of the incident and the recovery of the Qingqi Rickshaw. Sher Nawaz was examined under Section 164, Cr.P.C. before the Court of Judicial Magistrate, where he stated that while on his way back in his Qingqi Rickshaw from Paharpur to village Rangpur, when he reached to Paharpur Adda, there he saw Irfan Ali and Rizwan, who asked him to accompany them to

District Tank to repair and modify their rickshaw. He further stated that while leaving for Tank, he called his relative Ajab Khan, to arrange dinner for them, they spent night over there and early in the morning they proceeded towards Tank from village Abizar. The colour of the rickshaw was replaced with green from yellow by a painter at City Tank, therefore, they went to the shop of a cushion maker, as they were short of money, they parked their rickshaw in the said shop, the accused returned to their village, whereas he remained with Ajab Khan, at village Abizari, and thereafter, came back to Paharpur. He further stated that after 12/13 days, he was summoned by the local police in connection of the murder of the deceased and snatching of Qingqi Rickshaw, and he in the company of local police, proceeded to City Tank, where-from the said Qingqi Rickshaw was recovered by the local police from the shop of Zia ur Rehman PW. Ajab Khan, who recorded his statement under Section 164, Cr.P.C. confirmed the events narrated by Sher Nawaz, before the Court of Judicial Magistrate. The Investigating Officer also recorded the statement of PW Zia ur Rehman, under section 161, Cr.P.C, and thereafter, was produced before the Court of Judicial



Magistrate to record his statement under section 164, Cr.P.C, where he stated that he runs the shop of cushion maker, in the name of "*Ma Sha Allah Burki Autos*" at Tank City; that the convicts/appellant alongwith Sher Nawaz, came to his shop alongwith Qingqi Rickshaw for changing its cushions, he estimated the cost as Rs.5650/- and changed the cushion. The accused paid him Rs.1000/- and promised the remaining to be paid after few days. He further stated that he refused to honour the request of the appellant/convicts and it was after 13/14 days, that the police alongwith the accused and PW Sher Nawaz, came to his shop and asked about the rickshaw, which he handed over. The accused after their arrest faced trial and was convicted by the learned trial Court vide the impugned judgment. The learned trial Court dealt with the matter comprehensively and as the entire case against the accused is based on circumstantial evidence, so the facts of the case were minutely dealt with. The learned trial Court mainly relied upon the recovery of the rickshaw, identification of the appellant/convicts and the last seen evidence. In order to assess, as to whether the approach of the learned trial Court is based on proper appreciation of



evidence, and that the learned trial Court applied its judicial mind to the facts and circumstances of the case, we deem it appropriate to re-assess the available evidence, so that miscarriage of justice could be avoided. There is no denial to the fact that the incident went un-witnessed and that it was on collecting evidence from different sources that the appellant/convicts were implicated in the matter. Keeping in view the peculiar circumstances of the case, we deem it appropriate to assess different aspects of the case and to see as to whether the prosecution has succeeded in weaving different events into an organic whole which turned the basis for conviction. There is no denial to the fact that in case of circumstantial evidence, the prosecution is under the bounden duty to create a chain, that too, a well connected net, so that one end will touch the body of the deceased and other the neck of the accused, if that coherence is lacking, then in that eventuality, conviction cannot be awarded. The obligations in case of circumstantial evidence is higher than those cases where the witnesses come forward and depose.

7. To begin with, the incident went un-witnessed. The moot questions to be determined by

this Court are, as to whether the incident occurred in the mode, manner and at the stated time; and as to whether the recoveries effected from the spot were sufficient to connect the appellant/convicts with commission of the offence; and as to whether the rickshaw, allegedly recovered from the shop of one Zia ur Rehman, was proved to be the ownership of the deceased and as to whether the identification parade was conducted strictly in accordance with the procedure provided under the High Court Rules and Orders as well as in the Qanun-e-Shahadat Order, 1984.

8. The record tells that initially the Investigating Officer collected different suspects from the surrounding area and that it was one of the appellant whose foot matched to the mould collected from the spot by the tracer. The police official who collected the foot prints from the spot with the help of plaster of paris was examined as PW-2, who stated that soon after the recovery of the dead body he was informed and directed to reach the place of incident where on arrival he found hundreds of people present there, alongwith the police officials including the Investigating Officer. This is surprising to note that

when a good number of people were present there, how the tracer could collect and separated the one which matched with the foot of the appellant. If we admit that a host of people was present there, then instead of one, the tracer should have collected numerous and in that eventuality it was incumbent upon the Investigating Officer to invite those people to identify their foot prints with those collected from the spot, but the Investigating Officer did not take pain to indulge in such an exhaustive exercise and this lack of interest on part of the Investigating Officer reacted upon the veracity of the collected evidence from the spot.

9. The Investigating Officer though collected evidence in respect of the Qingqi Rickshaw allegedly snatched by the accused/appellant, but he failed to collect its registration book and even he could not collect any independent witness to confirm its ownership. Neither father of the deceased nor any other person produced the relevant documents before the Investigating Officer. It is still a mystery as to whether in fact the deceased owned and used to ply a rickshaw. We are surprised to note that when the accused were arrested and their statements under

section 164, Cr.P.C. were recorded, the accused Rizwan, who was elder to Irfan, stated that while on the way his younger brother complained of immoral activity by the deceased and that it was for that purpose the deceased was killed. If we say yes, to what the accused stated before the Investigating Officer, then the only purpose if any was to take revenge and not to snatch the rickshaw. We are yet to know that when PW Sher Nawaz was not on visiting terms with the appellant, then what prompted him to accompany the appellant and his brother to District Tank and that what special interest he had to arrange dinner for them in the house of his relative PW Ajab Khan. Sher Nawaz was produced as PW-9. He stated that PW Ajab Khan was his brother-in-law and during the days of occurrence he used to ply a rickshaw and it was because of his plying rickshaw in the vicinity that he knew the name of the accused Irfan, whereas the name of the co-accused Rizwan was disclosed to him by the local police. He further stated that it was after 12/13 days, when the local police approached him in respect of the incident. We are surprised to know that how the local police came to know that this PW had accompanied the accused for taking their rickshaw to

Tank. He further stated that though his statement was recorded by the local police but he did not mention the registration number of the snatched Qingqi Rickshaw. Ajab Khan was examined as PW-10, who stated that he also accompanied the appellant to Tank Bazaar, where they visited the shop of Zia ur Rehman, a cushion maker and that it was after 12/13 days that the local police contacted him in respect of the incident. This witness was cross-examined on material aspects of the case, where he admitted that neither he disclosed the registration number of rickshaw to the Investigating Officer, nor the accused were known to him, rather these were the accused who disclosed their names to him. When this specific portion of his statement is placed in juxtaposition with that of PW Sher Nawaz, it surprises us that when PW Ajab Khan was in the knowledge of the names of the accused as these were disclosed to him by the accused while staying at his home, then why PW Sher Nawaz did not explain the same and that why it was through the local police that he came to know the name of one of the accused as Rizwan. The cushion maker Zia-ur-Rehman was examined who stated that the rickshaw was brought by the accused for replacing the cushions

and that it was due to deficiency of amount that the same could not be replaced and that after some 13/14 days the local police alongwith the accused and PW Sher Nawaz came to his shop and asked about the rickshaw. The record is clear that none of these witnesses were either on visiting terms with the accused or they were previously known to them, but the Investigating Officer did not take pains to request for the identification parade of the accused through these witnesses. We cannot ignore that the local police allegedly recovered the rickshaw on joint pointation of the accused and law is clear that the recovery effected on joint pointation of the accused is inadmissible in evidence and cannot be relied upon.

In case titled '*The State through P.G.*

*Sindh and others Vs. Ahmed Omar Sheikh and*

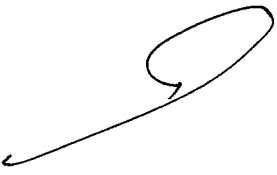
*others*' it was held that:

*“This single piece of evidence could not be more than circumstantial evidence, and would not alone, suffice to prove that accused was guilty of committing criminal conspiracy to abduct deceased for ransom”.*

10. The entire prosecution case rests upon the identification parade conducted through Amir Abdullah, who was examined as PW-13. We are to

see as to whether the said witness is independent and as to whether he had seen the accused at the time of travelling with the deceased in his rickshaw. There is no denial to the fact that PW Amir Abdullah is the close relative of the deceased and he hails from District Bhakkar (Punjab). This witness was examined as PW-13, where he stated that on 26.01.2017, while present near village Hazara at '*Maghrib Qaza Wela*' he saw the Qingqi Rickshaw of deceased Ghulam Abbas, coming from Nowshehra Morr alongwith two unknown persons. He further stated that one of them was driving the rickshaw whereas, the other was sitting on the rear seat with the deceased, on query he was told that they were going to village Kotla on a special trip. This witness explained that on the following day, he came to know regarding missing of Ghulam Abbas alongwith his rickshaw. He further stated that it was on 29.01.2017, that he came to know regarding the death of the deceased and as such, he attended his funeral ceremony. We are yet to know that when the witness had seen the deceased, that too, in company of accused on 26.01.2017, what stopped him to convey the same to the father of the deceased, either on the day when he lastly saw the deceased with

the accused or on 29.01.2017, when he came to know regarding the death of the deceased. When this witness had not contacted father of the deceased and had not shared his information with him, then how the local police came to know that this PW was the person who lastly saw the deceased in company of the accused and that how the local police reached to his house at Bhakkar and recorded his 161, Cr.P.C. statement on 02.02.2017. During cross-examination, he disclosed that he was informed by the complainant on 14.02.2017 to reach Central Prison D.I.Khan to attend the identification parade and that on the following day he reached there. The prosecution is to explain that whether this PW had lastly saw the deceased in the company of the accused and as to whether while making his statement, he disclosed the physical features of the accused/appellant. His conduct is not above board, as his presence, at the time when he lastly saw the accused and deceased together, is not established on the record. Even this witness could not explain the purpose of his presence and even the Investigating Officer did not collect information from the place where this witness used to work. The accused remained in constant custody with





police and even when father of the deceased reached D.I.Khan and recorded his 164, Cr.P.C. statement, that too, on the day when the accused were arrested, the presence of the identifier with the complainant at the time of charging the accused cannot be ruled out. Even no precautions were taken by the Investigating Officer to conceal the visibility of the accused from the complainant and the identifier. As the complainant and others constantly used to visit the police station, where the accused were confined, so the possibility cannot be excluded of their having been seen by the witnesses prior to the identification parade. In such a situation, the identification parade so conducted has no evidentiary value, that too, through an interested witness.

In case titled 'Mian Sohail Ahmad and others Vs. The State and others' (2019 SCMR 956),

it was held by the apex Court that:

***“After the test identification parade, the Court must verify the credibility of the eye-witness by assessing the evidence on the basis of the factors or estimator variables discussed above. Identification of an accused, therefore, becomes a two-step process. First, the suspects undergo a test identification parade and second, the credibility of the eye-witness is assessed by weighing the evidence in the light of the estimator variables”.***

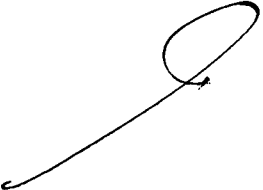
In the said judgment it was further held that:-

*66. "Last seen" evidence is merely a circumstantial evidence, and that too a weak type of evidence, which alone cannot sustain the weight of a capital punishment, and would require other independent corroborative evidence to effect conviction. In a case of murder, where the prosecution case rests on "last seen" evidence, then corroboration would be required from other circumstantial evidence; each piece of such evidence would have to be proved to complete the chain, stemming from the accused being "last seen" with the deceased, leading to his death".*

11. The record tells that one Ghulam Hussain, who finds mention in the calendar of witnesses and was the person who allegedly saw the deceased in the company of the accused was not produced during trial and even he was not invited to participate in the identification parade. We cannot ignore that he was an independent witness. The non-production of PW Ghulam Hussain, helps us in forming an opinion that he was not ready to support the false claim of the complainant. The other three witnesses namely Sher Nawaz, Ajab Khan and Zia ur Rehman were the best witnesses if the accused were put to identification from these witnesses, but the Investigating Officer did not take into consideration this material aspect of the case.

12. It was stressed that the statements recorded by the above mentioned witnesses provided strong support to the prosecution story and that their statements alone are sufficient to award conviction. We are not persuaded with what the learned counsel for the appellant submitted, as it is on record that none of these witnesses were either on visiting terms with the accused or the accused were known to them prior to their arrest, so their statements cannot be taken to connect the accused with commission of the offence, that too, in absence of an identification parade conducted from them. Had the accused been identified from these witnesses, then the situation would have been different. True, that the rickshaw in question was allegedly taken into possession from the shop of the cushion maker, situated at Tank, but without having been identified, the statements of the witnesses cannot be relied upon. The conduct of PW Sher Nawaz is not natural, as he admitted during his cross-examination that the accused were not previously known to him, then what compulsion he felt to accompany the appellant to the house of his relative, and thereafter, to Tank to repair the snatched rickshaw. The cumulative effect of the above-stated circumstances helps us in

forming an opinion that a conscious attempt was made by the Investigating Officer to connect the accused with commission of the offence and the conduct of the Investigating Officer is not above board as it was he who disclosed the name of accused Rizwan to the witnesses.





13. The prosecution despite hectic efforts could not succeed in creating a chain and that no reliable evidence was produced in that respect, more particularly the ownership of the snatched rickshaw has not been established on record. In such situation, this Court is left with no other option but to hold that the prosecution could not succeed in bringing home guilt against the appellant. The impugned judgment is suffering from inherent defects and the reasons advanced therein do not appeal to a prudent mind, what to say to the judicial mind of this Court, calls for interference. Resultantly, this appeal is allowed, the conviction and sentence awarded to the appellant by learned trial Court vide the impugned judgment is set aside and the accused/appellant is acquitted of the charges levelled against him. He be set free, forthwith, if not required to be detained in jail in connection of any other criminal case. Since we have set aside the

impugned judgment and acquitted the accused, so in such eventuality the connected criminal revision for enhancement of the sentence, bearing No.04-D of 2019 cannot proceed further, being bereft of merit is, therefore, dismissed.

14. Above are the detailed reasons of our short order of even date.

Announced.  
Dt: 27.9.2021.  
Kifayat/

  
JUDGE  
  
JUDGE

(D.B)  
Hon'ble Mr. Justice S.M. Attique Shah  
Hon'ble Mr. Justice Sahibzada Asadullah

office  
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