Crl. Appeal No.171/2019

Attaullah

Versus

The State and another

I N D E X

1.	Opinion of Hon'ble Justice Babar Sattar, J.	Page 2 to 33
2.	Opinion of Hon'ble Justice Mohsin Akhar Kayani, J.	Page 34 to 45
3.	Opinion of Referee Judge (Hon'ble Justice Arbab Muhammad Tahir, J.)	Page 46 to 61

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

(1) Criminal Appeal No. 171/2019
Attaullah Vs. The State.

(2) Murder Reference No. 13/2019
The State Vs. Attaullah

APPELLANT BY:	Raja Ghanim Aabir Khan and Mr. Muhammad Ilyas Khan, Advocates
STATE BY:	Mr. Osama Azeem Chaudhry, State Counsel. Mr. Waseem Anwar Bhatti, Advocate.
DATE OF HEARING:	03-11-2022.

BABAR SATTAR, J.- Through this judgment we will decide (i) Criminal Appeal No. 171/2019 filed by Attaullah against the judgment of the learned Sessions Judge dated 18.05.2019, whereby he has been found guilty under section 302(b) of PPC and sentenced to death and has been held liable to pay compensation to the legal heirs of Junaid Mustafa deceased in the amount of Rs.500,000/- in terms of section 544-A, Cr.P.C, and in default of payment or recovery of compensation undergo further imprisonment for a period of six months (S.I) and has been convicted under section 392 of PPC and sentenced to ten years rigorous imprisonment with fine in the amount of Rs.100,000/-, and (ii) Murder Reference No. 13/2019, whereby the judgment of the learned Sessions Judge, East-Islamabad dated 18.05.2019, through which he has found Attaullah guilty for an offence under section 302(b) of Pakistan Penal Code, 1860 ("PPC") and

sentenced him to death, has been referred to us under section 374 of the Code of Criminal Procedure, 1898, for confirmation.

2. Junaid Mustafa was a 26-year-old Careem Captain, who was murdered at 03.00 a.m on 22.02.2018 having been shot thrice at the edge of service road G-13/1 and Street 79, G-13/1, Islamabad. He stumbled into Street 79 and collapsed after walking a few meters. Noman Wahab (PW-8), who was a private night watchman hired by the residents of street 79, heard three gun shots, witnessed the collapse of the deceased Junaid Mustafa and heard him recite the Kalma before passing away. He informed the occupant of a nearby house. After a while rescue 1122 arrived and so did police officials and the body of the deceased was taken to Pakistan Institute of Medical Sciences (PIMS) where postmortem of the body of the deceased was performed. According to the postmortem report the deceased had been shot thrice. One of the bullets entered and exited his wrist and two bullets hit his neck, inflicted considerable damage on his internal organs and caused his death.

3. The prosecution's case is that the appellant, Attaullah, murdered Junaid Mustafa. Attaullah booked a ride through Careem App for pick-up in F-11 Markaz and was dropped off on the service road adjacent to Street 79, G-13/1, Islamabad. With the intent of robbing Junaid Mustafa of his vehicle (i.e. Suzuki Wagon R Stingray bearing No. AEG-658), Attaullah pointed a gun at Junaid Mustafa, who resisted and was consequently shot. During what transpired Attaullah dropped his CNIC at the edge of the service road which was recovered by the Investigating Officer,

Inspector Muhammad Riaz Gondal (PW-13). On the basis of the initial record provided by Careem, the Investigating Officer procured a profile photo of the customer who ordered the Careem Cab driven by Junaid Mustafa, which was that of Attaullah even though the customer's name mentioned in the Careem's database was Ifran Ullah. Attaullah meanwhile drove the vehicle after the incident to Mardan, Khyber Pakhtunkhwa. He then drove back the vehicle back to Islamabad on 22.02.20218 and parked it close to a roadside hotel (Chappar Hotel) in G-16/4 Islamabad, which was owned and managed by Attaullah's father and three other people. Attaullah left the 30-bore pistol that he used to shoot the deceased Junaid Mustafa under the driver's seat along with two magazines and ten bullets. On the basis of information supplied by an informer Attaullah was arrested from Islamabad Chowk at 11.00 a.m on 24.02.2018 while driving another stolen vehicle. He was interrogated. On his pointation the police recovered the vehicle on 27.02.2018 after Attaullah led the police party first to the roadside hotel and then pulled out the keys of the vehicle from a drawer in the hotel and led the police to the vehicle. From the vehicle the police recovered a 30-bore pistol, two magazines and ten bullets.

4. The case is one of circumstantial evidence where there is no eye-witness or direct evidence of the murder of Junaid Mustafa or the armed robbery attributed to the appellant, Attaullah. The learned Sessions Court has provided a summary of the evidence adduced by thirteen prosecution witnesses, which will be discussed subsequently in this judgment. The learned Sessions Court also examined three journalists as court witnesses but did

not rely on their testimony while finding Attaullah guilty of murder and armed robbery.

5. The prosecution's case that convinced the learned Sessions Court that Attaullah had murdered Junaid Mustafa is built on three planks. The first is evidence of Attaullah booking a Careem Cab on 22.02.2022 in response to which the deceased Junaid Mustafa picked up Attaullah from F-11 Markaz Islamabad at 02.35 am and dropped him off at the corner of service road, and Street No.79, G-13/1 Islamabad at 02.58 am. The second plank of the prosecution's case is that Attaullah in the process of shooting the deceased and robbing him off his vehicle dropped his CNIC at the place of occurrence (i.e. the corner of service road and street 79, G-13/1), which led to his identification by virtue of his profile photo for the account registered through mobile No. 0335-5167487 through which the Cab had been booked. While the mobile number was registered in the name of Irfan Ullah, the account was registered in the Careem system in the name of Attaullah and had his profile photo in the Careem database. The Investigating Officer thus matched the photo procured from the Careem system with the photo on the CNIC dropped by Attaullah at the place of occurrence and determined that Attaullah was the last person in touch with the deceased Junaid Mustafa, who robbed him of his vehicle and shot him in the process. The third plank of the prosecution's case is two sets of recoveries. The first is the recovery of the cell phone which had the SIM No. 0335-5167487 installed in it and the phone had the Careem App installed in it through which the Careem Cab had been ordered early morning on 22.02.2018. The second recovery was the

vehicle that was parked next to roadside hotel in G-16/4 supposedly co-owned and co-managed by appellant's father. And it was Attaullah on whose pointation the recovery was made. And while the recovery was being made from a public place, Attaullah had exclusive knowledge of the vehicle's key that he had hid inside the roadside hotel. Attaullah opened the vehicle using the key and the police then recovered the murder weapon (i.e. 30-bore pistol) as well as magazines and bullets from under the driver's seat.

6. The prosecution's case is therefore built on the basis that evidence procured from Careem together with the recovery of the cell phone from Attaullah establishes that he ordered the Careem Cab driven by the deceased Junaid Mustafa on the fateful morning of 22.02.2018. This evidence while being in virtual mode acquires the form of last seen evidence establishing that the deceased Junaid Mustafa was last determined to be alive while driving the Careem Cab to pick up and drop Attaullah. The CNIC recovered from the place of occurrence then places Attaullah at such place at the time when Junaid Mustafa was shot. The night watchman, Noman Wahab (PW-8), witnessed him breathing his last on Street 79, G-13/1 at 3.00 am on 22.02.2018. And the vehicle that Junaid Mustafa was robbed of was subsequently recovered on the pointation of Attaullah who had exclusive knowledge of the hiding place of the key for such vehicle.

7. The motive was not pleaded in an explicit manner but is built within the prosecution story. Attaullah needed money as he was to marry soon. And to generate the required funds he began

stealing cars and disposing them off in alliance with his friend, Zubair Khan, who was based in Mardan, KP. He intended to steal the vehicle being driven by Junaid Mustafa as part of his vehicle–stealing-enterprise. And when the deceased resisted, Attaullah shot the deceased and fled with the vehicle. And he was subsequently arrested while driving another stolen vehicle.

8. The learned Sessions Court, however, did not dwell on the motive and whether it had been proved, and also made no observations with regard to Attaullah's conviction under section 392 of PPC. While the learned Sessions Court did not state in its judgment that the motive stood proved, conviction of Attaullah for armed robbery under section 392 of PPC suggests that the learned Sessions Court deemed that the murder was driven by the intent to rob Junaid Mustafa of his vehicle.

9. Learned counsel for the appellant made the following submissions. There was no direct evidence against Attaullah and all the evidence adduced was circumstantial. SIM No. 0335-5167487 was not registered in the name of Attaullah but Irfan Ullah, who had purportedly furnished an affidavit to the Investigating Officer stating that the SIM had been handed over to Attaullah. But Irfan Ullah never appeared as a witness to testify before the Court or produce any evidence. The phone purportedly recovered from the possession of Attaullah, which had SIM linked to the number 0335-5167487 installed in it, was not subjected to forensic examination to establish that it was in the use of Attaullah. The purported Careem App installed in the phone was also not subjected to forensic examination to establish that the

said App had been used to book Junaid Mustafa's cab. The Security Manager of Careem, Qaiser Qayyum (PW-3), exhibited photo copies of documents printed out by Careem to establish the route of Junaid Mustafa's cab, but no examination of Careem's database had been undertaken to determine whether Junaid Mustafa's Careem Cab had in fact been booked from the cell phone linked with SIM No. 0335-5167487. The empties were recovered from the place of occurrence on 22.02.2018 but were not sent for forensic examination till after the appellant was arrested on 24.02.2018 and the alleged murder weapon was recovered from the vehicle on 27.02.2018. Consequently any report stating that the empties sent for forensic examination on 27.02.2018 matched with the gun also recovered on 27.02.2018 and sent for forensic examination on 05.03.3018 was inconsequential. Likewise, the recovery of the vehicle from a public place was also inconsequential and there was no direct or corroborating evidence to establish that Attaullah had parked the vehicle from where it was recovered. There was also no independent evidence that Attaullah's father was running the roadside hotel close to which the vehicle had been parked and there were no independent eye-witness of the recovery of the vehicle or of Attaullah procuring the key of the vehicle from a hidden place inside the roadside hotel. There was no evidence adduced to establish the motive. There was no evidence brought on record that Attaullah had stolen other vehicles. Neither Irfan Ullah (whose affidavit was presented as Ex-PJ stating that he had handed over a SIM registered in his name to Attaullah) was investigated as an accused person or presented before the court

as a witness, nor Zubair (who allegedly aided and abetted Attaullah in selling stolen cars and was visited by Attaullah on 22.02.2018 after Junaid Mustafa had been murdered) was investigated as an accused or produced as a witness. The prosecution recovered no CCTV footage from cameras installed in Street 79, G-13/1, even though Noman Wahab, the night watchman, had testified that the house at the corner of the street had CCTV cameras installed. The prosecution also collected no evidence from the Safe City Cameras installed in Islamabad to determine the movement and route of Junaid Mustafa's car. Learned counsel for the appellant submitted that the prosecution's case was based on suspicion alone and the extra-judicial testimony attributed to Attaullah was procured while he was in detention and was not voluntarily given. He submitted that benefit of doubt ought to be given to the appellant and given the lack of evidence implicating the appellant in murder or robbery the appellant was liable to be acquitted.

10. The learned State Counsel submitted that while the case was one of the circumstantial evidence, the complete chain linking Attaullah to the murder of Junaid Mustafa had been established through reliable evidence. He made the following submissions. Attaullah's CNIC was found at the place of occurrence. The Investigating Officer got the profile photo of Attaullah from the Careem database on the basis of the number linked to the profile that ordered the Careem cab. The night watchman Noman Wahab recalled that Attaullah had previously been involved in property business for which he used to visit G-13. This established that Attaullah was familiar with the location where he asked the

deceased Junaid Mustafa to drop him off. The cell phone which had the SIM through which the Careem Cab had been ordered was found in possession of Attaullah when he was arrested on 24.02.2018 driving another stolen vehicle. This established that Attaullah was in the business of stealing vehicles and he was in possession of the device through which the Careem Cab being driven by Junaid Mustafa had been ordered. While a forensic examination of the cell phone had not been undertaken, the learned Sessions Judge had himself taken judicial notice of the fact that the phone in question was in the use of Attaullah by switching on the phone during the trial and determining that the App through which the Careem Cab had been ordered was installed on the cell phone, which cell phone had also photos of Attaullah. Attaullah while in police custody led to the recovery of the vehicle, the key for which he had hidden inside the roadside hotel and the location of the key was in his exclusive knowledge. The recovery of the vehicle thus established that Attaullah had robbed the vehicle. The murder weapon was then recovered from the vehicle which was last used by Attaullah and locked by him and such recovery linked Attaullah to the murder of the deceased Junaid Mustafa and the robbery of the vehicle.

11. Let us consider the fault lines in the sequence of events and the evidence as produced by the prosecution. The incident took place at 03.00 am on 22.02.2018 at the corner of Street 79, G-13/1 and service road of G-13/1. Muhammad Hanif ASI (PW-9) was the first person who reached the place of occurrence, after which the body of the deceased was removed through Rescue 1122. Muhammad Hanif (PW-9) remained at the place of

occurrence and witnessed the recoveries of empties as well as the CNIC of Attaullah at around 11.30 am when Muhammad Riaz Gondal, Inspector/I.O (PW-13) reached there along with the deceased's brother/complainant, Sohail Mustafa (PW-7). The site map suggests that recoveries were made from the edge of the service road even though the place of occurrence was not cordoned off. And the recoveries were not made by Muhammad Hanif ASI (PW-9), who first arrived at the place of occurrence at 03.20 am, but the empties and the CNIC of Attaullah just sat on a functional public road to be recovered by Muhammad Riaz Gondal, Inspector (PW-13) at around 11.30 am.

12. It is perplexing that according to the prosecution's case, Attaullah, after murdering Junaid Mustafa, drove the vehicle out of Islamabad Capital Territory all the way to Mardan, KP, to consult with Zubair (his accomplice in selling stolen vehicles), but he did not hide the stolen vehicle with Zubair or in any other place in KP, but drove back in the same vehicle to park it not very far from the murder site. While doing so he stopped at the bridge over Attock River and threw deceased's cell phone and wallet into the river so that it could not be recovered. But he retained the cell phone linked with SIM No. 0335-5167487 through which he had ordered the Cab in his own possession enabling the police authorities to link him to the murder. He drove the robbed vehicle back to Islamabad on the day of the murder knowing full well that he had snatched it from somebody he had murdered and found it convenient to park the vehicle adjacent to roadside hotel co-owned and co-managed by his own father. And further he found it convenient to deposit the key in a drawer within such hotel. He

was then arrested by virtue of information provided by an informer driving another stolen vehicle. And at such time the cell phone he used to order the Careem Cab was in his personal possession along with another cell phone. This sequence of events does not appeal to a prudent mind. If the motive was to rob Junaid Mustafa of his vehicle, which was to be sold on the black-market, and Junaid Mustafa got shot because he resisted the robbery, why would the appellant drive the vehicle all the way to Mardan from where it was to be disposed of with the help of Zubair and then drive it all the way back and park it next to his father's roadside hotel? It also makes no sense that while Attaullah had the presence of mind to dispose of cell phones and wallet of the deceased in the Attock River he would retain the cell phone he used to order the Careem Cab to facilitate the establishment of a link between the murder of Junaid Mustafa and himself.

13. It is equally incomprehensible why the accused would leave the murder weapon under the driver seat in the robbed vehicle. While Munir Khan, ASI (PW-5) testified that he witnessed Attaullah recovering the car key from inside the roadside hotel, as was testified by Muhammad Riaz Gondal (PW-13). However, the police party chose not to affiliate any private witnesses with the recovery. Given that the key was not being recovered from an isolated place but from inside a functional roadside hotel during day time, it is inconceivable that there was nobody present at the hotel at the time of such recovery.

14. More inscrutable than the circumstantial evidence produced by the prosecution are the acts of omission by the

Investigators. Noman Wahab (PW-8), the night watchman, testified that there were CCTV cameras installed at the corner house of the Street 79, G-13/1. But the footage from such cameras was not procured to see if it provided any leads. The vehicle was driven outside of Islamabad all the way to Mardan, KP, and back to Islamabad but no footage was procured from Safe City Cameras installed across Islamabad to determine the time at which the vehicle left Islamabad Capital Territory and when it returned and who was the person driving it.

15. The cell phone through which the Careem Cab driven by Junaid Mustafa had been ordered was registered in the name of Irfan Ullah, who was neither included in the investigation as an accused, nor was produced as a witness, even though his affidavit was retained and adduced by Muhammad Riaz Gondal (PW-13) wherein he had purportedly stated that he had handed over the SIM to Attaullah and that his sister was going to be married to Attaullah. If such affidavit were to be believed, Irfan Ullah was a key witness to support the prosecution's case and help establish the presence of the appellant as a last customer driven by the deceased Junaid Mustafa and possibly help to support the prosecution's story that Attaullah's motive was to generate funds for his impending wedding with Irfan Ullah's sister. There was nothing on record to establish that the prosecution made any efforts to adopt coercive measures to procure the presence of Irfan Ullah before the court.

16. The prosecution also did not investigate Zubair. Even if Zubair had no part to play in the murder, he would have been a

key witness to establish the prosecution story that Attaullah visited him on 22.02.2018 after the murder along with the stolen vehicle and had also shared his plans of selling stolen vehicles to generate funds of his wedding. No other witness was produced to establish that Attaullah was in the business of stealing vehicles and selling them. If the purpose of the robbery was to sell the vehicle stolen from Junaid Mustafa at gunpoint, it would make no sense for Attaullah to bring the vehicle back into Islamabad instead of disposing it of in KP once he had successfully driven it there. Was Attaullah not aware that the vehicle was linked to the virtual system managed by Careem and the police authorities would be looking for such vehicle, which is why he disposed of the deceased's cell phone in Attock river? The cell phone recovered from Attaullah was not subjected to any forensic examination. A forensic examination of the Careem App installed in such phone together with the examination of the system maintained at the offices of Careem would have established that the App in question was used in ordering the vehicle being driven by the deceased. A forensic examination of the cell phone which was not registered in Attaullah's name could have established that the phone was in fact in the personal use of Attaullah and the photos in the phone were such that could only have been taken by some body using the phone. For such purpose the prosecution could have produced expert testimony before the learned trial court. However such lacunae were apparently filled by the learned Sessions Judge taking judicial notice of the use of the cell phone by switching it on and satisfying himself while conducting the trial that the Careem App was installed on the phone and the photos in the

phone were such that it appeared that the phone had been in Attaullah's personal use.

17. The CDR date produced by the prosecution does not present a consistent picture. Once it had been established through reliable evidence that the phone in question used to order the Careem Cab was in possession and use of Attaullah the CDR could then establish his whereabouts before and after the murder and robbery. It was the prosecution's case that two cell phones (having SIMs No. 0335-5167487 and 0349-0999345 as reflected in Ex-PC) were recovered from Attaullah's personal possession at the time of his arrest. If these two phones were in his possession at the relevant time, their location according to the CDR data should have been identical. Likewise the location reflected in the CDR for the cell phone in use of the deceased ought to have matched the location on Attaullah's phone up until such point when the deceased's phone was dumped in the Attock river. Thus, expert testimony could have been presented analyzing the CDR data to establish that the location of the cell phone in the possession of Attaullah and that which belonged to the deceased and remained in the stolen vehicle had identical location, and further the CDR analysis checked out the prosecution's story re whereabouts of Attualullah after the murder up until his arrest on 24.02.2018. None of the above was however done.

18. The prosecution produced four independent witnesses. Qaiser Qayyum (PW-3), as the Security Manager of Careem Company, who exhibited Careem Company's record and could only testify to what anyone could learn from the data maintained

by the Careem Company as reflected on a printed document. Sohail Mustafa (PW-7), the complainant and brother of the deceased Junaid Mustafa, was a Head Constable in Punjab Police and not a witness to the occurrence and had received a call in the early hours of 22.02.2018 regarding the sad news of his brother's murder. Noman Wahab (PW-8) was the night watchman in whose presence the deceased breathed his last. His testimony was limited to hearing three fire shots and not witnessing who shot the deceased. He testified that he could not recognize in view of photo on the CNIC but did recognize Attaullah based on the profile photo procured by Inspector Muhammad Riaz Gondal (PW-13) from the Careem system and then recalled that Attaullah had been discharging property services in the locality. While he was at the place of occurrence at the time of the murder, he was not made to witness the recovery of Attaullah's CNIC from the place of occurrence. And Farman Jalil (PW-12) testified that Attaullah visited the shop in which the said witness was employed to have his pistol cleaned, but as Attaullah did not possess a licensed weapon, Farma Jalil declined to provide the relevant service. His testimony included no details with regard to the nature of the pistol or otherwise linked Attaullah to the murder weapon. Farman Jalil testified that Muhammad Riaz Gondal (PW-13) visited his shop on 26.02.2022. It emerges from the record that such visit was prompted by information provided by Attaullah while in police custody and such visit predated the recovery of the murder weapon by one day. All it suggests is that Attaullah might have had one unlicensed weapon.

19. *"Evidence in criminal proceedings is the means whereby the truth of a matter may be established…direct evidence is that which … proves the existence of the fact in issue without inference or presumption"* (Corpus Juris Secundum Criminal Law, Vol 22-A, Para 655). Circumstantial evidence on the other hand is the evidence which tends to prove a disputed fact on the basis of other connected facts, that lead to the inference that the fact that is to be proved reasonably follows and can be inferred on the basis of facts which have been proved.

20. Let us consider the law laid down by the august Supreme Court in relation to circumstantial evidence and benefit of doubt. It is settled law that last seen evidence is a weak form of circumstantial evidence (see for example ***Fazal Elahi alias Sajawal Vs. The Crown (PLD 1953 FC 214)***, ***Rehmat alias Rahman alias Waryam alias Badshah Vs. The State (PLD 1977 SC 515)*** and ***Naqibullah Vs. The State (PLD 1978 SC 21)***).

21. It has been held by the august Supreme Court that punishments can be awarded on the basis of circumstantial evidence (See for example ***Jafar Ali Vs. State (1998 SCMR 2669)*** and ***Israr Ali Vs. State (2007 SCMR 525)***). It was however emphasized by the august Supreme Court, while relying on ***Lejzor Vs. The Queen (PLD 1952 PC 119) and Fazal Elahi Vs. Crown (PLD 1953 PC 214)***, in ***Hashim Qasim Vs. State (2017 SCMR 986)*** that *"circumstantial evidence may sometimes appear to be conclusive but it must always be narrowly examined,*

if only because this count of evidence may be fabricated in order to cast suspicion on another …".

22. It was held in ***Sh. Muhammad Amjad Vs. The State (PLD 2003 SC 704)*** that *"death sentence can be awarded on circumstantial evidence, provided all circumstances constituted a chain and no link is missing and their combined effect is that the guilt of the accused is established beyond any shadow of doubt."* It was emphasized that last seen evidence was a weak form of circumstantial evidence which *"must be accepted with great caution and is to be scrutinized minutely for reaching a conclusion that no plausible conclusion could be drawn therefrom accepting guilt of the accused".* In this case the court had approving the cited dicta from ***Charan Singh Vs. The State of Uttar Pradesh (AIR 1967 SC 520)*** wherein it had been held by the Indian Supreme Court that in a case of circumstantial evidence *"circumstances should be of such a nature as to reasonably exclude every hypothesis but the one proposed to be proved i.e. chain of evidence must be complete…".* It was held in ***Muhammad Hussain Vs. State (2011 SCMR 1127)*** that *"it is required that each piece of circumstantial evidence shall be supported by independent corroboration, which shall, by itself, be sufficient to establish guilt. However, each circumstance shall be so connected with each other that it shall make one complete chain, without there being any broken link."*

23. In order to punish the accused in the instant case the prosecution needed to establish circumstantial evidence in a manner that no prudent mind could entertain any reasonable

doubt regarding the culpability of the accused. This the prosecution has not done. As has been discussed in the reappraisal of the evidence undertaken by this Court above the prosecution's case is almost entirely based on an investigation driven by the extrajudicial confessions made by the appellant, Attaullah, while in police custody, which confessions are also conflicting.

24. It was held by the august Supreme Court while interpreting section 103 of Cr.P.C in ***Mir Muhammad Vs. State (1995 SCMR 614)*** that *"police officers are as good witnesses as any other citizens …"* and that in a recovery affected on the pointation of the accused there was no need to associate two respectable inhabitants of the locality for purposes of Article 40 of the Qanun-e-Shahadat Order, 1984. The same principle was reiterated by the august Supreme Court in ***Muhammad Akbar Vs. State (1995 SCMR 693)***, ***State Vs. Shankar (1997 SCMR 1000)*** and ***Asif Mahmood Vs. The State (2005 SCMR 515)***.

25. It is on the basis of the law in relation to Section 103 of Cr.P.C that the prosecution had argued that it need not have associated any private witnesses while affecting the recovery of the vehicle or its key. Notwithstanding the general principle laid down by the august Supreme Court, it still makes no sense that where recovery is being affected from a public place (i.e. a functional roadside hotel) and it is being affected at a time when such hotel ought to have been inhabited by owners, servers and workers, the police would not associate anyone while affecting the recovery. Or the police would not interrogate and collect evidence

from the owners and managers of such hotel to determine when the robbed vehicle wanted in a murder investigation was parked there and how come the key of the vehicle parked close to the hotel ended up being placed inside such hotel, and all this went unnoticed for at least five days till 27.02.2018 when the recovery was affected on Attaullah's pointation.

26. In the instant case there is no independent evidence with regard to recoveries. The recovery of the cell phone allegedly creating a link between Attaullah and the deceased used to order the Careem Cab was recovered from Attaullah at the time of his arrest on 24.02.2018 and was witnessed exclusively by the police arresting party. The CNIC and the empties recovered from the place of occurrence were recovered eight hours after the occurrence from a public place. And the robbed vehicle, which was recovered from public place and had the murder weapon, was also witnessed exclusively by the police party investigating the case. The murder weapon was recovered under the driver seat of the stolen vehicle on 27.02.2018 and it was after the arrest of Attaullah on 24.02.2018 and the recovery of the murder weapon on 27.02.2018 that the empties recovered from the place of occurrence on 22.02.2018 were sent for forensic examination on 27.02.2018 (which is also why the learned Sessions Court found the recovery of the murder weapon and empties inconsequential).

27. The august Supreme Court in ***State Vs. Mushtaq Ahmad (PLD 1973 SC 418)*** had dwelled on the concept of grant of benefit of doubt and it held that, *"law allows to persons accused of criminal offences the benefit of "reasonable" and not of*

imaginary doubts. What is reasonable doubt is not a question of law: it is essentially a question for human judgment by a prudent person to be found in each case, in the light of day to day experience in life, after, taking in account fully all the facts and circumstances appearing on the entire record." In ***Nazim Khan Vs. The State (1984 SCMR 1092)*** it was emphasized that benefit of doubt arising from discrepancies and inconsistencies must be given to the accused for safe administration of criminal justice and it was held in the case that, *"there is conspicuous lack of independent corroboration in accordance with the principles governing safe administration of criminal justice the appellants are entitled to benefit of doubt"*. Conviction of the accused in the case was set-aside. In ***Muhammad Akram Vs. State (2009 SCMR 230)*** it was held that *"if there is circumstance which created reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of doubt not as a matter of grace and concession but as a matter of right."*

28. Within the context of grant of benefit of doubt it was held by the august Supreme in ***Muhammad Shah Vs. The State (2010 SCMR 1009)*** that where two interpretations of the evidence adduced before a court are possible, one favoring the accused and the other favoring the prosecution, then the interpretation more favorable to the accused is required to be taken into account. It was further emphasized that all incriminating pieces of evidence available on record in the examination-in-chief, cross-examination or re-examination of witnesses are required to be put to the accused and that, *"if any*

piece of evidence is not put to the accused in his statement under section 342 Cr.P.C, and the same cannot be used against him for his conviction." The same principle that any piece of evidence not put to the accused in his statement under section 342 of Cr.P.C cannot be used against him was reiterated in ***Muhammad Shah Vs. State (PLJ 2011 SC 348)***. With regard to confessions made before police authorities it was held in ***Imran alias Dully Vs. The State (2015 SCMR 155)*** that, *"extrajudicial confession has never been considered sufficient for recording conviction on a capital charge unless it is strongly corroborated by tangible evidence coming from unimpeachable source..."*

29. Let us apply these principles to the facts of the present case. There is no unbroken chain of circumstantial evidence produced by the prosecution on the basis of which Attaullah can be found culpable for having murdered the deceased or indulging in armed robbery. The recoveries on the basis of which circumstantial case is built against Attaullah have no independent corroboration and have been witnessed exclusively by police witnesses. There is no eye-witness of Attaullah getting into the Careem Cab driven by the deceased or getting off the vehicle in G-13/1. No one witnessed Attaullah shooting the deceased and no one witnessed Attaullah driving the robbed vehicle while it was driven all the way to KP and back to ICT to be parked close to a roadside hotel in G-16/4. There is no direct evidence of Attaullah possessing or using the cell phone used to order the Careem Cab driven by the deceased. Neither Careem App installed on the cell phone with SIM No. 0335-5167487 was examined, nor the cell phone itself establish that it was in the possession and use of

Attaullah. This void has been filled by judicial notice of the relevant facts being verified by the learned Sessions Court itself. It is a settled principle that the power to take judicial notice of a fact as proof of such fact is to be exercised with extreme caution as at stake is the right of the accused who would have no opportunity to rebut the notice taken by the court itself. In the present case a foundational fact that the cell phone used to order the Careem Cab driven by the deceased was in the use of Attaullah and the Careem App used to order the vehicle was installed on such phone has been determined conclusively by the learned Session Court itself by virtue of taking judicial notice of it. This also militates against the right of fair trial of an accused guaranteed under Article 10A of the Constitution as well as the law laid down in relation to putting all incriminating evidence to an accused under section 342 of Cr.P.C. A Presiding trial court Judge is no forensic or IT expert and has no basis, in the absence of expert testimony to analyze the footprints of an App and data installed in a phone, to determine the identity of a user of the phone. The accused also had no occasion to rebut any inference drawn by the court itself. Taking judicial notice of a critical link within the chain of circumstantial evidence amounts to filling in a lacuna and militates against safe administration of justice.

30. What emerges from the above is that it is entirely possible that Attaullah booked the cab and it ended up killing the deceased while attempting to steal the vehicle at gunpoint. But unless Attaullah’s extrajudicial confessions before the police and the investigation undertaken by the police on the basis of such disclosure can be deemed reliable it is equally possible that all the

evidence used to build a circumstantial case against Attaullah was planted by investigators in a high-profile murder case in which the police authorities were under significant media scrutiny and public pressure to quickly identify the culprit. And Attaullah became a scapegoat who as per the defenses's suggestion in the cross-examination of Muhammad Riaz Gondal (PW-13) had been under arrest on 22.02.2018 as opposed to 24.02.0218. Where there are two interpretations possible of the evidence, the court cannot pick the one that disfavors the accused, as in case of such doubt the benefit of the same must be given to the accused as a matter of right. As this opinion reflects, this Court is concerned with both, the sufficiency of evidence and the trustworthiness of evidence produced and therefore finds that the prosecution has failed to prove through the circumstantial evidence adduced that the appellant, Attaullah, was guilty of the offence of murder and armed robbery. This Court also finds that the learned Sessions Court taking judicial notice to prove that Attaullah was using the cell phone through which the Careem Cab driven by the deceased was booked caused prejudice to the appellant, undermined his right to fair trial and compromised safe administration of justice. We therefore find that the judgment is liable to be set-aside due to lack of proof of guilt beyond reasonable doubt. The appellant, Attaullah, is entitled to be acquitted.

31. The purpose of administration of criminal justice is not to convict the accused but to convict the guilty. We are cognizant of the fact that a 26-year-old lost his life while trying to make ends meet and the release of an individual convicted for the murder of a citizen can erode public confidence in the criminal justice

system. However when it comes to retaining public confidence in the justice system on the one hand and the right of a citizen to be presumed innocent until proven guilty beyond reasonable doubt through a fair trial, a court must err on the right of side of the individual's right to life and liberty. Judicial decisions cannot be informed by the desire to gain public approval by enhancing the conviction rate in relation to gruesome crime even where the evidence as produced before the Court does not support returning a guild verdict.

32. This Court, however, feels that in view of the nature of the offence and the use of the electronic devices therein, the failure of the prosecution in building a case beyond reasonable doubt is either due to the complicity of the Investigating Officers or their utter incompetence. It is beyond comprehension why the cell phone purportedly used to order the Careem Cab was not subjected to forensic examination to establish conclusively that the Careem App through which the Cab driven by the deceased was ordered was installed on the cell phone attributed to Attaullah. And why forensic investigation of such cell phone was not undertaken to generate expert testimony to the effect that the device was in use of Attaullah as alleged by the prosecution. It is equally inexplicable as to why the Investigating Officers would not procure CCTV footage from the cameras installed in the street at the edge of which the murder was committed or why footage from Safe City Cameras was not procured to determine and corroborate the facts of the case and the identity of the individual driving the vehicle after the murder of the deceased. It is also incomprehensible why no finger printing was done to lift prints

from the vehicle driven by the accused from the place of occurrence all the way to Mardan, KP and back to G-16/4, Islamabad. In the event that fingerprints of the appellant were found in the car, especially on the driving wheel, would establish his presence within such vehicle as a driver and would be a key piece of evidence. It is also unfathomable as to why Irfan Ullah, in whose name the SIM of the relevant cell phone was registered, was not made part of the investigation or his presence not ensured as a witness before the learned trial court. And also why Zubair, who is alleged to be an aider and abettor of Attaullah in selling stolen vehicles and who Attaullahh met on 22.02.2018 after the murder of the deceased along with the stolen car in Mardan on 22.02.2018 was not made part of the investigation and not produced before the learned trial court. If the prosecution story is assumed to be true, there is no reason why circumstantial evidence could not be gathered and proved such that the chain connecting the accused with the murder of the deceased could be established beyond a shadow of doubt and in each link in the chain could be supported by credible corroborating evidence. This Court therefore finds that the Investigating Team in the case is liable to be proceeded against by the Inspector General of Police Islamabad Capital Territory, and ought not be given any investigation responsibility, if they are retained in active service pending disciplinary proceedings. The Court further finds that the manner in which investigations are being conducted in ICT are undermining public faith in the ability of our criminal justice system to hold criminals to account.

33. This Court is also cognizant of its powers under section 375 of Cr.P.C read with section 428, to order further inquiry or take additional evidence, where in question is the guilt or innocence of a person, to discharge its responsibility under section 561-A of Cr.P.C to secure the ends of justice. However forensic examination of the relevant cell phone at this stage alone would prove nothing as the remaining links in the circumstantial case built by the prosecution are equally vulnerable and lacking credibility. The vehicle in question was released on superdari on 10.03.2018 to the father of the deceased and is not useful for purposes of further inquiry and fingerprints analysis etc. Irfan Ullah the owner of the SIM used in the cell phone and Attaullah's cousin and Zubair, Attaullah's alleged accomplice in disposing of stolen vehicles, were never charged. In these facts and circumstances the hands of the courts despite its powers under section 375 read together with sections 428 and 561-A of Cr.P.C. cannot be of much use. The investigation had so badly bungled that nothing short of an investigation from scratch would do.

34. In view of the above, we **allow** Criminal Appeal No. 171/2019 filed by Attaullah, and answer the Murder Reference in the **negative** and set-aside the impugned judgment dated 18.05.2019. The appellant, Attaullah, stands acquitted from the charge framed against him by the learned Sessions Court by orders dated 25.06.2018 and 12.10.2018 and shall be released forthwith if not required in any other case.

35. The Court can however not act as an efficient bystander while releasing the accused on the basis of benefit of doubt due to

the failure of the prosecution to conduct the investigation competently. The Court does owe a duty to the society that has an interest in ensuring that those involved in crime do not go unpunished and justice is served not only to deter the criminals but also to bring solace to the legal heirs of citizens who are victims of brutal crime.

36. Protecting the role of investigators and prosecutors falls primarily within the domain of the Executive. But where the Executive does not seem to be discharging such responsibility and the effect is that the right of citizens to life, liberty, dignity and dispensation of justice is undermined, it is the Judiciary's responsibility as the enforcement machinery re fundamental rights and provisions of the Constitution, to direct that remedial action be taken. To discharge our duty as the dispensers of justice in accordance with law, we feel that following instructions must be issued:

(1) The Police Order, 2002, is in force in Islamabad Capital Territory as has been observed by this Court in ***Mahera Sajid Vs. Station House Officer, Police Station Shalimar and others*** ***(2018 CLC 1858)*** and a key feature of the Police Order is that duties of watch and ward must be separated from the duties of investigation. Police Order, 2002, envisages functional specialization. The Ministry of Interior and the Inspector General of Police, ICT must therefore ensure that the ICT Police is structured such that the duties of watch and ward

and the duties of investigation are separated within a period of no longer than six months.

(2) The accused in criminal matters are frequently released as courts extend benefit of doubt to them as required by law, which doubt is more often than not generated due to faulty investigations. The Ministry of Interior and the Inspector General of Police, ICT will ensure that all officers of Islamabad Police deputed for purposes of conducting investigation have received basic investigative training, including inter alia, training on how to ensure crime scene preservation, prior to them being posted to an office that entails an investigation role. Such training mechanism shall be put in place within a period of six months.

(3) Doubt is created in the prosecution's case due to lack of proper preservation of recoveries and lack of analysis in relation to incriminating material. The ICT Police shall put together a Standard Operating Manual to ensure that all recoveries which are to be used in building a case against an accused are not left within the custody of the investigators or the custody of the relevant Police Station. The Ministry of Interior and ICT Police shall put in place a creditable and verifiable mechanism for storing recoveries in criminal matters during investigation, trial and appellate proceedings, such that sanctity of the

recovered item is beyond doubt and the system of checks and balances inspires confidence and recoveries cannot be doctored or planted. The control of the depository for the recoveries shall neither be with the police station nor with the investigation team. Such system shall be put in place with in a period of one year.

(4) The Standard Operating Manual will also include guidelines in the manner in which the evidence is to be generated from the recovered items, including the timing of sending empties as well as weapons for forensic investigation in a manner that such recoveries do not become inconsequential. The Manual will include mandatory instructions re lifting fingerprints from recoveries affected and/or place of occurrence and undertaking forensic examination of electronic devices and generating required expert evidence especially where electronic devices become relevant.

(5) The Ministry of Interior and the Inspector General of Police, ICT will ensure that the investigators are also equipped with body cameras especially in cases where recoveries are made on the basis of disclosures made by the accused when in police custody and to ensure that there is proper video evidence of such recovery to satisfy the conscience of the court that recoveries are not attributed to the

accused through use of coercive means and torture and are independently verifiable through corroborating evidence. The guidelines in this regard must be mandatory and disregarding them must entail penal consequences for the officers disregarding them.

(6) Frequently doubt is cast due to lack of independent corroborating evidence and the only material available in support of the prosecution case is the account within police diaries. It is settled law that such material does not constitute evidence in cases of circumstantial evidence and thus the court has nothing to rely on but suspicion based on prosecution's account. The Ministry of Interior and the Inspector General of Police, ICT will initiate the process of digitization of police dairies such that each entry within such diaries has an electronic timestamp which cannot be manipulated subsequently. This will give greater credibility to the real time account recorded by the Investigating Officers while undertaking investigations especially in cases of circumstantial evidence. Such process, which has already been undertaken to some extent by the Punjab Government through work of Punjab Information Technology Board (PTIB), shall be undertaken within the ICT within a period of one year.

(7) The Ministry of Law and Office of the Chief Commissioner ICT shall ensure that an appropriate number of prosecutors are appointed and trained for prosecution of criminal matters within the ICT, and the Chief Commissioner together with Ministry of Interior and Inspector General of Police ICT will ensure that a qualified prosecutor is staffed with an investigation team in each case at the investigation stage to ensure that evidence collected during the investigation is admissible and sufficient for successful prosecution of the charge. And further to determine what charge ought to be included within the charge sheet filed before the court in view of the evidence collected so that those accused of criminal charges can be successfully prosecuted and convicted. An appropriate system for training and staffing of the prosecutors as stated above shall be put in place within a period of one year.

37. Let a copy of this judgment be sent to the Secretary Ministry of Interior, Secretary Ministry of Law and Justice, Chief Commissioner ICT and Inspector General of Police ICT for compliance. Each one of them will file progress reports every three months for perusal in Chambers and a final compliance report within the time period prescribed for compliance in Para 36.

38. The Inspector General of Police ICT will file a report of the inquiry and any subsequent disciplinary action if any, in

relation to the conduct of the Investigating Officers in the instant case within a period of three months for perusal in Chambers.

(MOHSIN AKHTAR KAYANI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open Court on _____/2022.

JUDGE JUDGE

Approved for reporting.

Saeed*

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,

JUDICIAL DEPARTMENT

Crl. Appeal No.171-2019

Attaullah
Vs.
The State.

Murder Reference No.13-2019

The State
Vs.
Attaullah.

Appellant by:	Raja Ghaneem Aabir Khan and Mr. Muhammad Ilyas Khan, Advocates.
State by:	Mr. Osama Azeem Chaudhary, State Counsel. Mr. Waseem Anwar Bhatti, Advocate for respondent No.2.
Date of Hearing:	03.11.2022.

MOHSIN AKHTAR KAYANI, J: I have had the privilege to go through the main judgment authored by my learned brother Justice Babar Sattar. I, with respect is not agree with findings recorded in the case, whereby it has been decided to acquit the appellant Attaullah in Murder Reference, therefore, I render my own judgment.

2. The prosecution case was set up on the complaint of Sohail Mustafa PW-7, the real brother of deceased Junaid Mustafa, who submitted his complaint Exh.PL, which was converted into FIR No.85 dated 22.02.2018 under Section 302/ 392 PPC, police station Golra Sharif Islamabad Exh.PL/1, whereby it was stated that Junaid Mustafa, his younger brother was working with Careem company and used his private Car AEG-658 as Cab on 21.02.2018, complainant received the information from the police that his younger brother Junaid Mustafa has been murdered, he reached PIMS Hospital where he identified the dead body of his brother lying in PIMS Hospital, he is also witness of subsequent investigation links recovered

during the course of investigation by the I.O. The entire case unfolded through the prosecution evidence, especially with the evidence of Noman Wahab Chowkidar, PW-8, who was performing his duty in Street 79, G-13/1 Islamabad on the fateful night in the security post, when he heard three fire shots, then he saw that a boy came in the street in injured condition, who fell down, thereafter he called the police, the police has reached at spot, whereafter investigation was started by Muhammad Hanif, ASI, PW-9, who dispatched the dead body to the hospital. Dr. Irshad Hussain, PW-10 conducted the autopsy of the deceased and referred seven injuries on the dead body including exit entry wound with firearm injuries and observed blackening. He has submitted the postmortem report Exh.PR as well as sketch and issued death certificate Exh.PT.

3. The main Investigation Officer, Muhammad Riaz Gondal, PW-13 was posted at Homicide Unit, Islamabad and on 22.02.2018, he received information of the occurrence, reached PIMS Hospital, Islamabad, where dead body of Junaid Mustafa was lying in the Hospital. He drafted an application Exh.PU for keeping the dead body in mortuary and another application Exh.PV for conducting postmortem examination of deceased. On the personal search of dead body, the ID Card of deceased, was found having the address of Rawalpindi, whereafter he informed his relatives through telephone calls via Police Station, Civil Lines, Rawalpindi. On receiving information, Sohail Mustafa, PW-7, Complainant as well as real brother of the deceased alongwith other relatives reached to the hospital and identified the dead body, however, the same was handed over to the legal heirs of the deceased.

4. Muhammad Riaz Gondal, PW-13 and Muhammad Hanif, ASI, PW-9 visited the place of occurrence in Street No.79, G-13/1, Islamabad and took

into possession three empties of 30 bore pistol and original CNIC, P-21 of Attaullah accused vide recovery memo Exh.PP. He also took into possession bloodstained piece of cloth, P-16 vide recovery memo Exh.PM. He also prepared unscaled site plan sketch Exh.PX. I.O, PW-13 went to the given address of appellant Atta Ullah, from where it transpired that he had left that premises about five years ago. He contacted Careem services, who provided the mobile number on the basis of which, car of deceased Junaid Mustafa was booked with referred mobile No.0335-5167487. I.O while conducting the investigation, checked mobile number given by the Careem Company, which was found in the name of one Irfan Ullah, however, on whatsapp, picture was of Atta Ullah accused. On 24.02.2018, he arrested Atta Ullah accused and on his personal search, Valet P1, ATM Card, P2, registration book of a motorbike, P3, Ufone sim, P4, CNIC of one Zohar Khan, P5, Samsung Mobile, P6, and another mobile, P7 were taken into possession vide recovery memo Exh.PC. However, at the time of arrest of the accused, he was having a car without number plate vide recovery memo Exh.PT and a number plate ACT-781 was recovered from the diggy of the car, when the same was verified, it was found that this vehicle was also snatched and in this regard FIR was separately recorded in Police Station Shalimar, Islamabad. I.O, PW-13 during the course of investigation submitted an application for obtaining the record of the Careem Company on 27.02.2018 and on disclosure and pointation of the accused Atta Ullah, the Car of deceased Junaid Mustafa bearing No.AEG-658, P-12, which was parked adjacent to Chappar Hotel in the area of G-16/4, Islamabad was recovered and taken into possession by the I.O vide recovery memo Exh.PF. The accused then got recovered pistol 30 bore, P-9, two magazines , P-10/1-2 with live bullets, P-11/1-10 beneath under the driving seat of the Car. The record of the Careem Company was

also taken into possession as Exh-PB/1 to Exh-PB/6 vide recovery memo Exh.PA. I.O, PW-13 during the course of investigation also confirmed that mobile recovered from the accused contains the Careem Application and record of booking of car of deceased was also there.

5. The above referred details initially linked the accused Atta Ullah with this case only due to recovery of his original CNIC, P-21 from the place of occurrence and as such there is no logical explanation by the accused anywhere during the trial as to how and under what circumstances, his original CNIC was recovered from the place of occurrence, but the most astonishing feature surfaced on record is the question, which has been asked by the defence side from the Noman Wahab, Chowkidar, PW-8, who was performing his duties in the post in Street No.79, G-13/1, Islamabad i.e. place of occurrence in the midnight of 22.02.2018, when he heard three fire shot, then he saw a boy came in the street in injured condition and fell down, whereafter he informed the police, his testimony is very straight and simple as he is not a witness like having any adverse interest against the accused nor he has exaggerated anything, he is natural witness of place of occurrence, but the defence side has asked the question from this witness as to how he came to know about Atta Ullah is accused, his answer was *"I was shown CNIC by the police and then I told that it was of Atta Ullah accused"*, this aspect further corroborates the identification of Atta Ullah, though PW-8 has not seen the accused on the fateful night, but the police started the investigation and the Muhammad Riaz Gondal, Investigation Officer, PW-13, took into possession the record of the Careem Company, which was confirmed and brought on record of the Court by the official witness of Careem Company namely Qaiser Qayyum, PW-3, who was posted as Regional Security Manager, Careem Company, Islamabad and had given the evidence to confirm the

identity of the accused that *"as per the last ride record the last customer of the vehicle ride was Atta Ullah Phone No.0335-5167487. At about 2:30 am the ride was assigned to Captain Junaid Mustafa. At about 2:37 am Captain reached at designated place of Passenger Atta Ullah at F-11 Markaz, Islamabad. The ride was ended at about 2:58 am at G-13, Islamabad"*. The PW-3 then submitted the documents Exh.PB/1-6, record bearing detail of captain driver (deceased), ride history, booking mobile number, time, place and name of passenger summary was provided. The witness has also highlighted the working of Careem Company and as per his record as well as the details provided by PW-3, confirms the booking of the vehicle, which contain the details of vehicle of Junaid Mustafa deceased, the model of the vehicle, date and time and travelling history including the customer information by whom the vehicle was booked, which clearly spells out the name of Atta Ullah with telephone No.033-5167487, even the details of booking started from 02:36 and ended at 02:58 in G-13, Islamabad clearly spells out that the missing link is cleared. All these aspects establish that the vehicle was booked by one Atta Ullah having mobile No. No.0335-5167487 and even his original CNIC, P-21 was recovered from the place of occurrence, thereafter he was arrested by the police and on his pointation the snatched vehicle bearing Registration No.AEG-658 Exh.P-12 as recovered from *Chappar* Hotel in G-16/4, even in the investigation, keys of the Car were also recovered on the pointation of the appellant Atta Ullah from Chappar Hotel, which completes the chain and when the vehicle was unlocked by accused in front of police, a pistol, P-9 was also recovered from the vehicle, which was matched as per test with fire empties recovered from spot in Punjab Forensic Science Agency Report through Exh.PZ though the trial Court has not agreed to the recovery of pistol.

6. The other important feature is the recovery of CNIC, P-21 of accused/appellant from the place of occurrence and as such there is no explanation on the part of accused in his statement U/S 342 Cr.P.C. in question No.4 where his original CNIC, P-21 was confronted to him but he simply declared those proceedings as so called proceedings which is adverse to his case. The Appellant is under legal obligation to explain those circumstances in which his CNIC was recovered from the place of occurrence as burden shifted upon him to give reasonable explanation. The CNIC was recovered during the course of investigation of crime and has duly been recorded in the daily diary of proceedings of investigation, which was confronted to appellant in his statement under Section 342 Cr.P.C., but no justiciable answer was given by him. Hence, Article 129(g) of the *Qanun-e-Shahadat* Order, 1984 comes into play as if appellant had explained his position it might go adverse to him, therefore, he withheld such information. Similarly, it has also been presumed that if he answers that question, the answer would be unfavorable to him, which also creates an adverse effect in terms of Article 129(h) of the *Qanun-e-Shahadat* Order, 1984.

7. Another important feature is the permanent address of accused/appellant provided in the CNIC, P-21, recovered from the place of occurrence on the fateful night, which contains the same addresses provided by the appellant at the time of framing of charge in the trial Court.

8. I have also gone through the judgment of trial court and in para 21 and 22 of the impugned judgment, detailed review of mobile phone Huawai, Sim No.0335-5167487, Exh.P7, recovered at the time of arrest of appellant on 24.02.2018 during his personal search through Exh.PC was given in the following manner:-

Another challenge of worth importance was that the SIM number from which booking was made was belonging to accused or someone else? It was 24.02.2018 when Ataullah was arrested in this case. On his personal search besides other articles two cell phones one Samsung and other Huawai were recovered. In Huawai the SIM under use and available was "0335-5167487" and this was the same SIM on the basis of which booking was made for the car of deceased. That mobile was also produced in Court and today it was examined by me. After it was switched on it was showing the same SIM number. In this mobile also there was an app of Company. The history in this app was showing full details of booking of car of deceased through Company. The complete study of cell made today is formulated as under on the basis of visible data:-

FOLDER	***PHOTOS***	***VIDEOS***
Camera	*48*	*(01:23:00)*
Careem Screen shots	*02*	*Nil*
WhatsApp images	*57*	*Nil*
SD Card Root directory	*Nil*	*01*
Photo	*06*	*01*
Instagram photo	*25*	*Nil*
Camera	*148*	*Nil*
Candy Cam	*449*	*Two videos (00:00:31) (00:00:29 to 00:00:37)*
WhatsApp profile	*1*	*Nil*
WhatsApp Images	*59*	*Nill*
WhatsApp video	*Nil*	*(00:00:03)*
WhatsApp images	*26*	*Nil*
Instagram	*72*	*Nil*
UC Downloads	*06*	*Nil*

Most of the photographs are of accused. Many pictures are with different kinds of firearm weapons. Many pictures are selfie. Even a video was made by him in selfie position. Some more which I cannot add here? ***This also shows that mobile was in regular use of accused and non else.***

9. I have gone through the above referred scrutiny of the trial court qua recovered Mobile Phone Exh-P-7 from the appellant, which contains selfies of appellant, his personal videos, and it was also confirmed that Mobile No.0335-5167487 was in his use. However, appellant was also confronted with question No.9 in statement U/S 342 Cr.P.C., which is a key question, the same is reproduced as under:-

Q. No.9 *It is in evidence that when mobile number provided by Careem services was placed in system, it was found in the name of Irfan Ullah (Pw) however on WhatsApp there was your picture as DP. What do you say about it?*

Ans. *It is incorrect.*

10. The above mentioned facts spell out that no explanation was available with the appellant, therefore, he simply answered the same "*it is incorrect*", in such scenario, it is the primary duty of the trial court to check the veracity of every statement, article or evidence to explore the possibility to reach at just decision, which trial court did in this case, especially when the mobile phone was recovered from accused at the time of his arrest, was switched on, which provide details of his personal photographs and videos like selfies and videos, which were examined by the trial court and also referred above in para-08 of this judgment.

11. This entire exercise is not barred by any law, though it seems to be the failure on the part of I.O, who did not get mobile phone forensically examined from an expert of National Forensic Science Agency, but such failure does not impose any restriction upon the trial Court to consider the recovered phone of the accused on common prudence of the trial Court. The wisdom has to be considered in terms of Section 540 Cr.P.C. where Court had powers to summon material witness or examine any evidence at any stage of any inquiry, trial or other proceeding under Cr.P.C. or summons any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined if his evidence appears to it essential to the just decision of the case. Such aspect gives wide discretionary powers, which could only be exercised in a mandatory manner to ascertain the truth in order to reach at

fair conclusion of the case. No doubt the trial Court has unfettered powers to examine any person as a witness at any stage of any inquiry, trial or other proceedings obligatory for Court to do so when it was essential for just decision of case and under this analogy, the powers are clearly been explained in Criminal Procedure Code, where trial Court can look into the incriminating articles recovered from the accused like mobile phone P-6 in this case. This Court has taken guidance in this regard from the case law reported as ***PLD 1984 SC 95 (Muhammad Azam vs. Muhammad Iqbal)***, ***1987 SCMR 886 (Painda Gul vs. The State)***.

12. The Investigation Officer PW-13 has submitted Exh.PC the personal search memo of the Attaullah which contains the recovery of mobile phone Huawei P-6 containing the same mobile No. 0335-5167487 in presence of the other recovery witness namely, Asif Khan PW-4 and both the witnesses remained consistent on the recovered mobile phone from the appellant, but not a single question has been asked from the respective witnesses qua the alleged recovery of the mobile phone, in such scenario, the admissibility of mobile phone could not be denied nor it could be discarded in any manner, even question No.10 of the statement of the accused recorded under Section 342 Cr.P.C., whereby recovered mobile phone P-6 vide recovery memo Exh.PC has been confronted to the appellant, he has not answered in a proper manner, thus an adverse inference could only be made by going through the available data in the mobile phone by the trial Court, especially when mobile phone was examined by the trial Court itself during the course of trial, even no prejudice has been caused to the appellant, when the important piece of evidence available on record, has been confronted to the appellant, but he opted not to explain his position, hence the conclusion

drawn by the trial Court that recovered mobile phone was in use of appellant is correct.

13. At last this court is of the view that chain of substantial evidence is complete against Attaullah accused, who has booked the vehicle of Careem No. AEG-658/P-12 and same was confirmed through testimony of Qaiser Qayyum/PW-3, Regional Security Manager Careem Company, Islamabad, who has produced documentary evidence where booking details of vehicle by Attaullah has been confirmed, even complete journey was highlighted which ends at the place of occurrence at Sector G-13. The appellant after commission of offence of murder snatched the vehicle AEG-658, P-12 from deceased Junaid Mustafa, Careem Captain, fled away from the scene and also lost his original CNIC, P-21 at the place of occurrence during snatching of vehicle, which led to his arrest and mobile phone P-6 used in the booking was also recovered from him which further confirmed his involvement and no explanation was rendered by him. The I.O has also taken photographic evidence of place of occurrence referred as Exh.P-14/1-10 vide recovery memo Exh.PH confronted to the appellant in question No.18, though he has answered the same as incorrect but those photographs spells out the mode and manner, in which the deceased was done to death even in one photograph, the original I.D (CNIC P-21) of the appellant was visibly been seen alongwith firearm empties of 30 bore pistol, such overwhelming evidence was rightly relied upon by the trial Court for the purpose of conviction.

14. This chain of incriminating evidence if seen in the context of one natural witness available at the place of occurrence i.e. security guard Noman Wahab/PW-8, who informed the police qua the incident on the fateful night. However, in cross-examination, he admits that he was shown

CNIC by the police and then he told that it was of Atta Ullah accused and he had not stated in his statement to the I.O that, although he know Atta Ullah/appellant. All these aspects create complete chain, even mobile phone, which was switched on by trial court recovered from the appellant/accused confirms his selfies and pictures, which was in his use though SIM was belonging to his cousin, who was not produced before the court, therefore, there is no missing link in the evidence of recovery, which fully connects the appellant and the principle drawn in ***2015 SCMR 155 (Imran alias Dully vs. The State)*** clearly establishes the culpability and involvement of appellant in the brutal murder of Junaid Mustafa, who deserves no leniency in any manner though I.O has made certain shortcoming in the investigation where mobile phone recovered from the accused was not sent to forensic science agency and even he was not able to secure the evidence of one of the cousin of appellant namely Irfanullah, whose SIM was in use of appellant, but such shortcoming of the I.O amounts to an irregularity and mistake of I.O for which prosecution should not suffer and despite such irregularity conviction could be achieved as held in ***PLD 2003 SC 704 (Sh. Muhammad Amjad vs. The State), 1995 SCMR 1365 (Sheraz Asghar vs. State).***

15. The murder of Junaid Mustafa in unnatural manner with firearm at the hands of appellant is confirmed in the testimony of Dr. Irshad Hussain/PW-10, where firearm was used in close proximity, the deceased received seven injuries with three entry wounds with blackening and deceased died due to multiple firearm injuries, which caused severe damage to vital parts of the body and other organs, where major vessels of body caused excessive bleeding, which is also reflected in the pictures exhibited in the evidence, as such doctor was not cross-examined, therefore, in these peculiar circumstances when there is no logical explanation put forward by

appellant himself to deny as to how his original CNIC was recovered from place of occurrence next to deceased. Similarly, it is also proved on record that at the time of appellant's arrest, mobile Phone No. 0335-5167487 was recovered from him, which was used for the booking of snatched vehicle AEG-658, P-12, even the said phone contains his own selfies and videos, which creates an irresistible conclusion that he is guilty in this case, who murdered one innocent man while snatching his vehicle.

16. This court comes to conclusion that appellant deserves no leniency, therefore, his conviction is maintained, however, due to nature of the incident, this case is based upon circumstantial evidence, certain mitigation appears on record, where I.O has not referred five empties to PSFA before the arrest of appellant, hence it is not proper to award death sentence in such type of cases and rule of caution is applied. Resultantly, the appellant is awarded life imprisonment in terms of Section 302 (b) PPC, as *Tazir*, whereas rest of the sentence under Section 392 PPC, as well as the compensation is maintained, hence, instant appeal is **DISMISSED** and Murder Reference answered in **NEGATIVE**.

(BABAR SATTAR)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE **JUDGE**

RAMZAN

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD (JUDICIAL DEPARTMENT)

Crl. Appeal No.171/2019

Attaullah

Versus

The State and another

Appellant by	:	Mr Mujahid Khan, Advocate.
Respondents by	:	Mr Waseem Anwar Bhatti, Advocate. Sardar Salman Ijaz, State Counsel. Mr Muhammad Riaz, Inspector (Retd)/I.O. Mr Muhammad Khan, ASI with record.
Dates of Hearing	:	**23.04.2024**

Arbab Muhammad Tahir, J.- This criminal appeal was heard by a learned Division Bench of this Court comprising of my learned brothers *Mr Justice Mohsin Akhtar Kayani, J.* and *Mr Justice Babar Sattar, J.* Both the learned members of the Bench are equally divided in opinion and have rendered separate judgments. *Mr Justice Mohsin Akhtar Kayani, J*. has maintained the conviction and converted the Death Sentence to Life Imprisonment, whereas, *Mr Justice Babar Sattar, J.* has arrived at a different conclusion and has acquitted the accused of the charge. The matter has been referred to this Court under section 378 of the Code of Criminal Procedure, 1898 (hereinafter the ***"Cr.P.C."***) to hear the matter as a Referee Judge and deliver its opinion. Accordingly, after serving due notice on the parties, the matter was extensively heard. The judgments rendered by my learned brothers have been carefully perused. My opinion in this matter is as follows.

2. FIR No.85, dated 22.02.2018 was registered under sections 302, 392, 201 and 412 of the Pakistan Penal Code, 1860 (hereinafter the ***"PPC"***) at Police Station Golra Sharif, Islamabad on the complaint of Sohail Mustafa (PW-7), wherein it has been alleged that his brother Junaid Mustafa (hereafter the ***"Deceased"***) had registered himself as Captain No.582931 with Careem and was using his vehicle No.AEG-658-ICT for ride-sharing through Careem App. On 21.02.2018, at about 03:00 p.m., the Deceased left his house and as per Sohail Mustafa (PW-7) he had talked to him on his cell phone at about 10:50 p.m. A cellular number 0333-5881982 was also allotted by Careem to the Deceased, which was inserted in his personal cellular mobile phone i.e. Samsung Galaxy. As per the complainant, he received the information regarding murder of his brother from police and also identified the dead-body of the Deceased. The complainant also alleged that the Deceased has been murdered by unknown persons, who also snatched the vehicle, mobile phone (Iphone-0333-5486836), Careem SIM-0333-5881982, copy of the registration book of the vehicle. In the FIR, the complainant-Sohail Mustafa (PW-7) had disclosed that the last known location of Careem mobile (number) was *"Hakla Service Station".*

3. During initial investigations, CNIC (Exh.P21) alongwith three empties of 30 bore pistol were recovered from the crime scene i.e. Stree No.79, G-13/1, Islamabad (the ***"Street"***) and taken into possession vide recovery memo (Exh.PP). The last ride, as per the Careem's data, was booked by the appellant, who was picked from the area of Sector F-11 and dropped-of by the Captain/Deceased near the Street. Noman Wahab (PW-8), was performing his duties as Chowkidar in the Street. At about 03:00 a.m., he saw that *"a boy came in the Street in injured condition and fell down"*. He informed the local police. In his cross examination he admits that on one corner of the house, there were CCTV cameras.

4. On receipt of the information of commission of offence, *Muhammad Hanif ASI* (PW-9) rushed to the crime scene at 03:05 a.m. and dispatched the dead body to PIMS Hospital. After that, this witness remained deputed at the crime scene to guard the same. In his cross examination, this witness admitted that the OPD ticket issued by the Hospital contained his name as the person who brought the dead body.

Muhammad Riaz Gondal, Inspector (PW-13) reached Hospital at 04:00 a.m. The Complainant-Sohail Mustafa (PW-7) reached the Hospital at about 06:15 a.m. The complainant identified the dead body. Upon complaint (Exh.PL) of Sohail Mustafa (PW-7), the FIR (Exh.PL/1) was registered. Dr Irshad Hussain, Medico Legal Officer PIMS (PW-10) conducted post-mortem of the Deceased. The relevant portion of his testimony is as follows.-

> "It was a dead body of young made [sic] brought by police from G-13/1, street 92, Islamabad on 22.02.2018 at 04:25 a.m. at PIMS.
>
> It was dead body of young male on autopsy table wearing navy blue sweater, white shirt, sky blue jeans pent and blue underwear. Mouth and eyes semi open. Small beard and mustaches. Height 06 feet. Postmortem levidity and rigor mortis developed. I had noted following injuries on his body.-
>
> (i). Entry wound of firearm 2x2 cm inverted blackening and blood stained margins on just above the mid clevical bone.
> (ii). Firearm entry wound 2x1.5 cm inverted, blackening and blood stained margins on left clavicular joint
> (iii). 1x1cm exit firearm wound on lower angle of left scapular upper back. Pleurae was severally damaged and chest cavity was full of blood
> (iv). Pallet of firearm seen on X-ray cannot be retrieved.
> (v). 4x2.5 cm vertical firearm wound entry and exit with bone fracture of right long finer on dorsal surface of right hand.
> (vi). Five cm entry inverted firearm wound on right wrist.
> (vii). 2x1cm exit wound of firearm right wrist near to entry wound.

> On internal examination, scalp, skull and vertebrae, membranes, and spinal cord were found healthy.
>
> On thorax examination, walls ripe and cartilages, pleurae and blood vessers [sic] were damaged. Whereas, Larynx and tracheae and Pericardium and heart were health. Right lung was although health but there was blackening. Left lung was severally damaged due to firearm with its major vessels.
>
> On abdominal examinations, all organs were found healthy.
>
> On examination of muscles, bones and joints, multiple left side ribs fractures. Multiple displaced fracture of right long finger.
>
> In my opinion, deceased died due to multiple firearm injuries and damages which caused severe damage to multiple part of body, bones and organs of body like lung left sided with multiple major vessels of body which caused excessive bleeding and blood loss which caused death. All injuries and damages are antemortem which are sufficient to cause death.
>
> Time between injury and death was 2-3 minutes approximately whereas between death and postmortem, it was seven hours approximately."

The postmortem report was exhibited as Exh.PR, sketch of injuries as Exh.PR/1 and death certificate as Exh.PT.

5. Muhammad Riaz Gondal (PW-13) testified before the Court that the appellant was arrested on 24.02.2018 from a check-post at Islamabad Chowk while driving a vehicle, which was later found to be stolen/subject matter of a separate criminal case at Police Station Shalimar. From the personal search of the appellant, Valet (Exh.P1), ATM Card (Exh.P2), registration book of motorbike (Exh.P3), Ufone SIM (Exh.P4), CNIC of one Zohr Khan (Exh.P5), Samsung Mobile (Exh.P6), another mobile phone (Exh.P7) were recovered, duly taken into possession vide recovery memo (Exh.PC). On 27.02.2018, during physical remand, the appellant led to recovery of vehicle snatched from the Deceased, duly taken into possession vide recovery memo (Exh.PF). The weapon of offence i.e. 30 bore pistol (Exh.P9), two magazines (Exh.P10.1-2) and ten live bullets (Exh.P11/1-10) were also got recovered from beneath the driving seat of the said

vehicle, duly taken into possession vide recovery memo (Exh.PE). The appellant was remanded to judicial custody on 02.03.2018.

The CDRs of the mobile numbers of the appellant and the Deceased were obtained on 03.03.2018 and taken into possession vide recovery memo (Exh.PG). The Investigating Officer also took into possession the record of Careem company vide recovery memo (Exh.PA), which was later exhibited in the Court as (Exh.PB/1-6). The Investigating Officer took into possession an affidavit on stamp paper produced by one Irfan Ullah through recovery memo (Exh.PJ) on "09.04.2018", after a month of remanding the appellant to judicial custody.

Tariq Aziz/3654-LHC (PW-01) is the one who delivered the complaint to the Police Station for registration of FIR. He also delivered the parcels of recovered empties and recovered pistol 30 bore to the National Forensic Science Laboratory on 05.03.2018.

Asif Khan ASI (PW-4) and Munir Khan SI (PW-5) testified before the trial court regarding arrest of appellant and recoveries.

Amir Shahzad (PW6) testified before the trial court regarding preparation of sketched site plan (Exh.PK). In his cross examination he stated that he did not notice any CCTV camera on house No.1 to 4.

Sohail Mustafa/complainant (PW-7) in his statement reiterated the facts narrated in the FIR and the fact that he was associated with recovery proceedings.

Niaz Muhammad ASI (PW-11) testified before the Court that he had chalked the FIR on the complaint delivered by Muhammad Tariq (PW-1).

6. The Court examined three CWs. Shakil Qarar (CW-1) affiliated with Dawn TV as Crime Reporter who had published a story regarding the incident reported in the FIR on 23.02.2018. His story was exhibited as (Exh.CW1/A).

Naeem Janjua (CW-2) affildiated with Sama TV as crime reporter entered the witness box and tendered in evidence a CD (Exh.CW2/A) containing a TV Program titled Crime Scene aired on 22.03.2018.

Noor Ul Amin (CW-3) affliated with Sama TV as Crime Reporter testified before the Court that he was present in a press conference being managed by SP CIA on 24.03.2018 and when the accused was brought before the media he started crying that he is innocent.

The prosecution gave up 07 witnesses including Irfan Ullah, who was owner of the SIM used in the commission of offence.

The appellant did not opt to lead defence evidence or to record statement under section 340(2) Cr.P.C. The statement of appellant under section 342 Cr.P.C. was recorded on 09.05.2019. After conclusion of the trial, the learned trial court convicted and sentenced the appellant vide judgment, dated 18.05.2019, as follows.-

- Under section 302-B PPC to death penalty as Tazir. He shall pay an amount of Rs.500000/- (five lacs) as compensation under section 544-A Cr.PC to the legal heirs of deceased. In default thereof he shall undergo six months SI.
- Under section 392 PPC to undergo ten years RI with fine of Rs.100000/- (one lac). In default of payment of fine he shall further undergo six months SI.

7. Heard. Record perused.

8. The first person who saw the Deceased in injured condition is Noman Wahab (PW-8) wh was performing his duties as Chowkidar in the Street. At about 03:00 a.m., he saw that *"a boy came in the Street in injured condition and fell down"*. This witness did not utter a single word that he saw the appellant firing at the Deceased. His statement is silent as to whether the incident was actually an armed robbery and on resistance the appellant fired shots at the Deceased. The incident is, therefore, unseen and completely based on circumstantial evidence.

9. In order to connect the appellant with the commission of crime, the prosecution took support of the statement of Noman Wahab (PW-8) mobile number (0335-5167487) which was tagged with the Careem ID through which the ride was booked. The mobile number (0335-5167486) was later found to be registered in the name of one Irfan Ullah. During investigations, the said Irfan Ullah appeared before the Investigating Officer on 09.04.2018, submitted his affidavit mentioning therein that the appellant is his cousin and that he had handed over the said SIM to the appellant. Surprisingly, the prosecution gave up this witness, despite the fact that his testimony was crucial for this case which is totally dependent upon circumstantial evidence. Noman Wahab (PW-8) stated before the court that when the Investigating Officer confronted him with a CNIC recovered from the crime scene, he identified that it was of Atta Ullah, the appellant. However, his statement before the court is silent as to how he knew the appellant, particularly when he belongs to District Nowshera and had no reason to meet the said witness or that he was resident of the vicinity where the Deceased had been murdered. In his statement, this witness failed to mention that the appellant was employed somewhere near the place of occurrence so as to support his claim that the appellant was known to him. This witness admits

that one corner of the street in a house (place of occurrence) there were CCTV Cameras. But there is no explanation as to why the Investigating Officer could not obtain footage of the occurrence so as to uncover true facts and identify the culprits.

10. The evidence of Sohail Mustafa (PW-7) is formal as he was mainly witness of identification and recoveries. In his cross examination he admitted that empties were at a distance of about 30 steps from the place where the dead body was stated to be lying. However, his statement is unjustified in view of his admission that *"During the entire proceedings those were made by IO, I remained seated in the vehicle"*. If he did not get off the car, how he witnessed recovery of empties and CNIC from the crime scene. This witness had stated in his complaint that the last known location of the SIM issued by Careem was near *"Hakla Service Area"*, but failed to give explanation as to how he came to know about existence of such fact. Furthermore, neither the Investigating Officer in his statement nor any other witness testified such fact before the Court.

11. Muhammad Hanif, ASI (PW-9) in his examination-in-chief has stated that on receipt of the information regarding commission of offence he rushed to crime scene and dispatched the dead body to the Hospital and thereafter he was deputed at the crime scene to guard the place of occurrence. On the contrary, in his cross examination, he admits that on the OPD ticket issued by the Hospital, his name has been recorded as the one who brought the dead body to Hospital.

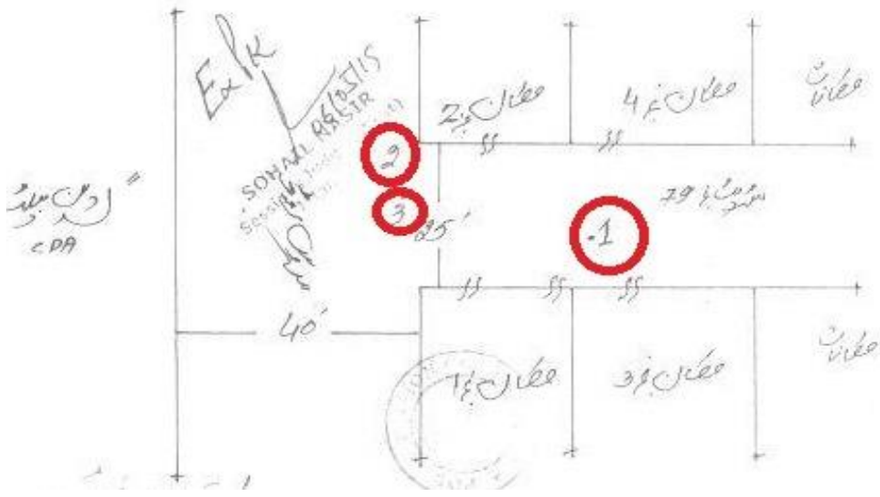
12. Abid Husain, HC/4151/Moharrar (PW-2) in his examination-in-chief has stated that on 27.02.2018 he handed over parcel containing recovered empties of 30 bore pistol to Tariq Aziz (PW-1) for onward transmission to NFSA, Islamabad, who submitted the same in NFSA on the same day. Furthermore, this witness had handed over the parcel containing the recovered 30 bore pistol

alongwith live rounds and two magazines of 30 bore pistol to Tariq Aziz (PW-1) for onward transmission to NFSA, who submitted the parcel in NFSA on the same day. Tariq Aziz (PW-1) also testified delivery of two parcels one on 27.02.2018 and other on 05.03.2018. Contrary to the statements of PW-1 and PW-2, the report of NFSA (Exh.PZ) shows delivery of two parcels (*containing 03 crime cartridge cases of 30 bore and 01 pistol of .30 bore alongwith 02 magazines & 10 live rounds*) in the NFSA on "05.03.2018". It shows that the empties stated to be recovered from the crime scene were not dispatched to the NFSA till recovery of the weapon of offence. Instead the weapon of offence recovered after arrest of the appellant and empties recovered before his arrest from the crime scene were delivered together in the NFSA for analysis.

13. To show that the last ride was booked by the appellant, the prosecution produced Qaisar Qayyum, Regional Security Manager of Careem. He adduced in evidence certain documents which do not show as to who authored the same. They are merely stamped and do not contain any signatures of the person attesting/verifying the same to be correct. This witness could not show that the documents were certified by Careem and the witness was authorized to use the same in evidence. The documents do not qualify to be the opinion of expert for the purposes of Qanoon-e-Shahadat Order, 1984. Even the first page (Exh.PB/1) has been prepared recklessly, mentioning wrong numbers against Careem customer and captain. This witness admits that he even do not know as to whether the map shown in the documents is Careem's own map or is borrowed from Google. Nothing was brought on record that he was lawful custodian of such record. An IT Expert of Careem could have been a star witness, supported by the statement of Irfan Ullah (given up) to unshakably connect the appellant with the commission of offence to complete the chain of circumstantial evidence. But the prosecution opted to ruin its case by not producing such witnesses.

14. The Call Detail Records (CDRs) obtained by the Investigating Officer did not indicate any telephonic communication between appellant and the Deceased. The Investigating Officer (PW-13) in his statement has mentioned that *"when the mobile number provided by Careem services was placed in system, it was found in the name of one Irfan Ullah, however, on whatsapp picture was of Atta Ullah"*. No record has been produced in evidence suggesting that the Investigating Officer had direct access to the database of cellular mobile companies or that such exercise was conducted with the help of any prosecution witness.

15. Asif Khan, ASI (PW-4) stated before the Court that no fire mark or blood was found in the vehicle recovered at the pointation of the appellant stated to be the one snatched from the Deceased. Whereas, Dr Irshad Hussain (PW-10) in his statement has noted blackening on the injuries. In his cross examination, he admits that *"the blackening on a wound indicates that fire was made from a close range"*. The relevant portion of the scaled site plan (Exh.PK) prepared by the Draftsman (PW-6) on the direction of the Investigating Officer (PW-13) is reproduced below.-



(points encircled for convenience)

Explanation:-

- Point No.1 is the place where Deceased fell down in injured condition.
- Point No.2 is the place from where three empties of .30 bore pistol were recovered.
- Point No.3 is the place from where CNIC of the appellant was recovered.

16. The absence of any fire mark or blood in the car would indicate that the incident did not take place in the vehicle. The recovery of empties and CNIC from the street (points 2 and 3) suggest that the incident took place outside the vehicle in front of the street, exposed to CCTV Cameras installed on the corner house of the Street (as per statement of PW-8). As per statement of PW-7 the empties were at a distance of 30 steps from the place where the dead body was lying. However, Noman Wahab, Chowkidar (PW-8), did not utter a single word in his statement that he saw the appellant firing at the Deceased. In the case in hand, the evidence of Irfan Ullah (who owned the SIM through which the ride was booked), the footage of CCTV camera and evidence of IT expert of Careem was crucial. However, the prosecution neither procured CCTV footage nor produced Irfan Ullah, as witness before Court. In such circumstances, under Article 129(g) of the Qanoon-e-Shahadat Order, 1984 the presumption would be that, had the CCTV footage been collected and Irfan Ullah (given up) produced before the Court, such evidence/testimony would have been unfavourable to the prosecution. The dispatch of empties recovered from the crime scene before arrest of the appellant to NFSA alongwith .30 bore pistol recovered after his arrest has rendered the recovery of these incriminating materials inconsequential.

17. To resolve the controversy whether SIM number 0335-5167487 was in the use of the appellant, the learned trial court switched on the mobile phone (recovered from personal search of appellant) in the Court and examined. The learned trial court after examining the mobile phone concluded that the referred SIM in the said mobile phone was the one used for booking the ride and was in the use of the appellant. It was further noted by the trial court that most of the photos and videos were of the appellant. To dispel a presumption that data of mobile phone was not edited/tampered, the investigating officer or the trial court were required to get the said

mobile phone examined by a forensic expert and after a positive report could have drawn such an inference/conclusion. It is also a mystery that the mobile phone remained charged for more than one year. It is also significant to note that as per statement of PW-13-Muhammad Riaz Gondal, the appellant was arrested driving a vehicle which was found stolen and an FIR in this regard was also registered at Police Station Shalimar, Islamabad. However, the said FIR of Police Station Shalimar, Islamabad was not exhibited before the trial court to substantiate such claim.

18. Circumstantial evidence may sometimes be conclusive but it must always be narrowly examined. It is of the utmost importance that the circumstances should be ascertained with minute care and caution, before any conclusion or interference adverse to the accused person is drawn. The process of inference and deduction involved in such cases is of a delicate and perplexing character, liable to numerous causes of fallacy. This danger points the need for the great caution in accepting proof of the facts and circumstances before they are held to be established for the purposes for drawing inferences therefrom. A mere concurrence of circumstances some or all of which are supported by defective or inadequate evidence can create a specious appearance, leading to fallacious inferences. Hence, it is necessary that only such circumstances should be accepted as the basis of inferences that are, on careful examination of the evidence found to be well established. A high quality of evidence is, therefore, required to prove the facts and circumstance from which the guilt of the accused person is to be drawn. Reliance is placed on the cases titled *"Lejzor Teper v. Queen"* [PLD 1952 SC 117], *"Fazal Ellahi v. Crown"* [PLD 1953 FC 214], *"Saeed Ahmed Hamdani v. Muhammad Irfan and others* [PLD 1986 SC 690].

19. There are chances of fabricating evidence in cases that are based solely on circumstantial evidence before the Court in such cases should take extra care and caution to examine the evidence with pure

judicial approach on strict legal standards to satisfy itself about its proof, probative value and reliability. Where there are apparent indications of possibility of fabricating evidence by the Investigating Officer in making the case, the court must be watchful against the trap which may mislead to draw a false inference and satisfy itself about the fear and genuine collection of such evidence. The failure of the Court to observe such care and caution can adversely affect the proper and safe administration of criminal justice. Reliance is placed on *"Hashim Qasim v. The State"* [2017 SCMR 986], *"Fayyaz Ahmed v. The State"* [2017 SCMR 2026].

20. The settled approach to deal with the question as to sufficiency of circumstantial evidence for conviction of the accused person is this; if, on the facts and circumstance proved no hypothesis consistent with the innocence of the accused person can be suggested, the case is fit for conviction of the accused person on such conclusion; however, if such facts and circumstances can be reconciled with any reasonable hypothesis compatible with the innocence of the accused, the case is to be treated one of insufficient evidence resulting in acquittal of accused person. Reliance is placed on the cases titled *"Siraj v. Crown"* [PLD 1956 FC 123], *"Muhammad Nazir Hossain v. The State"* [1969 SCMR 388].

21. Circumstantial evidence in a murder case should be like a well-knit chain, one end of which touches the dead body of the deceased and the other the neck of the accused. No link in chain of circumstances should be broken and the circumstances should be such as cannot be explained away on any reasonable hypothesis other than guilt of accused person. Chain of such facts and circumstances has to be completed to establish guilt of accused person beyond reasonable doubt and to make the plea of being innocent incompatible with the weight of evidence against him. Any link missing from the chain breaks the whole chain and renders the same unreliable; in that event

conviction cannot be safely recorded especially on a capital charge, therefore, if the circumstantial evidence is found not of the said standard and quality it will be highly unsafe to rely upon the same for conviction rather not to rely upon said evidence will be a better and safe course. Reliance is placed on the cases titled *"Saeed v. Muhammad Irfan"* [PLD 1986 SC 690], *"Imran v. The State"* [2015 SCMR 155], "Azeem Khan v. Mujahid Khan" [2016 SCMR 274].

22. It is held by the Supreme Court in the case titled *"Maqsood Alam and another v. The State and others"* [2024 SCMR 156] that it is settled principle of law that the conviction must be based on unimpeachable, trustworthy and reliable evidence. Any doubt arising in prosecution case is to be resolved in favour of the accused and burden of proof is always on prosecution to prove its case beyond reasonable doubt. It is also an established principle of law and equity that it is better that 100 guilty persons should let off but one innocent person should not suffer. The peculiar facts and circumstances of the present case are sufficient to cast a shadow of doubt on the prosecution case, which entitles the petitioner benefit of the doubt not as a matter of grace and concession but as of right. For the accused to be afforded this right of the benefit of the doubt, it is not necessary that there should be many circumstances creating uncertainty and if there is only one doubt, the benefit of the same must go to the accused. Reliance is placed on Mst. Asia Bibi v. The State (PLD 2019 SC 64), Tariq Pervaiz v. The State (1995 SCMR 1345), Ayub Masih v. The State (PLD 2002 SC 1048) and Abdul Jabbar v. State (2019 SCMR 129).

23. The Supreme Court in the case titled *"Naveed Asghar and two others v. The State"* [PLD 2021 SC 600] has held that the frightful nature of crime should not blur the eyes of justice, allowing emotions triggered by the horrifying nature of the offence to prejudge the accused. Cases are to be decided on the basis of evidence and

evidence alone and not on the basis of sentiments and emotions. Gruesome, heinous or brutal nature of the offence may be relevant at the stage of awarding suitable punishment after conviction; but it is totally irrelevant at the stage of appraising or reappraising the evidence available on record to determine guilt of the accused person, as possibility of an innocent person having been wrongly involved in cases of such nature cannot be ruled out. An accused person is presumed to be innocent till the time he is proven guilty beyond reasonable doubt, and this presumption of his innocence continues until the prosecution succeeds in proving the charge against him beyond reasonable doubt on the basis of legally admissible, confidence inspiring, trustworthy and reliable evidence. No matter how heinous the crime, the constitutional guarantee of fair trial under Article 10A cannot be taken away from the accused. It is, therefore, duty of the court to assess the probative value (weight) of every piece of evidence available on record in accordance with the settled principles of appreciation of evidence, in a dispassionate, systematic and structured manner without being influenced by the nature of the allegations. Any tendency to strain or stretch or haphazardly appreciate evidence to reach a desired or popular decision in a case must be scrupulously avoided or else highly deleterious results seriously affecting proper administration of criminal justice will follow. It may be pertinent to underline here that the principles of fair trial have now been guaranteed as a Fundamental Right under Article 10-A of the Constitution and are to be read as an integral part of every subconstitutional legislative instrument that deals with determination of civil rights and obligations of, or criminal charge against, any person.

24. The evidence brought on record proves that the murder of an innocent person was committed. The occurrence is unseen. The who committed the murder? The prosecution was burdened with heavy duty to bring on record unimpeachable and undeniable circumstantial evidence to connect the appellant with the commission

offence beyond the shadow of doubt. The evidence brought on record by the prosecution in the instant case is deficient and inconsistent. Material evidence has either not been collected or given up, which has broken the chain raising serious doubts as to involvement of the appellant in the commission of offence. In the facts and circumstances of the case, the learned trial court has wrongly inflicted the conviction and sentence upon the appellant. The appellant ought to have been extended the benefit of doubt and should not have been punished for proving his innocence as it was duty of the prosecution to prove its case beyond the shadow of doubt. The prosecution has failed to bring home guilt of the appellant by producing cogent, reliable and trustworthy evidence in this regard.

25. I agree with the conclusion of acquittal arrived at by my learned brother *Mr Justice Babar Sattar, J.* and the directions contained in paragraph 36 of his opinion/judgment.

26. For what has been discussed above, the Criminal Appeal No.171/2019 titled *"Attaullah v. The State & another"* is allowed. Consequently the appellant (Attaullah) is acquitted of the charge. He be released forthwith if not required to be incarcerated in any other case. Murder Reference No.13/2019 titled *"The State v. Attaullah"* is, therefore, answered in the "negative".

(ARBAB MUHAMMAD TAHIR)
REFEREE JUDGE

Announced in the open Court on _____

REFEREE JUDGE

Luqman Khan/*