JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

JAIL APPEAL NO. 364 OF 2024

QUDSIA LIAQUAT
VS.
THE STATE

Appellant by	:	**M/s Raja Ikram Ameen Minhas, Aamir Zar Bhatti, Adeel Ahmed Kundi Advocates.**
Complainant by	:	**Mr. Hassan Rashid Qamar Advocate.**
State by	:	**Malik Sardar Khan Awan, State Counsel. Mr. Tariq Mahmood, SI/IO.**
Date of hearing	:	**28-2-2025.**

SAMAN RAFAT IMTIAZ, J.

1. The Appellant [Qudsia Liaquat] has filed the instant Jail Appeal against the Judgment dated 30.09.2024 **("Impugned Judgment")** passed by the learned Sessions Judge, Islamabad (East) **("Trial Court")**, whereby the Appellant has been convicted the offences under FIR No.906/23 dated 28-11-2023 registered with Police Station, Lohi Bher, Islamabad **("FIR")** and sentenced under Section 365, P.P.C to undergo seven years Rigorous Imprisonment ("R.I") with fine of Rs.100,000/- and in case of non-payment of fine further Simple Imprisonment ("S.I") of six months and under Section 302(b), P.P.C., to life imprisonment. The Appellant has also been ordered to pay compensation amount of Rs.500,000/- to the legal heirs of the deceased under Section 544-A, Cr.P.C., which shall be recovered from the Appellant as arrears of land revenue in case of nonpayment of compensation amount. The benefit of Section 382-B, Cr.P.C has been extended to the Appellant. The substantive sentences of imprisonment are to run concurrently.

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Contents of the FIR:

2. The relevant contents of the FIR (Ex-PD) registered at 2:55 pm on 28-11-2023 on the Complaint (Ex-PF) of Ayesha Amjad **("Complainant")** are that at about 03:00 p.m. on 27.11.2023 her father [Amjad Mahmood] messaged on the family WhatsApp group, which aroused the Complainant's suspicion that something is amiss. Thereafter, upon calling her father several times the Complainant sensed that some people are with her father especially a woman who answered the phone once but hung up without any conversation. The dubious manner in which the phone was disconnected caused the Complainant to suspect that her father is in some kind of trouble and that someone is not allowing him to talk freely by answering the phone in his presence. On repeated enquires it was learnt that four people are with father of the Complainant one of whom is a woman who was talking on the phone over and over again but the father of the Complainant kept on saying that he will explain upon reaching home. By this time it was 7:30 p.m. when for the last time the paternal aunt of the Complainant spoke with the father of the Complainant which proved to be the last contact. Thereafter, no one answered the continuous calls on the phone of the father of the Complainant till 3:00 a.m. His device was located by using the computer at home and it was found that location of father of the Complainant at 8:00 p.m. was near Siri Expressway (Khajot). At 3:00 a.m. the phone of the father of the Complainant was switched off which was still off. The Complainant sought help by calling Rescue 15 at 1:00 a.m. who informed the Police Station, Lohi Bher from where a representative called the Complainant upon which the Complainant narrated everything to him and sent a photograph of her father. The Complainant suspected that the woman is the same with whom marriage of the father of the Complainant was under consideration. The Complainant named the woman as Qudsia **("Petitioner")** and provided her mobile number as 0333-1572685. The father of the Complainant was stated to be a healthy man who left driving his blue coloured, Toyota Yaris Vitz bearing No. LE-11-8622 himself. His failure to contact anyone was worrying the Complainant hence initially the FIR was lodged under Section 365, PPC.

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Discovery of a dead body in District Abbottabad:

3. Meanwhile, according to the Inquest Report-Unnatural Death by Violence dated 28-11-2023 (Ex-PQ) prepared by P.S. Doonga Gali, a dead body was discovered under Toheedabad Lasyala Road at 10:00. The position of limbs, eyes and mouth stated in column 8 was that eyes were closed and the mouth was slightly open baring teeth. In column 10 the injuries or marks of violence on the discovered body were stated to be a mark on the forehead (resulting from) a strike and the nose was slightly compressed whereas both eyes were swollen and bruised. According to column 11 there was a blood clot from the nose. The Site Plan of the Recovery of the dead body (Ex-P4) shows that the body was discovered face down in a deep ditch on the side of Toheedabad Lasyala Road.

4. According to the Injury Statement dated 29-11-2023 (Ex-PF) prepared by SHO, P.S. Doonga Gali the dead body of an unknown, well-built person, aged 50 to 52 years was found under Toheedabad Lasyala Road in the southern direction but no documents for identification were found on the said body.

Post-mortem report:

5. As per the Post Mortem Report (Ex-PR) the body was examined at 2:30 p.m. on 28-11-2023. The probable time that elapsed between injury and death is given as 1 to 2 hours and between death and post mortem 12 to 14 hours approximately. Death is stated to have occurred due to damage to skull and brain matter sufficient to cause death. The external appearance of the body revealed *inter alia* bleeding from nose and right ear, depressed and fractured frontal bone and blackening and swelling of eye; abrasion on the back and knee (minor bruises); skull bone fractured; rigidity and lividity on dependent area.

Complainant's Supplementary Statement:

6. The Complainant recorded her supplementary statement on 28-11-2023 stating that she fully supports her previous statement in the FIR in which she had expressed suspicion against the Appellant/Accused for the disappearance/abduction of the Deceased. She further stated in the supplementary statement that now she has received information that her father's

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dead body was found in the area of Doonga Gali, Police Station, District Abbottabad which she has identified by way of photographs and that since her father had gone with the Appellant/Accused to *Nathiagali, Murree* and his car No. 8622/LEII, Toyota Yarish Vitz has not yet been found therefore, the Complainant is convinced that the Appellant/Accused in collusion with her various unknown companion(s)/co-accused enticed the Deceased on the pretext of marriage and kidnapped and murdered him while misappropriating her father's mobile phone, purse, cash, and the aforementioned vehicle.

Contents of Challan:

7. The report under Section 173, Cr.P.C. was submitted. Initially the investigation was carried out by Umer Hayat, SI who appeared as PW-3. According to the challan information was received regarding a dead body from Doonga Gali, Police Station, District Abbottabad and pictures of the abductee/Deceased were received through WhatsApp which were shown to the Complainant for identification. The Complainant identified the pictures of her father/Deceased whereupon supplementary Statement of the Complainant was recorded. Thus offences under Sections 302/34 PPC were added in this case.

8. Further investigation was carried out by Tariq Mahmood, SI who appeared as PW-11 and who went to the Police Station Doonga Gali, District Abbottabad and obtained all the documents of the case vide Recovery Memo dated 29-11-2023 (Ex-PS) including Memo of Position, Injury Statement (Ex-PF), Post Mortem Report (Ex-PR) and the clothes last worn by the Deceased (P2-P4). He inspected the place of recovery of the dead body and prepared the un-scaled site plan (Ex-PU). The case property was handed over to the Moharrir of the Police Station. On 30-11-2023 the Call Data Record **("CDR")** record of the Appellant/Accused and of the Deceased was obtained and taken into police custody vide Recovery Memo dated 30-11-2023 (Ex-PB). On 1-12-2023 the Complainant submitted photocopies of the documents of the vehicle No. LE-8622 which was in the use of the Deceased and the box of POCO Mobile of her Deceased, which were taken into custody of the police vide Recovery Memo dated 1-12-2023 (Ex-PG). The statements of the nephew of

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the Deceased [Abdullah] (PW-6) was recorded. On 5-12-2023 the Draftsman (PW-7) was taken to the place of recovery of the dead body in the area of Police Station *Doonga Gali* by Tariq Mehmood SI. On 8-12-2023 record of the phone No. 0333-1572685 used by the Appellant/Accused was obtained which was found in the name of Mr. Noor-ur-Rehman. The report regarding criminal record of Mr. Noor-ur-Rehman was obtained from the Office of Criminal Record Office ("**CRO**") and an application was submitted for recovery of statement of bank account of the Deceased before the Area Magistrate. On 11-12-2023 the bank statement of the Deceased was obtained and taken into custody of the police vide Recovery Memo dated 10-12-2023 (Ex-PC). On 17-12-2023, a site map without scale was obtained from the draftsman. On 21-12-2023, the Appellant/Accused was formally and legally arrested. As per legal procedure, a thorough search of the Appellant/Accused was conducted by a head constable and the items recovered were taken into police custody vide Recovery Memo dated 21-12-2023 (Ex-PA). The Appellant/Accused was detained at the Women's Police Station and the case property was handed over to the Moharrir of the Police Station. On 22-12-2023, the Appellant/Accused was presented before the competent court and three days' physical remand was obtained. The Complainant submitted hard copies of the family group chat which were seized by the police vide Recovery Memo dated 23-12-2023 (Ex-PH). On 24-12-2023, based on the disclosure and identification by the Appellant/Accused, the Mobile phone of the Deceased (Poco Model M3), the Vehicle (LE-11-8622), and the Deceased's Identity Card were recovered. The recovered vehicle, mobile phone, and Identity Card were seized by the police vide Recovery Memo dated 24-12-2023(Ex-PM). The Vehicle was parked at the Police Station, and the case property was handed over to the Moharrir of the Police Station. The Appellant/Accused was locked in the Women's Police Station's Lockup. On 25-12-2023, the Appellant/Accused was sent on judicial remand. On 28-12-2023 two parcels (i) parcel containing an iPhone 6S Plus and (ii) parcel containing a Poco Mobile, Model M3 were delivered to PFSA, Rawalpindi via road Certificate No. 1021/23. During the investigation, it was found that besides the Appellant/Accused no other person was involved in the crime. Therefore, the case under Section 34 PPC was dropped. During the investigation, it was revealed that the Appellant/Accused wanted to marry the

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Deceased but believed it was impossible due to the behavior of the Deceased's daughters. Consequently, the Appellant/Accused deceived the Deceased and took him to Doonga Gali and in order to grab the Vehicle of the Deceased she pushed him into a deep pit, where he fell on a stone face down. After killing him, the Appellant/Accused took the Deceased's Vehicle, Mobile Phone, Identity Card, Purse etc. and fled away. On 16-2-2024 reports from the Punjab Forensic Science Agency were received and complete Challan was submitted before the Court.

Charge:

9. The Appellant/Accused was formally charge sheeted on 29-4-2024 as follows:

*"**Charge Sheet"***

I, Shahrukh Arujumand, Sessions Judge, Islamabad-East, do hereby charge you above named accused as under:-

Firstly, on 27.11.2023 at about 03:00 p.m., you accused abducted Amjad Mehmood from his House No.491-D, Street No.28, Pak PWD Housing Society, Islamabad and took him to Donga Galli, Abbottabad and thereby committed offence punishable under Section 365 P.P.C.

Secondly, on 28.11.2023 at about 02:30 a.m. you accused after abducting Amjad Mehmood took him Donga Galli, Abbottabad and committed his murder by pushing him into a deep ditch and thereby you committed qatl-i-amd punishable under Section 302 P.P.C. which is within my cognizance.

I, Shahrukh Arjumand, Sessions Judge, Islamabad-East, do hereby direct you that accused to be tried by this court on the above said charge.

R R.O & A.C. *(Shahrukh Arjumand)*
29.04.2024 *Sessions Judge, Islamabad (East)*

Charge has been read and explained to the accused in her own language, which she understand. Let her plea be recorded separately.

R.O & A.C. *(Shahrukh Arjumand)*
29.04.2024 *Sessions Judge, Islamabad (East)*

Statement of Qudsia Liaquat daughter of Liaquat Hayat Bhatti, resident of Flat No.319, Crown Business Plaza, E-11/2, Islamabad, permanently resident of Rajput House, Iftikhar Janjua Road, Habib Ullah Colony, House No. CB-95, Abbottabad Cant, Tehsil & District, Abbottabad, CNIC No.13101-8629410-0 (Without Oath)

Q No.1. *Have you understand the charge?*
Ans. *Yes.*
Q No.2. *Do you plead guilty?*
And. *No. I do not plead guilty?*

Q No.3. *Do you claim trial?*
Ans. *Yes.*

R.O & A.C. *(Shahrukh Arjumand)*
29.04.2024 *Sessions Judge, Islamabad (East)"*

Trial:

10. The prosecution produced 12 witnesses i.e. PW-1 to PW-12. The Scaled Plan produced by PW-7 as Ex-PO shows that where the body was recovered from was a 12 feet deep ditch in the form of a slope. The statement of the Appellant/Accused was recorded under Section 342, Cr.P.C.

11. Aggrieved of the Impugned Judgment, the Appellant filed the instant Jail Appeal.

Arguments:

12. The learned counsel for the Appellant emphasized that there is no eye witness in the instant case nor is it a case of 'last seen' evidence as there was no allegation that the Deceased was seen leaving with the Appellant/Accused. He argued that the whole case is based on mere suspicion, conjectures, and surmises. He submitted that the SIM of which the CDR was obtained and exhibited as Ex-P1 was registered in the name of one, Noor-ur-Rehman son of Shams-ur-Rehman and not in the name of the Appellant/Accused. Even otherwise, he submitted that CDR was not produced through the author and instead was produced by the Investigating Officer and as such constitutes inadmissible evidence, which cannot be relied upon. The learned counsel pointed out that a great deal of stress has been laid upon the testimony of PW-12 but her statement under Section 161, Cr.P.C. was not recorded and as such the testimony stands vitiated under Section 265, Cr.P.C. He also highlighted that no motive has been ascribed to the Appellant/Accused.

13. The learned counsel for the Complainant started off by submitting that there is no bar in convicting a person on the basis of circumstantial evidence and that this is a case where the circumstantial evidence connects the dead body of the Deceased with the neck of the Appellant/Accused. He argued that the evidence establishes that the Deceased was *last known to be in the company of* the Appellant/Accused which according to the learned counsel for the

Appellant/Accused is akin to 'last seen' evidence. In this regard, while referring to the contents of the FIR and the Complainant's evidence he explained that the Complainant is the daughter of the Deceased who was well aware of the Deceased's habits and usual conduct therefore the sudden WhatsApp message sent by the Deceased that the Deceased is going away on a trip with friends aroused the Complainant's suspicion as it did not conform with the Deceased's general conduct and behavior particularly considering that the Deceased did not even take with him any necessary items of general use required on a trip. The Complainant also mentioned that when she called the Deceased on his mobile number the Deceased either did not answer or would immediately hang up which too was highly suspicious. Finally when he attended the call the Complainant could hear a female voice in the background who she suspected was of the Appellant/Accused. The learned counsel also contended that the Complainant's suspicion was confirmed by the PW-12's testimony who is the paternal aunt of the Complainant and the sister of the Deceased that the Deceased told her that he was with the Petitioner. The learned counsel submitted that the PW-12's testimony is admissible as she was examined under Section 540, Cr.P.C. as she was present in Court for which statement under Section 161, Cr.P.C. is not necessary. He pointed out that PW-12 has been mentioned in the FIR as well as the list of witnesses therefore her evidence caused no prejudice to the Appellant/Accused. Thus he referred to PW-12's testimony according to which the Deceased spoke to her and told her that he was with the Appellant/Accused at *Nathyagalli Murree* as such he argued that the evidence establishes that the Deceased was last known to be in the company of the Appellant/Accused.

14. Next he argued that the recoveries made from or on the identification of the Appellant/Accused connects her with the alleged offences. The learned counsel emphasized that the FIR not only mentions that the Deceased went in his own car but also provides the vehicle number as well as the phone number of the Appellant/Accused and that according to the Injury Statement (Ex-PF) a dead body was found on 28-11-2023 under Toheedabad Lasyala Road without any identification documents. Thereafter the Petitioner was arrested on 21-12-2023 and her personal search led to the recovery of *inter alia* mobile phone having the same SIM as mentioned by the Complainant in the FIR as belonging to the

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Appellant/Accused and on 24-12-2023 the Deceased's ID card and Mobile Phone with IMEI number that matched the IMEI number mentioned on the box of the Deceased Mobile Phone produced by the Complainant was recovered from the Appellant/Accused's flat located in Crown Business Center, Sector E-11/2. On 24-12-2023 the Appellant/Accused also caused recovery of such vehicle which was parked below the Appellant/Accused's Flat and disclosed that she had taken it into her possession after the occurrence. The Complainant provided the documents of the vehicle of the Deceased. The learned counsel submitted that the Recovery Memos were witnessed by independent witness who was produced as PW-6 and who is the nephew of the Deceased. The learned counsel for the Complainant relied upon the illustration given in clause (i) of Article 21 of the Qanun-e-Shahadat Order, 1984 to argue that possession of the Deceased's property with the Petitioner is relevant. The learned counsel for the Complainant submitted that while the cross-examination conducted on behalf of the Appellant/Accused contains admissions as far as recovery is concerned the same was denied in her statement under Section 342, Cr.P.C. However, he pointed out that while cross-examination is conducted under oath statement under Section 342, Cr.P.C. is not. He argued that even otherwise evasive replies under Section 342, Cr.P.C. cannot negate admissions made through cross-examination. The learned counsel submitted that no motive has been alleged and it is not necessary to do so.

15. The learned State Counsel submitted that the entire cross-examination conducted on behalf of the Appellant/Accused constitutes admissions. He particularly highlighted the cross-examination of the Complainant according to which it stands establishes that the Deceased and the Appellant/Accused were interested in marrying each other and also that the Complainant had no objection to such match and therefore bore no ill will towards the Appellant/Accused. He also highlighted that there is no suggestion in the entire cross-examination that the recoveries from the Appellant/Accused were planted on her. He contended that the CDR establishes that the Deceased and the Appellant/Accused were travelling together on 27-11-2023. He also referred to the Scaled Site Plan produced as Ex-PO to highlight that it depicts that the body was found face down

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in a 12 feet ditch and that the post-mortem report as well as PW-9's evidence shows abrasion on back and knee (minor bruises) and that death occurred due to damage to skull and brain matter, sufficient to cause death. He relied upon *Khurshid Vs. The State*, PLD 1996 SC 305.

16. In rebuttal the learned counsel for the Appellant/Accused emphasized that benefit of doubt is the cardinal principle of criminal law. He submitted that the prosecution case is entirely dependent on deficiencies in cross-examination. Despite any such deficiency it is the prosecution that has to connect the accused with the alleged offence. He pointed out that Inquest Report was prepared before FIR was registered and as such is illegal. In answer to a query of the Court he submitted that no FIR was registered in *Nathiagali* when the body was found.

17. I have heard the arguments of the learned counsel for the parties and perused the record with their assistance.

Conviction for the offence under Section 365, P.P.C:

18. 'Abduction' has been defined in Section 362, PPC according to which whoever compels by force or induces by any deceitful means any person to go from any place abducts that person. Section 365, PPC provides that whoever abducts any person with the intent to cause that person to be secretly and wrongfully confined shall be punished with imprisonment of either description for seven years, and shall also be liable to fine. Thus in order to constitute the offence of 'abduction' it must be established that the accused either compelled by force or induced any person by deceitful means to go from any place and such abduction is punishable when it is with the intent to cause the person to be secretly and wrongfully confined.

19. However, in the instant case, the Complainant alleged in the FIR and categorically admitted in her cross-examination that the Deceased drove his own car from home. The contents of the FIR make no mention nor does the record contain any evidence that the Appellant/Accused compelled the Deceased by force or induced him by any deceitful means to leave or that the Appellant/Accused intended to cause the Deceased to be secretly or wrongfully

confined. The allegation made by the Complainant vide her supplementary statement that the Appellant/Accused has abducted the Deceased is therefore contrary to the FIR and even otherwise unsubstantiated by evidence.

20. Therefore, the prosecution failed to bring home the charge of abduction under Section 365, PPC.

Conviction for the offence under Section 302, P.P.C:

'Last known to be in the company of':

21. In order to establish that the Deceased was last known to be in the company of the Appellant/Accused the learned counsel relied upon the evidence of the Complainant and of PW-12; recoveries from the Appellant/Accused; admissions in cross-examination conducted on behalf of the Appellant/Accused; CDR of the Deceased's mobile number and that which was allegedly in the use of the Appellant/Accused; and evasive statements of the Appellant/Accused under Section 342, Cr.P.C.

Evidence of the Complainant and of PW-12:

22. The Complainant testified that she got worried upon receiving the Deceased's message on the family WhatsApp group because of the sudden trip and the unusual style of typing. The Deceased did not answer the first few calls but when he did she heard the voice of a lady who disconnected the call. The Complainant called again and this time the Deceased answered and told the Complainant that he will tell her about his trip upon his return but disconnected the phone without saying *Allah Hafiz* which too was unusual. The Complainant kept calling and at last the Deceased told her that there are four persons with him including a lady whose voice the Complainant heard during the call.

23. The Complainant further stated that at about 7:30 p.m. on 27-11-2023 her paternal aunt received a call from the Deceased who told her that he is coming from *Nathiagali* with the Appellant/Accused. Such statement of the Complainant is based on information given to her by PW-12 and as such

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constitutes indirect oral evidence or hearsay. However, PW-12 was examined as a witness herself[1]. Essentially, therefore, the prosecution case rests on the testimony of PW-12[2].

24. PW-12 is the Complainant's paternal aunt i.e., the Deceased's sister who testified that on 27-11-2023 she was present at the residence of the Deceased and that on the same day she received a phone call from the Deceased at about 7:23 p.m. when the Deceased told her that he was with the Appellant/Accused at *Nathiagali, Murree*. The learned counsel for the Appellant/Accused objected that evidence of the PW-12 is inadmissible in the absence of her statement under Section 161, Cr.P.C. This objection has no force in light of *Sajid Mehmood vs. The State*, 2022 SCMR 1882, wherein it has been held:

> *"7.* ***It was one of the arguments of learned counsel for the appellant that although Zameer Hussain (PW-11) was mentioned as witness in the FIR but his statement under section 161, Cr.P.C. was not recorded, therefore, his testimony cannot be relied upon to sustain conviction of the appellant. However, we do not tend to agree with the learned counsel. To arrive at a just conclusion, the courts can call any person likely to be acquainted with the facts of the case after ascertaining it from the Public Prosecutor or the complainant, subject to general provisions that summoning of any such witness does not cause delay or defeat the ends of justice.*** *Section 265-F(2) of the Code of Criminal Procedure empowers the Courts to summon a person, after having been ascertained from the Public Prosecutor or the complainant, who is likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution. Section 265-F(7) grants even to the accused a right to apply for summoning any witness and production of documents. The very purpose of section 265-F is to ensure the concept of a fair trial and to achieve this purpose equal opportunity has been given to both the accused and the prosecution for summoning the evidence. There is nowhere mentioned in this Section that only those witnesses could be examined whose statements under section 161, Cr.P.C. have been recorded. Under this provision of law i.e. section 265-F the Trial Court is not bound to record the statements of only those witnesses who have been listed in the calendar of witnesses. On the other hand, section* ***540, Cr.P.C. empowers the Trial Court to summon a material witness even if his name did not appear in the column of witnesses provided his evidence is deemed essential for the just and proper decision of the case. In the present case, <u>although the statement of Zameer Hussain (PW-11) under section 161, Cr.P.C. could not be recorded by the Police</u> yet the fact remains that <u>he was named as an eye-witness in the very FIR</u> and was fully acquainted with the facts and circumstances of the case.*** *It would be advantageous to*

[1] *Sulleman and 2 others vs. The State*, 1981 P Cr. L J 434; *Muhammad Iqbal vs. the State*, PLD 1996 Lahore 402; *Mian Muhammad Nawaz Sharif and others vs. the State and others*, PLD 2002 Karachi 152; *Mohsin Saleem and another vs. the State*, 2006 P Cr. L J 969.

[2] *Daud alias Dadan and another vs. the State*, PLD 1964 Karachi 428.

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reproduce section 540, Cr.P.C., which is as follows:-

> *"540. Power to summon material witness, or examine persons present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon 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;* ***and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case".***

8. ***This section is divisible in two parts.*** *In the first part, discretion is given to the Court and enables it at any stage of an inquiry, trial or other proceedings under the Code, (a) to summon anyone as a witness, or* ***(b) to examine any person present in the Court,*** *or (c) to recall and re-examine any person whose evidence had already been recorded. On the other hand,* ***the second part appears to be mandatory and requires the Court to take any of the steps mentioned above if the new evidence appears to it essential to the just decision of the case. The object of the provision, as a whole, is to do justice not only from the point of view of the accused and the prosecution but also justice from the point of view of the society.*** *The Court examines evidence under this section neither to help the prosecution nor to help the accused. It is done neither to fill up any gaps in the prosecution evidence nor to give it any unfair advantage against the accused.* ***Fundamental thing to be seen is whether the Court considers this evidence necessary in the facts and circumstances of the particular case before it.*** *If this results in only "filling of lacuna" that is purely a subsidiary factor and cannot be taken into consideration.* ***There is no bar that a witness, whose statement under section 161, Cr.P.C. had not been recorded at the time of investigation, cannot be allowed to examine under section 540, Cr.P.C. When a witness examined in Court, whose statement has not been recorded at the time of investigation under section 161, Cr.P.C., the evidentiary value to be attached to the evidence of such witness has to be looked into and if it is found that prejudice has been caused to the accused then the evidence of such witness may or may not be acted upon.*** *Therefore, the argument of the learned counsel for the appellant is misconceived.*" [Emphasis added].

25. In the instant case too, PW-12 has been named in the FIR as well as the list of witnesses in the challan therefore her evidence cannot be discarded only because her statement under Section 161, Cr.P.C., was not recorded given the powers the Court has under Section 540, Cr.P.C., where under the Court can examine any person present in the Court and must examine a person if it is necessary in the facts and circumstances of the particular case before it. In *Naseebullah vs. The State*, PLD 2021 Quetta 127 the Baluchistan High Court dismissed a Constitutional petition filed against orders allowing an application under Section 540, Cr.P.C., for summoning of witness whose statement under

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Section 161, Cr.P.C., was not recorded but who were mentioned in the FIR by holding that where the Court comes to the conclusion that evidence of any person is essential to the just decision of a case the evidence of such person must be made part of the record and the Court has no discretion under Section 540, Cr.P.C. in the matter. The evidence of PW-12 is essential in determining whether the Deceased was last known to be in the company of the Appellant/Accused.

26. Whether any value is to be attached to such evidence depends on whether it will cause prejudice to the accused. The Lahore High Court in *Waris Khan and others vs. The State and another*, 2004 MLD 1982 held that no prejudice would be caused to the accused due to non-recording of statement under Section 161, Cr.P.C., as the witness was mentioned in the FIR and as such there was no surprise element involved and the accused is presumed to be in the knowledge that the witness would appear against him. In the instant case, the Complainant specifically mentioned in the FIR that the Deceased spoke to PW-12 on the phone. Therefore, it can be presumed that the Appellant/Accused was in the knowledge that PW-12 would appear as a witness against her and as such no prejudice can be said to be caused to her.

27. Thus I find PW-12's testimony admissible. PW-12 testified that on 27-11-2023 she received a phone call from the Deceased at about 7:23 p.m. in which the Deceased told her that he was with the Appellant/Accused at *Nathiagali Murree* and that he would inform his children about this fact but would reach home late at night. However, she admitted in cross examination that her mobile phone was never taken into possession during investigation by the I.O. nor did she produced any CDR of her phone to establish the alleged phone call of the Deceased to her. Be that as it may, the testimony of PW-12 at the most indicates that the Deceased stated to her that he is with the Appellant/Accused which does not by itself establish that she was indeed with him or for how long.

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Recoveries from the Appellant/Accused:

28. The Complainant's legal counsel argued that the evidence of PW-12 is corroborated by the recoveries made from and on the identification of the Appellant/Accused. The Recovery Memo produced as Ex-PA records that at the time of arrest the personal search of the Appellant/Accused revealed (i) Silver colored IPhone 6S plus, IMEI No. 353301072234599 containing SIM No. 03331572685, (ii) Black colored Samsung, Model Note5, IMEI No. 356373080016950 containing Telenor SIM, (iii) Driving Licence No. 1066000000619 of the Appellant Accused issued by Traffic Police Abbottabad, KPK, and (iv) one artificial silver colored ring.

29. The Recovery Memo produced as Ex-PM records that during remand the Appellant/Accused led the police to her home located in Flat No. 319, Crown business Center, Sector E-11/2, third floor, Islamabad where she entered her bedroom and recovered from the shelf of a wooden *almirah* lying against the western wall: (i) one blue colored, mobile phone POCO, model M3 with IMEI Nos. 864113052788714 and 864113052788706; and (ii) the Deceased's original CNIC bearing No. 37405-0619214-9 and disclosed that she after the occurrence took the mobile and the CNIC of the Deceased in her custody. The Complainant provided the box of the mobile POCO, Model M3 which was taken into possession vide the Recovery Memo produced as Ex-PG.

30. The Recovery Memo produced as Ex-PN records that during remand the Appellant/Accused led the police to recover a blue colored car bearing No. LE-8622 Model 2007, Engine No. IKR346497, Chassis No. VNKKG96390A098344 which was parked in the back alley of her flat located in Crown Business Center, E-11 directly under her flat and disclosed that she took the vehicle in her possession after the occurrence and took it to Islamabad and parked it under her flat. On cross-examination the Complainant confirmed that the vehicle i.e. Toyota Yaris LE-11-8622 was in the use of the Deceased.

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31. However, recoveries were witnessed by PW-6 who is the nephew of the Deceased and the cousin of the Complainant and a police official who did not appear as witness in the Trial. The Appellant/Accused specifically alleged in her cross-examination of the I.O. who appeared as PW-11 as well as in her statement under Section 342, Cr.P.C. that the recoveries were planted on her after taking them from the complainant party. No explanation was given by the prosecution as to why no effort was made to associate independent witnesses to the recovery in compliance of Section 103, Cr.P.C. In such circumstances, non-compliance of Section 103, Cr.P.C. creates doubt in the alleged recoveries and planting cannot be ruled out. I am fortified in my view by the cases of *Hajjan Shah vs. the State,* 1997 MLD 1730 and *Amir Mehmood vs. the State and another*, 2024 YLR 309.

32. It was argued that the CDR of the Deceased's phone and that used by the Appellant/Accused shows that they were together. The CDR produced in evidence as Ex-P1 allegedly reflects the Call Data Record of the Deceased's number and that of the Appellant/Accused. The learned counsel for the Appellant vehemently argued that the CDR does not constitute admissible evidence as it was not produced by the telecom operator. Even otherwise, there is no evidence on the record that the number allegedly belonging to the Deceased of which CDR has been produced was registered in the name of the Deceased. Insofar as CDR of the mobile number given by the Complainant in the FIR as that of the Appellant/Accused is concerned the same was not was not registered in the name of the Appellant/Accused. The learned counsel for the Complainant argued that recovery thereof from the Appellant/Accused indicates that the same was in her possession and use. However, as held herein above the recovery cannot be taken into consideration due to non-compliance of Section 103, Cr.P.C.

33. Thus there is no evidence on the record that establishes beyond doubt that the Appellant/Accused was with the Deceased between 3:00 pm on 27-11-2023 when he whatsapped on the family group and the time that he sustained the injury that caused his death which would be between 10:30 pm on 27-11-2023 and 1:30 am on 28-11-2024 approximately as per the probable time between injury and death and between death and post-mortem as per the post-mortem

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report.

Cause of death:

34. Moreover, the circumstances in which damage to the Deceased's brain that resulted in death as per the post-mortem report remain a mystery. The prosecution alleged that the Appellant/Accused pushed the Deceased into a deep ditch. According to the Site Plan (Ex-PO) the body was found face down in a 12 feet deep ditch which was in the form of a slope. The post-mortem report concludes that death of the Deceased occurred due to damage to skull and brain matter sufficient to cause death. However, the prosecution was unable to establish whether the damage to the skull and brain matter which was sufficient to cause death as per the post-mortem report was caused due to the alleged fall in the deep ditch or due to any other cause prior to the body being thrown or placed in the ditch.

35. It is not clear whether the fractured frontal bone/skull or the mark on the forehead (resulting from) a strike as per the Inquest Report was ante-mortem, peri-mortem or post mortem leaving all three aforementioned possibilities open. The swelling and bruising of the right eye reported in the description of the external appearance of the body as per the post-mortem report and the Inquest Report is somewhat inconsistent with the allegation of a fall as according to Dr. Jaising P. Modi, in Chapter 29 on 'Regional Injuries' in his book, *Medical Jurisprudence and Toxicology*, 25th Edition a simple fall on the face on a flat surface does not usually cause a black eye because the prominence of the eye-brow and cheekbones and nose prevent damage to the orbit. While it is acknowledged that the surface in the ditch was unlikely to be flat, it cannot be concluded with certainty that swelling and bruising of the right eye was ante-mortem or peri-mortem.

36. On the other hand, the allegation of fall is corroborated with the finding in the Inquest Report as well as the Post-Mortem Report that the frontal bone and nose were compressed together with the post-mortem report that blood oozing from the nose and right ear. Similarly the abrasion present on the back and knee (minor bruises) also supports that the allegation of pushing as opposed to an accidental fall.

Uncertified

37. Be that as it may, the Complainant nominated the Appellant/Accused along with other unknown persons in her supplementary statement for the abduction and murder of the Deceased. Yet according to the challan besides the Appellant/Accused no other person was involved in the crime and as such Section 34, PPC was dropped. Nevertheless, the Complainant again stated in her examination-in-chief that the Deceased told her that there are four persons with him. Yet there is no evidence worth the name that it was the Appellant/Accused out of the four unknown persons who pushed the Deceased causing his the death.

38. The prosecution has failed to prove the charge under Section 302, PPC beyond a reasonable doubt. The cardinal principle of criminal jurisprudence is that the benefit of the doubt must go to the accused. In consequence of the aforementioned discussion, the instant Appeal is **allowed**. Resultantly the Impugned Judgment of the Trial Court is set aside and the Appellant/Accused is acquitted of the charge. She is directed to be released forthwith if not required in any other case.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the Open Court on the 25th day of March, 2025.

JUDGE

Tanveer Ahmed/*

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