

THE HIGH COURT OF SINDH AT KARACHI

Spl. Crl. Anti-Terrorism Appeal No.66 of 2002.
 Spl. Crl. Anti-Terrorism Appeal No.67 of 2002.
 Confirmation Case No.12 of 2002.

Present:

Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Muhammad Saleem Jessar.

Appellants:

1. Ahmed Omar Sheikh s/o. Saeed Ahmad Sheikh.
 through Mr. Mahmood A. Sheikh, Advocate
 assisted by Rauf Ahmed Sheikh Advocate.
2. Fahad Nasim Ahmed S/o. Nasim Ahmad,
3. Syed Salman Saqib S/o. Syed Abdul Rauf,
4. Sheikh Muhammad Adil s/o Abdul Shakoor
 through Mr. Khawaja Naveed Ahmed and Mr.
 Ria Bashir Ahmed Advocates.

For State:

Through Mr. Saleem Akhtar Buriro, Additional
 Prosecutor General.

Spl. Crl. Anti-Terrorism Appeal No.68 of 2002.

Appellant/State:

Through Mr. Saleem Akhtar Buriro, Additional
 Prosecutor General.

Respondents:

1. Fahad Nasim Ahmed S/o. Nasim Ahmad,
2. Syed Salman Saqib S/o. Syed Abdul Rauf,
3. Sheikh Muhammad Adil s/o Abdul Shakoor
 through Mr. Khawaja Naveed Ahmed and
 Mr. Ria Bashir Ahmed Advocates.

Dates of hearing:

03.03.2020, 04.03.2020
 05.03.2020 and 06.03.2020

Date of Judgment:

02.04.2020.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- Accused (1) Ahmed Omar Sheikh S/o. Saeed Ahmad Sheikh (2) Fahad Nasim Ahmed S/o. Nasim Ahmad, (3) Syed Salman Saqib S/o. Syed Abdul Rauf and (4) Sheikh Muhammad Adil S/o. Abdul Shakoor were tried by learned Judge, Anti-Terrorism Court Hyderabad Division & Mirpurkhas Division, Hyderabad in Special Case No.26 of 2002 arising out of Crime No.24/2002

U/s. 365-A/368/302/109/201/120-A/34 PPC read with Sections 7-a 8(a)(v)(c), 11/A(a)(b)(c), 6(2)(b)(c)(e)(f), 11/H(3-4), 11/V(I)(a)(b)(2), 11/L(a)(b)7(a)(b)(2), 11/H(2)(a)(b), 11/W(1)(2), 7 of the Anti-Terrorism Act, 1997, Police Station Artillery Maidan, Karachi (South). After trial vide judgment dated 15.07.2002 the appellant namely Ahmed Omer Saeed Sheikh was convicted and sentenced to death under section 365-A, 302 PPC read with Section 6(a) of the Anti-Terrorism Act, 1997 and Section 120-A PPC. The other accused persons namely Adil Sheikh, Salman Saqib and Fahad Naseem were sentenced under section 7 of the Anti-Terrorism Act, 1997 to suffer Life Imprisonment. They were also sentenced to pay fine of Rs.500,000/- each. In case of non-payment of fine, the accused persons were ordered to suffer sentence for five (5) years more. The court directed all the four accused persons to pay jointly a sum of Rs.20,00,000/- (Rupees twenty lacs) which shall be given to the widow of Daniel Pearl and also to his orphan son. All the above sentences were ordered to run concurrently. The appellants were extended the benefit of section 382(b) Cr.P.C.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Anti-Terrorism Court Hyderabad Division & Mirpurkhas Division, Hyderabad, these appeals have been preferred by the appellants, whereas the State has also filed Special Criminal Anti-Terrorism Appeal (Revision Application) No.68 of 2002 for enhancement of sentence from life imprisonment to death in respect of Respondents Adil Sheikh, Salman Saqib and Fahad Naseem.

3. The brief facts of the prosecution case are that on 04.02.2002 one Mariane Pearl residing at 19/1 Zamzama Street, D.H.A. Phase-V, Karachi under her signatures addressed a letter to the Station House Officer of Artillery Maidan Police Station, Karachi wherein she placed information on record in the following terms:- The contents of the letter have been incorporated in FIR and FIR was registered.

"My husband Daniel Pearl, a U.S. National and South Asia Bureau Chief of the Wall Street Journal was on assignment in Pakistan. He disappeared on the 23rd of January, 2002 and has not come back since that date. I came to know from driver Nasir Abbas son of Muhammad Din of Taxi Registration No.PL-1676 that Mr. Abbas dropped my husband in front of the Village Restaurant in Saddar, Karachi. My husband's whereabouts have not been determined since that time.

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I first heard of my husband's kidnapping from e-mail message received on the 27th of January 2002. The e-mail message included photographs that showed my husband held in detention in inhuman conditions. The writer(s) of the e-mail wrote that they had abducted my husband in retaliation for the imprisonment of Pakistani men by the US. Government in Cuba and other complaints.

The unknown accused persons had demanded the provision of Lawyers to Pakistanis detained in the U.S., the release of the Pakistanis jailed in Cuba to Pakistan, the return of former Taliban Ambassador Mulla Zaeef to Pakistan and the delivery of F-16 fighter jets to Pakistan or the repayment of money allocated for those F-16 jets as well as 15 percent interest.

In a subsequent e-mail received on 30.01.2002, the unknown accused threatened to kill my husband within 24 hours if their demands were not met.

I approached you for registration of this case and request that you return my husband from his kidnappers".

*Sd/-
Mariane Pearl
19/1, Zamzama Street,
Karachi."*

4. After the kidnapping for ransom of the abductee Daniel Pearl by the appellants working through a pre planned conspiracy, as indicated above, when the ransom demands were not met the abductee Daniel Pearl was murdered by the appellants with his execution being video recorded.
5. After investigation the challan was filed and the accused who had been arrested for the offenses as mentioned above were sent up to face trial. The charge against the accused was framed to which they all pleaded not guilty and claimed trial of the case.
6. To prove its case the prosecution examined 23 prosecution witnesses and exhibited documents and various other items and thereafter side of the prosecution was closed. The statements of the accused were recorded u/s 342 Cr.P.C. wherein they proclaimed their innocence. The accused did not examine themselves on oath although appellant Ahmed Omar Sheikh examined two DW's in support of his defense case.
7. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 15.07.2002 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

8. Mr. Mahmood A. Khan, learned counsel for the appellant Ahmed Omar Sheikh has contended that the FIR has been registered after an unexplained delay of 12 days during which period the complainant and the police concocted a false case against the appellants; that with regard to the calls allegedly received at Governor's House by Pearl in front of PW-2 Jameel Yousaf there was no evidence that such calls had come from appellant Omar Sheikh and thus there was no evidence to show that the appellant Omar Sheikh had abducted Pearl, that Mrs Pearl who was the complainant and was a very important witness avoided giving evidence and that her complaint was concocted, that there is no evidence of any conspiracy on record, that neither of the judicial confessions of co-accused Salman Saqib and Fahad Naseem could be safely relied upon as they had not been made voluntarily as admitted by the Judicial magistrate in her evidence, that the identification of appellant Omar Sheikh at identification parades by PW-6 Asif Mahfooz and PW-1 Nasir Abbas are of no legal consequence as neither of them gave any hulia of the appellant, that there was a delay in the identification parade and that the identification parade was not carried out in accordance with the relevant guidelines and rules for safe identification parades. That the handwriting expert's opinion cannot be safely relied upon as he was completely unqualified, that there was no evidence that appellant Omar Sheikh made any ransom demand, that appellant Omar Shakh was arrested in Lahore on 6th February and not in Karachi on 13th February, that the laptop which was used to trace the e-mails allegedly sent by the other appellants on appellant Omar Sheikh's instructions was according to the prosecution evidence seized on 11th February and yet it was with the FBI forensic computer expert on 4th February which shows that the e-mails were planted on appellant Omar Sheikh and the other appellants and this is a false case, that the video which showed the murder of Pearl was not genuine and had not been authenticated and even otherwise it did not link appellant Omar Sheikh or any other appellant to Pearl's murder and as such based on any of the above reasons appellant Omar Sheikh should be acquitted of the charge by extending to him the benefit of the doubt. In the alternative he submitted that this was not a case which justified the death penalty but only life imprisonment. In support of his contentions he has placed reliance on the cases of **Mah Gul v. The State** (2009 SCMR 4),

Muhammad Yameen alias Raja v. The State and others (2009 SCMR 84), Waqar Ahmad and another v. The State (2012 P. Cr.LJ 170), Abdur Rashid v. The State (2003 P. Cr.LJ 742), Muhammad Ayaz and others v. The State (2011 SCMR 769), Muhammad Ramzan and others v. The State (2011 P. Cr.LJ 140), Shafqat Mehmood and others v. The State (2011 SCMR 537), Sabir Ali alias Fauji v. The State (2011 SCMR 563), Umar Farooq v. The State (2006 SCMR 1605), Abdul Salam and others v. The State and others (PLD 2005 Quetta 86), Ziaullah alias Jaji v. The State (2008 SCMR 1210), Abdul Jabbar and another v. The State (2019 SCMR 129), Zafar v. The State (2018 SCMR 326), G.M. Niaz v. The State (2018 SCMR 506), Nazir Ahmad v. The State (2018 SCMR 787), Muhammad Ashraf alias Acchu v. The State (2019 SCMR 652), Ali Raza alias Peter and others v. The State and others (2019 SCMR 1982), Muhammad Mansha v. The State (2018 SCMR 772), Kanwar Anwaar Ali, Special Magistrate in the matter of Criminal Miscellaneous Application No.183 of 2019 in criminal Appeal No.259 of 2018 (PLD 2019 SC 488), Mian Sohail Ahmed and others v. The State and others (2019 SCMR 956), Abdul Karim alias Raja and another v. The State (1996 P. Cr.LJ 503), Immadine v. Pathan and 3 others (2001 P. Cr.LJ 1892) and Abdul Qadir Motiwala v. The State (1971 SCMR 569).

9. Mr. Ria Bashir Ahmed and Mr. Khawaja Naveed Ahmed, learned counsel for the appellants Fahad Nasim Ahmed, Syed Salman Saqib and Sheikh Muhammad Adil have adopted the arguments of learned counsel for appellant Omar Sheikh in so far as it relates to them and have further contended that the appellants are completely innocent, that there is no evidence of any conspiracy against them, that the judicial confessions of appellants Salman Saqib and Fahad Naseem were not made voluntarily and were retracted and as such cannot be relied upon, that there is no evidence that they were involved in any kidnapping or making any ransom demand or were involved in the murder of Pearl and as such for any of the above reasons they should be acquitted of the charge based on being given the benefit of the doubt. They submitted that it was a case of acquittal and certainly not a case which justified the enhancement of their sentences if this court maintained their convictions due to the relatively minor role which they played in the offenses. In support of their contentions they placed reliance on the cases of **Gul Munir and another v.**

The State (1990 P. Cr.LJ 1878), **Munir Ahmed and others v. The State** (1988 P. Cr.LJ 116), **Ali Akbar v. The State** (2001 P. Cr.LJ 890), **Mst. Darya Khatoon v. The State** (1996 P. Cr.LJ 1477), **Wali Muhammad alias Mandhoo v. The State** (1986 P. Cr.LJ 1153), **Moharram v. The State** (1983 P. Cr.LJ 471), **Miskeen v. The State** (1983 P. Cr.LJ 1113), **Hamzo and another v. the State** (1083 P. Cr.LJ 892), **Minhon and another v. The State** (1996 P. Cr.LJ 528), **Ghulam Abuzar and another v. The State** (1991 P. Cr.LJ 697), **Shah Nawaz v. The State** (1989 P. Cr.LJ 621) and **Murtaza and 2 others v. The State and another** (1996 P. Cr.LJ 358).

10. On the other hand Mr. Saleem Akhtar Buriro, learned Additional Prosecutor General has fully supported the impugned judgment. He has contended that the delay in the filing of the FIR has been fully explained, that it is not relevant whether the complainant was examined or not as it is up to the prosecution to decide which witnesses to call and even otherwise Mrs. Pearl has explained her inability to come to Pakistan as she had just given birth and had been advised not to travel on medical grounds, that there was sufficient evidence on record through the PW's, identification of the appellants before identification parades, the judicial confessions of two of the appellants Salman Saqib and Fahad Naseem, last seen evidence, recoveries of bills for the international hotel, recoveries of e-mails sent to Mrs. Pearl and their original manuscripts and laptop along with expert forensic report along with appellant Omar Sheikh's confessions before the police that he had abducted Pearl and that Pearl was dead to prove that the appellants had kidnapped Pearl for ransom, although he did fairly concede when confronted by the court that there was little evidence on record to link the appellants to the video which showed the execution of Pearl and that the hand writing expert appeared to lack the required qualifications and his report lacked reasons for his conclusions but none the less he contended that when all the prosecution evidence was viewed in a holistic manner the prosecution had proved its case against the appellants beyond a reasonable doubt and that the appeals should be dismissed and all the sentences of life imprisonment be enhanced to the death penalty as the appellants who had been sentenced to life imprisonment were on the same footing as the appellant Omar Sheikh who had been sentenced to death keeping in view the brutality of the offense committed. In support of his contentions, he placed reliance on

Sh. Muhammad Amjad V The State (PLD 2003 SC 704), Ghulam Husain Soomro V The State (PLD 2007 SC 71), Zakir Khan and others V The State (1995 SCMR 1793), Raz Muhammad V The State (PLD 2002 SC 56), Nazeer alias Wazeer V The State (PLD 2007 SC 202), Muhammad Amin V The State (PLD 2006 SC 219), Khan Muhammad V The State (1999 SCMR 1818), Ghazanfar Ali @ Pappu and others V The State (2012 SCMR 215), The State V Minhun alias Gul Hassan (PLD 1964 SC 813) and Ghulam Nabi V The State (2007 SCMR 808).

11. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellants, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

12. In a nutshell the case of the prosecution is that an American Journalist Daniel Pearl (Pearl) whilst on assignment in Pakistan was trying to make contact with Pir Mubarak Shah Geelani (Geelani) in order to seek information from Geelani in connection with an incident whereby a person known as Richard Read later dubbed "the shoe bomber" had tried to blow up a commercial airliner while in the air. That the appellants taking advantage of Pearls search for Geelani hatched a conspiracy in Room 411 of Akbar International Hotel Rawalpindi on 11-01-2002 to kidnap Pearl for ransom. In his search for Geelani, Pearl along with two colleagues had met Bashir aka Omer Sheikh aka Farooq Muzafer who claimed to be a Murid (follower) of Geelani and was very close to Geelani at Room No.411 of Akbar International Hotel Rawalpindi where Bashir aka Omer Sheikh aka Farooq Muzafer on 11.01.02 took Pearls business card and told Pearl that if he was able to arrange a meeting for Pearl with Geelani he would let Pearl know. According to the prosecution about a week later Bashir aka Omer Sheikh aka Farooq Muzafer contacted Pearl and told him he could arrange such meeting in Karachi. On 23-01-02 Pearl left his wife and where he was staying in Karachi by taxi and after a meeting with Jameel Yousaf at the CPLC at the Governors House took the same taxi to the Metropole hotel near the village restaurant where he was supposed to meet Bashir aka Omer Sheikh aka Farooq Muzafer who was to take Pearl to his meeting with Geelani. When Pearl reached outside the Metropole Hotel in a taxi a white corolla pulled up in front of the taxi.

Pearl got out of the taxi and was greeted by Bashir aka Omer Sheikh aka Farooq Muzafer who was to take him to his meeting with Geelani and Pearl left with Bashir aka Omer Sheikh aka Farooq Muzafer and the other appellants for his meeting with Geelani in the white corolla. Pearl did not return home after his meeting. Mrs Pearl the next day contacted Jameel Yousaf head of the CPLC who Pearl had met before leaving for his meeting with Bashir aka Omer Sheikh aka Farooq Muzafer and informed him that her husband had not returned home. Hence efforts were made to track down Pearl's whereabouts by Mrs. Pearl and the police assisted by the FBI since Pearl was an American citizen and the US authorities had sent the FBI to assist the Pakistani police in their investigation. That on 27-01-2002 Mrs. Pearl received an e-mail from the appellants stating in effect that her husband had been kidnapped and would be returned provided that certain demands were met as set out in the letter reproduced above and which was incorporated in the FIR. On 30-01-2002 the appellants sent Mrs. Pearl another e-mail stating that unless the demands were met within 24 hours Pearl would be murdered. That according to the prosecution all the appellants were involved in one way or another as part of the conspiracy to kidnap for ransom Pearl through playing a role in his abduction, sending the e-mail ransom demands and when these demands were not met in executing Pearl which execution was video recorded where he was in essence murdered by churri by cutting his head from the rest of his body as shown in a recovered video film. His body however was not recovered.

13. In considering and reassessing the evidence on record we have scrutinized, examined and taken account individual pieces of evidence whilst considering the whole context of the case so that all the evidence can be viewed in a holistic manner. In our view this is important especially in cases of kidnapping for ransom which is often carried out in a highly organized fashion with each participant carrying out his separate role without which the kidnapping for ransom could not be achieved. For example, one person could have abducted the person, another could have held him captive, another could have made the ransom demand whilst yet another person could have collected the ransom demand. Thus, the role of each appellant must be seen in this background. No doubt some of the accused may have played a lesser role. For example, the person who fed

the accused as opposed to the person who adducted him but the important point in our view is that without all the accused playing their designated role the kidnapping for ransom could not have been achieved and would have failed and thus each accused involved in the kidnapping for ransom bears equal responsibility and liability for the offense.

14. We are acutely aware that this is a very sensitive case where a foreign journalist was murdered in the most brutal circumstances whilst on assignment in Pakistan and would have spread terror amongst other foreigners in Pakistan and the journalist community as a whole with the result that freedom of expression would be impugned upon. We are also cognizant of the human tragedy whereby Mrs. Pearl who was pregnant at the time had to endure the agony of her husband going missing and eventually being murdered in a barbaric manner and the fact that on account of such an unspeakable crime a child will never know his father. However, as Judges we have to put such aspects aside and decide the guilt or innocence of the appellants by dispassionately assessing the evidence before us and coming to a decision which is supported by the evidence on record and the governing law and not by our emotions or own personal feelings. We can only be guided by the evidence and the law and nothing else. In this respect we refer to the case of **Azeem Khan V Mujahid Khan** (2016 SCMR 274) which held at P.290 Para 32 as under;

"Similarly, mere heinous or gruesome nature of crime shall not detract the Court of law in any manner from the due course to judge and make the appraisal of evidence in a laid down manner and to extend the benefit of reasonable doubt to an accused person being indefeasible and inalienable right of an accused. In getting influence from the nature of the crime and other extraneous consideration might lead the Judges to a patently wrong conclusion. In that event the justice would be casualty".

15. Before proceeding to decide these appeals we were pained to have noticed with concern that these appeals have been pending for the last 18 years during which time the appellants have been in jail. An appeal is a continuation of a trial and in our view under Article 10 (A) of the Constitution which envisages an expeditious trial it also envisages an expeditious hearing and decision of an appeal if one is filed. In our view to keep an appeal pending for years on end regardless of who is at fault is

tantamount to violating Article 10 (A) of the Constitution and ultimately it is for the judges before whom such cases are fixed to use their judicial authority to ensure that such appeals are decided expeditiously. In our humble view the High Courts need to put in place a system for expediting the hearing and deciding of old appeals to ensure that Article 10 (A) of the Constitution is complied with and an appeal is a meaningful right. For example, appeals which are up to 5 years old could be put in yellow files, between 5-10 years in blue files and over 10 years in green files. If a person is released after serving out his sentence and his appeal still remains pending then an appeal can only be regarded as a right on paper which is completely illusory and would amount to a fraud on both the appellant and the criminal justice system. If a convict is acquitted after serving 18 years in jail he cannot make up for the loss of such precious time and is not compensated for it. In such a case if a man had a young child of say 3 years old at the time of sentencing he would completely have missed that child growing up who would be almost an alien to him at the time of his release. Even if a convict's conviction is upheld by a High Court he can at least, if he so chooses, expeditiously move on to the next level of the appellate process which is his right and from where he may still get relief. A right of appeal will only become meaningful, as opposed to illusory, in criminal cases if such appeals are decided expeditiously which is an obligation which the State owes to its convicted citizens which objective is to ensure that no person is deprived of his liberty for longer than is legally justified since a person's liberty is in our view the highest expression of his right to life which is also guaranteed by the Constitution.

Turning to the evidence in respect of each ingredient of the offense charged.

The appellants have all been convicted for conspiracy under S.120 (A) PPC.

16. S.120 (A) and (B) PPC which define the offense of conspiracy and its punishment is set out below for ease of reference;

120-A. Definition of criminal conspiracy. *When two or more persons agree to do, or cause to be done, -*

(1) an illegal act, or

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(2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

120-B. Punishment of criminal conspiracy.

(1) *Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for life or rigorous imprisonment for a term of two years, or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.*

(2) *Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."*

17. After our reassessment of the evidence we are of the view that it shows through PW 6 Asif Mehfooz Farooqui and PW 7 Amir Afzal that appellant Omar Sheikh aka Bashir aka Farooq Muzafer stayed at Room 411 of Akbar International Hotel Rawalpindi on 11-01-2002 and met with Pearl, PW 6 Asif Mehfooz Farooqui and a person named Arif and that Geelani was discussed. There is no evidence that any of the other appellants were present and that any conspiracy/plan was made to abduct Pearl on that date in that room of the Hotel which in the presence of Pearl himself would have been absolutely absurd. Thus, we have not found any evidence to prove that either appellant Omar Sheikh aka Bashir aka Farooq Muzafer or any other appellant hatched a conspiracy to kidnap Pearl for ransom in room 411 of the Akbar International Hotel in Rawalpindi on 11-01-2002 within the meaning of S.120 (A) PPC and thus all the appellants are acquitted of this charge.

18. The appellants have been convicted for Kidnapping for Ransom which is defined under S.365 (A) PPC as is set out below;

"365-A. Kidnapping or abduction for extorting property, valuable security, etc. Whoever kidnaps or abducts any person for the purpose of extorting from the person kidnapped or abducted, or from any person interested in the person kidnapped or abducted any property, whether movable or immovable, or valuable security, or to compel any person to comply with any other demand, whether in cash or otherwise, for obtaining release of the person kidnapped or abducted, shall be punished with death or imprisonment for life and shall also be liable to forfeiture of property".(bold added)

In essence there are two limbs to this offense which each must be satisfied;

- (a) Kidnapping or abduction and (as in this case)
- (b) to compel any person to comply with any other demand, whether in cash or otherwise, for obtaining release of the person kidnapped or abducted (bold added)

19. Turning to the offense of kidnapping or abduction.

S.362 PPC in essence defines abduction as under;

"362.Abduction. Whoever by force compels, or by any deceitful means induces, any person to go to any place, is said to abduct that person" (bold added)

20. Keeping in view the definition of abduction after our reassessment of the evidence we are of the view that the prosecution has proved beyond a reasonable doubt that the appellant Omar Sheikh aka Bashir aka Farooq Muzafer has committed the offense of abduction under S.362 PPC for the following reasons;

- (a) In our view there is no unexplained delay in lodging the FIR after the incident which could have lead to concocting a false case against the appellants. Admittedly the FIR was lodged after a delay of 12 days however firstly in cases of kidnapping for ransom it is not unusual for there to be some delay in lodging an FIR as the immediate concern of the loved ones of the abductee is to try to track down the missing person by calling friends, relatives and others who were last in contact with the missing person. In this case this delay would be more acute as the loved one of the missing person was a foreign national (American) who was a lady who had

accompanied her husband (the abductee) on his trip to Pakistan. As such she would have been even more scared and traumatized than usual and would not even know how to go about such matters. Most likely one of her first ports of call would have been the US Embassy in order to report her husband as missing. Even otherwise she contacted PW 2 Mr. Jameel Yousaf on the day after her husband went missing and the police soon after that got involved in the case along with the FBI since Pearl was an American citizen. Thus, we find no unexplained delay in lodging the FIR. Most significantly, why would an American lady accompanying her journalist husband to Pakistan who did not know the appellants want to cook up a story to falsely implicate the accused? The answer is that she would have no such reason. Her priority would have been to find and get her husband safely returned.

- (b) There is evidence on record that Pearl was making efforts to meet Geelani by utilizing his journalist contacts. PW 6 Asif Mehfooz Farooqui who was a journalist working with a Japanese news paper and was working with Pearl prior to his abduction and who was in touch with Pearl gave evidence that Pearl wanted to help him to arrange a meeting with Geelani in connection with Richard Read the so called "shoe bomber". Through his contacts including one Arif he was able to trace out Geelani's Murid (follower) who claimed to know Geelani well and a meeting was arranged at the International Hotel in Rawalpindi at 9pm on 11-01-2002. They found the Murid who was known as Bashir in the restaurant and returned to Room 411 to which Bashir had the key and opened the door and discussed with him and Pearl in room 411 about Geelani and in particular whether Bashir could arrange a meeting between Geelani and Pearl. According to his evidence Bashir said he would try and Pearl gave him his business card so that he could get in contact with Pearl if he was able to arrange such a meeting. Later Pearl told him that Bashir had arranged his meeting with Geelani in Karachi and that he was going to meet Bashir and Geelani. On 23.01.2002 Pearl called him (the day when Pearl was to meet Geelani) and he told Pearl that it was not dangerous to meet Geelani. This witness identified Bashir at an identification parade as the person who they met in room 411 and told them he would try to arrange Pearl's meeting with Geelani. In our view this witness would have gotten a good look at Bashir as according to him the meeting in the room with Bashir lasted about 3 hours and there was full

light in the room and as such he could easily identify Bashir even without an identification parade which was not mandatory in this case. Reliance is placed on **Ghazanfar Ali v. State** (2012 SCMR 2015). He did pick Bashir out at an identification parade as the person who met Pearl in the hotel room and discussed Geelani and meeting him. He was an independent witness, he was not a chance witness, he had no enmity with the appellant and had no reason to falsely implicate the appellant Omar Sheikh or incorrectly identify him. There may be some deficiencies in the conduct of the identification parade but in our view based on the particular facts and circumstances of this particular witnesses identification of the appellant Omar Sheikh these deficiencies are not particularly relevant. In this respect reliance is placed on **Muhammed Siddique V State** (2020 SCMR 342) His evidence was not shattered during lengthy cross examination and thus we believe the evidence of this witness in terms of his correct identification of Bashir and as Bashir being the person who agreed to arrange Pearl's meeting with Geelani. The evidence of the meeting between Bashir and Pearl at the hotel is corroborated by the evidence of PW 7 Amir Afzal who was the receptionist at the hotel on the day that Pearl and Bashir met. PW 7 Amir Afzal in his evidence confirms that one Muzafer Farooq had occupied room 411 of the hotel on 11-01-2002 which was the date on which Bashir met Pearl in room 411 and confirmed that an English man had also met with Muzafer Farooq. He identified appellant Omar Sheikh who was present in court as Muzafar Farooq. In our view this witness is an independent witness, is not a chance witness and had no ill will or enmity with Omar Sheikh and had no reason to falsely implicate him in this case and as such we believe the evidence of this witness. He provided the record of Room 411 to PW 22 Rao Aslam who was the first IO of the case who also recovered bills in the name of Muzafer Farooq which were duly exhibited. PW 3 Javaid Abbass corroborates the evidence of PW 22 Rao Aslam about the recovery of the bills from PW 7 Amir Afzal who was the receptionist at the hotel and was mashir of recovery. Thus, based on the above discussion of the evidence we find that Omar Sheikh is also known as Bashir and is also known as Muzafer Farooq who met Pearl, PW 6 Asif Mehfooz Farooqui and Arif at 9pm on 11-01-02 and had a meeting with Pearl in room 411 at the International Hotel in Rawalpindi where Omar Sheikh aka Bashir aka Muzafer Farooq agreed to arrange a meeting with Geelani and Pearl and that he would contact Pearl in this regard.

(c) On 23-01-2002 PW 1 Nasir Abbass who is a taxi driver states that he took Pearl to the Governor's House and then at about 7pm took him to the village restaurant where he parked up close to the metropole hotel. According to his evidence en route he dropped Pearl at the CPLC in order to meet Jameel Yousaf. This is corroborated by PW 2 Jameel Youasf who was head of the CPLC and who in his evidence confirms meeting Pearl at about 5.45pm on that day. According to his evidence Pearl received a phone call which he over heard and to which Pearl responded in effect that he was close to the office where his meeting was to be held. At about 6.45pm Pearl left the CPLC for his meeting. This corroborates the evidence of taxi driver PW 1 Nasir Abbas who had waited outside the CPLC in order to take Pearl to his next destination. According to PW 1 Nasir Abbas' evidence he took Pearl to the village restaurant in Karachi and parked near the metropole hotel. At that time a white Toyota car then pulled up in front of his car. Pearl got out and he saw Pearl greet a man who he saw and identified as Omer Sheikh aka Bashir aka Farooq Muzafer. Admittedly it was dark but in his evidence PW 1 Nasir Abbass specifically says that there was light and he saw a person who he later identified as Omer Sheikh aka Bashir aka Farooq Muzafer before an identification parade. Admittedly this witness gave did not give any hulia of Omer Sheikh and the identification parade was held after some delay and not all the rules of the identification parade may have been followed but in our view he was an independent witness, he was not a chance witness, he had no enmity with the appellant and had no reason to falsely implicate the appellant Omar Sheikh or incorrectly identify him and his evidence in part is corroborated by PW 2 Jameel Yousaf. His evidence was not shattered during lengthy cross examination and thus we believe the evidence of this witness in terms of his correct identification of Omar Sheikh aka Bashir aka Farooq Muzafer as the person who left with Pearl on the night of 23-01-2002.

(d) In our view the evidence shows that Omar Sheikh aka Bashir aka Farooq Muzafer by deceitful means i.e pretending to set up a meeting between Pearl and Geelani induced Pearl to go with him and Pearl was never seen alive again **and as such Omar Sheikh has committed an offense under S.362 PPC of abducting Pearl and we hereby convict him of such offense.**

(e) There is no evidence that any of the other appellants played any role in abducting Pearl. There is no evidence that any of them were present at Hotel international when Pearl met Bashir on 11-01-2002 and there is no evidence that any of them were present when Omar Sheikh aka Bashir aka Farooq Muzafer left with Pearl in the white corolla on 23-01-2002.

21. Based on our above discussion we find that Omar Sheikh aka Bashir aka Farooq Muzafer was the person who was last seen with Pearl alive and this aspect of the case will be dealt with later in this judgment.

22. To convict Omar Sheikh aka Bashir aka Farooq Muzafer for the kidnapping for ransom and murder of Pearl we must consider the other evidence on record and in particular to see what corroborative material may be available in this respect.

23. The question now arises whether the prosecution has proved beyond a reasonable doubt that either appellant Omar Sheikh aka Bashir aka Farooq Muzafer or any of the other appellants kidnapped Pearl for ransom keeping in view the definition of kidnap for ransom under S.365 A PPC as set out above and the fact that if any of the other appellants are involved in the ransom demand they will still be liable for the offense under S.365 A for kidnapping for ransom despite the fact that they played no role in abducting Pearl because as mentioned earlier if they did play a role in sending the ransom demand by e-mail or keeping Pearl captive then they would all come within the ambit of S.365 A PPC. In this respect reliance is placed on **Sh. Muhammed Amjad V The State** (PLD 2003 SC 704)

24. In determining this issue in our view the following key aspects of the case are of particular significance.

(A) Whether we can safely rely on either or both of the judicial confessions of Salman Saqib and Fahad Naseem.

(B) Whether Omar Sheikh aka Bashir aka Farooq Muzafer was arrested in Lahore on 6th February 2002 or in Karachi on the night of 13th February 2002.

(C) Whether the laptop from where the e-mails were traced was recovered on the night of 10/11th February 2002 from where Fahad Naseem was staying.

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(D) Whether the handwriting expert's report can be safely relied upon in terms of its accuracy in matching appellant Omar Ahmed Sheikh's and appellant Muhammed Adil's handwriting.

25. We will proceed to deal with each question in turn.

A. Whether we can safely rely on either or both of the judicial confessions of Salman Saqib and Fahad Naseem.

26. For ease of reference the judicial confessions of both Salman Saqib and Fahad Naseem are set out below.

Judicial Confession of Salman Saqib under section 164 Cr.P.C.

"I remained stay about 4/5 months in Afghanistan. In the month of April 1999 I was caused injured in Baghram (Afghanistan) wherefrom I was brought to Pakistan and I remained under medical treatment in different Hospitals of Karachi about one and half / two months ago I removed stick and I became able. My operation about 25/30 were conducted. I met with Sheikh Umar first time in Procession (Jalsa) and this meeting has taken place in January 2000, thereafter in the month of December 2001, I met with Sheikh Umar second time in the office of Jaish Muhammad, thereafter on 2nd January 2002, I received phone call of Sheikh Umar who told me that he is coming to Karachi tomorrow you can meet me I replied him you come tomorrow. On the next day, he having made phone and told me that he is coming from Islamabad by Air, may you receive me at Airport, and do you have any conveyance, I replied him that I have no conveyance but if you said me then I come through Taxi, on which he replied me that you reach at airport at 1030 hours, I arrived at airport on fixed time then Sheikh Umar was standing in the Launch and another person was also accompanied with him he got introduced him that he is his friend Qasim, he asked that where is your house then I replied that my house is situated at Gulshan-e-Iqbal, he said that there is so ahead his house and we have to go for work on 21st January, I stated him my paternal house is situated at Gulistan-e-Jouhar then he said me that they have to fresh therefore, I took away both of them to the house of my paternal uncle situated at Gulistan-e-Jouhar, where they became free about 10/15 minutes, thereafter they made phone and they asked me that you are introduced about student Biryani House situated at Saddar, I replied them yes, on which they said you go with us thereafter we all three went away towards student Biryani House through Taxi, where one person Sheikh Umar was waiting. Sheikh Umar having gone talked him separately and he did not any talk in our presence, thereafter Sheikh Umar asked me do you know about Muhammad Ali Society, I replied him yes; Muhammad Ali Society is situated near PECHS Society. Thereafter we all three along with fourth person whose name doesn't know departed to Muhammad Ali Society in Taxi. We conducted search bungalow No.D-17 situated at Muhammad Ali Society, where Sheikh Umar disclosed that this is house of his

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paternal Aunt. We took tea in the said house. I came to know that there are his three paternal cousins, who left to their works. Paternal aunt did not come in our presence, where one was old servant. After half an hour Sheikh Umar asked that you have to go, on which I replied yes. They said it is ok. I drop you at Aga Khan. The Taxi in which we had come was parked outside, in which we boarded, they dropped me at Aga Khan, where from I went away to my house, on next day 22nd January I received phone call of Sheikh Umar who said me you come to me then I said him that I am going to Market along with cousin Fahad, on which he said that to come here then I agreed, thereafter I and Fahad came at D-17 and met with Sheikh Umar and he said me that he had some work at that time and I have assigned said work to someone and if now any work would be then I will call you, now you may go to Market, thereafter we both went away to Market. About 1130 / 1200 hours, I received phone call of Sheikh Umar on my mobile phone, he asked me where is you at this time, I replied that I am present at I.I Chundrigar Road then he said me you come Via Saddar and bring Poloside camera for me. I replied him that I did not purchase any camera nor I have any experience then he said it is simple and will be available in the Electronic Market. I having made free from my work came at Saddar along with Fahad and purchased Poloside Camera in Rs.1500/- and also purchased two cartridges. Thereafter we came at D-17 to hand over camera to Sheikh Umar where I gave camera and cartridges to Sheikh Umar, where at that time two person were also present, out of them one was Qasim and second was Aadil whom I also met. Where I offered Zohar prayer in the leadership of Aadil, thereafter Aadil and Qasim went away. After that Sheikh said me that you may not go right now I have some work with you. After short while of their leaving, Sheikh kept two pages in front of me and Fahad, out of which, one was in English version while another one in Urdu version, it was written therein that we are going to start campaign of Saving Pakistan "Pakistan Bachao" and our demands are that Mulla Zaeef may be released and also those Pakistani peoples who are confined in Cuba Jail they may also be released. America has to give F-16 to Pakistan or American should give F-16 or return amounts alongwith interest. Sheikh Umer further added that this written declaration has to email them without changing. This written/declaration has to email to Pakistan and International Level Newspapers. They asked me to wait a bit because two friends have to come and you have to tell them about using of Camera, thus we stayed there. In the evening after about one and half hours two guys came, out of them, one was the that boy who had met me yesterday at Students Biryani and another was new comer. We taught them to use of a Camera and inserting cartridge therein. After that, I and Fahad started to move from there, meanwhile, Sheikh Umer said his cousin whose house was this, to drop both guys at Taxi Stand and he dropped us and then we came back at home by taxi. Thereafter, on 23rd January Sheikh phoned me and asked that he is going back, so, come to meet me. After that, I and Fahad went to D-17 in order to see him at about 11:00A.M., he told us that I am going, so, those papers which I had handed over to you, you should email in verbatim, and Adil will deliver you something within one or two days, thus you have to send alongwith this email. After meeting him and we leaved from there. Again on 25/26th January Sheikh

Umer phoned and asked me that Adil has made any phone call to you. I replied him that Adil has not phoned me yet. He told me that Adil will phone you shortly and will call you for meeting, you may see with him. After that, Adil phoned me at Maghrib time and called me at Naubahar Hotel Saddar at 9:00PM. I and my cousin Fahad arrived at Naubahar Hotel at 9:00pm where met with Adil, he gave us an envelop and we received a envelop came back at home. When we opened the said envelop and found four pictures therein these pictures of one person who was tied in chains. Then again received a phone call of Sheikh Umer and told that this is a Denial Pearl and we have kidnapped him. Now when you make mails you should write in email that we have kidnapped Denial Pearl and these are our demands, and also send these all four pictures alongwith this mail. After that, we mailed this message alongwith pictures on next day. After two days, again Sheikh phoned and told that Adil will call you again today, you meet with him. Thereafter, received a phone call from Adil in evening time and he again called me at Naubahar Hotel at about 9:00pm. After that, I and Fahad reached there on fixed time, again Adil handed over an envelope and came back at home and opened it and found two pictures therein and these pictures were of also Denial Pearl. Thereafter, Sheikh Umer again phoned for mailing of said pictures to him. On next day, Fahad also mailed him. He made some changing in earlier message that he is not a CIA Agent but he is of a MOSAD Agent. After one day Sheikh made phone call and told me to email one another mail but I refused him and I had also refused him before this. When I came to know about kidnapping of Denial Pearl and I told him that all these are wrong, from which Government will have to face hardships and Crusaders/Mujahid will be defamed as well but he recited/preached me Hadith and also gave religious references and got me ready. After two or three days we had been arrested and this all happened because Fahad had emailed from his uncle's home. This much is my statement, heard and found correct and put my signature".

Judicial Confession of Fahad Naseem under section 164 Cr.P.C.

"We met with a person there whose name was later known as Sheikh Umar and Salman Bhai informed that he is the person who has come along Moulana Masood after getting released from India in a plane. I had seen him for the first time. He kept talking to us for a while. Then he asked me what do you do? I told him that I am a computer programmer at which he said God has helped me as I was looking for the same person who I have found. He asked me if I could send emails etc and I replied that it is not a difficult task. He said if I make a movie and give it to you, will you be able to email it? I told him that the size of a movie on disk is too big to be emailed then he asked about pictures. I said pictures can be emailed. Then Sheikh Umar asked Salman Bhai that if I give you a negative, who'll you get to develop it? Salman Bhai said it's a very difficult task. Then he told Salman Bhai that if I get a Polaroid camera the problem of getting the pictures developed will be no more. Salman Bhai said such cameras are easily available in the market. He said I cannot easily go out; you bring me one and then gave some money to Salman Bhai. In the meanwhile, one more

person came out; he had a long beard whose name was later known as Adil. He sat down there and after 4-5 min later one person came from inside, whose name was later known as Qasim. Then Adil led the Zuhar (afternoon) prayers for all of us. After that Sheikh Umar asked both of us to leave and bring the camera. I and Salman Bhai went to the Stock Exchange Building, where Salman Bhai's amount of Rs.175,000/- had been received at the money changer. They did not tell that which currency had been received but he received PKR before me. After that we reached the Regal Chowk and then purchased a camera from there and two (words cut off). Then we went back to the same house D-17 and after reaching there, handed over the camera to (words cut off). Then he said that I do not know how to use it. Teach the people, who come to take it, how to use it. I said we also do not know how to use it but I will guide after checking out its manual. Then he said okay let me show you the message which is required to be emailed. Then he gave me two papers. One was written in Urdu and the other one was written in English. When I read those I got to know what they were about to do. It was written on those papers that "We have kidnapped the US journalist Daniel Pearl and those of our Muslim brothers incarcerated in Cuba, if there are any allegations against them, it should be decided in Pakistan and custody of Mullah Zaeef should be gotten back from the US and the payment which Pakistan had made to the US for purchase of F-16 jets, it should either be gotten back or F-16 should be acquired." When I asked them, they informed me that Daniel Pearl is actually a Jew and a US agent who is working against the Muslims in Pakistan. He said if you support us in this work then God shall reward you for it. This is a great work and you shall involve in this work by sending this email. I asked Sheikh Umar from where you will kidnap him and what will you do to him so he scolded me and said do only whatever you are asked to and if you do not do it then the more you inquire about it, the more trouble you'll find yourself in. let me give you the email address of those who are required to be sent this email. Then he connected the internet in the same house and started searching for the email address. In the meanwhile, a new person came inside and I only put a glance on him. He came and sits behind me. That room was quite large. After that Sheikh Umar asked me to put the reel in the camera. I put the reel in the camera. Sheikh Umar asked me to keep doing my work and asked me to write down the email addresses which he had searched. Then Sheikh Umar started saying to the newly arrived person to check the camera and do not click picture of any person otherwise evidence will be created. Take picture of a table etc. He clicked a picture of a table and then went out of the room. After that Sheikh Umar asked myself and Salman Bhai to take the email address and leave and if you also get the email address of the newspapers, so also email this message to them. You will get the pictures. After that we came back to our house. After two days on 24-01-2002, Salman Bhai informed that we have to go to Saddar, where someone will bring the pictures, we have to get those and then we went to Saddar, where Adil met us at Hotel Naubahar. I was standing at a distance upon Salman Bhai's instructions. Adil arrived quickly, he handed over the envelope to Salman Bhai and left. After that Salman Bhai, having gone to the washroom of the hotel, checked those pictures and then we came back. We arrived at uncle's house in Noman Grand City, Gulistan-e-Johar as my

computer is lying in uncle's house. Then Salman Bhai asked how to scan it so I told him that for this we need a scanner. Then we put this work off until the next day. After that we purchased a scanner from Jogies Computer Centre situated at Shahr-e-Faisal. Then we came back to the uncle's house. After that we scanned the pictures and typed the message and saved it in a floppy. After that Salman Bhai said if we sent the email from home we'll get caught. We will email it tomorrow from some internet café. Next day Salman Bhai brought me to Tariq Road and said there is a café, email it from there. There Salman Bhai sat outside a hotel and I went inside. I do not remember the name of the internet café but it was situated at Tariq Road near Bhadurabad Roundabout. There I tried for about 1-1½ hours but the internet was slow there so it could not be emailed. Salman Bhai called me on my cell phone and said it was getting very late so come back and we'll do it from somewhere else. Then we went to Gulshan-e-Iqbal and emailed from Sir's Internet Café situated nearby Hassan Square and then we went back our homes respectively. After about three days Salman Bhai contacted me and said some other pictures have arrived which Sheikh Umar has sent and we have to go back to Hotel Naubahar to collect them. It was perhaps 29-01-2002. We went to Hotel Naubahar, where Adil once again gave pictures to Salman Bhai. We, having arrived at the uncle's house, scanned them again. Salman Bhai asked me to email them myself the next day. On the same day I had created a new email address due to which I got caught. I was creating it from my home which is why police traced it although Salman Bhai and Umar had forbade me from doing anything from home. After that the next day I myself went to Shahr-e-Faisal and sent the second email from an internet café. After a few days I got caught in a police raid. Such is my statement, heard and admit it to be correct and put my signatures".

Law on retraction of judicial confessions.

27. After a review of the relevant law on the legal validity of judicial confessions the Hon'ble Supreme court in the case of **Ch. Muhammad V Yaqoob V The State** (1992 SCMR 1983) reached the following conclusion:

"The legal position, which has emerged from the above reports, seems to be that in order to judge the evidentiary value of retracted confession, the Court is to advert to the question, whether the same appears to have been made voluntarily, without any inducement, duress or coercion with the object to state the truth. If the Court is satisfied on the above aspect, the mere fact that there were some irregularities in recording of a confession, would not warrant disregarding of the same". (bold added)

28. It is settled law that a retracted judicial confession can be legally admissible and used against its maker in certain circumstances. In the later case of **Muhammed Amin** (Supra) it was held at P.224 Para 9 as under;

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"9. There is no cavil to the proposition that conviction could have been awarded on the basis of retracted confession which proposition was examined in case of *Mst. Joygun Bibi v. The State* PLD 1960 (SC (Pak) 313 as under:-

"We are unable to support the proposition of law laid down by the learned Judges in this regard. The retraction of a confession is a circumstance which has no bearing whatsoever upon the question whether in the first instance it was voluntarily made, and on the further question whether it is true. The fact that the maker of the confession later does not adhere to it cannot by itself have any effect upon the findings reached as to whether the confession was voluntary, and if so, whether it was true, for to withdraw from a self-accusing statement in direct face of the consequences of the accusation, is explicable fully by the proximity of those consequences and need have no connection whatsoever with either its voluntary nature, or the truth of the facts stated. The learned Judges were perfectly right in first deciding these two questions, and the answers being in the affirmative, in declaring that the confession by itself was sufficient, taken with the other facts and circumstances to support Abdul Majid's conviction. **The retraction of the confession was wholly immaterial once it was found that it was voluntary as well as true.**"

10. Similarly in the case of *the State v. Minhun alias Gul Hassan* PLD 1964 SC 813 this Court has observed as under:-

"As for the confessions the High Court, it appears, was duly conscious of the fact that retracted confession whether judicial or extra judicial, could legally be taken into consideration against the maker of those confessions himself, and if the confessions were found to be true and voluntary, then there was no need at all to look for further corroboration. **It is well-settled that as against the maker himself his confession, judicial or extra judicial, whether retracted or not retracted, can in law validly form the sole basis of his conviction, if the Court is satisfied and believes that it was true and voluntary and was not obtained by torture or coercion or inducement.**" (bold added)

29. Thus, the court laid down a two pronged test as under (a) whether the retracted judicial confession appears to have been made voluntarily, without any inducement, duress or coercion and (b) was made with the object to state the truth.

30. *Notably it was also held that if both (a) and (b) were satisfied that even if there were some irregularities in recording of a confession it would not warrant disregarding of the same. In our view however following the case of *Azeem Khan* (Supra) such irregularities must be of a minor nature

and must not have detracted from either the voluntariness or truthfulness of the confession.

31. In the case of **Bahadur V State** (PLD 1996 SC 336) although it was suggested that a judicial confession alone can be made the basis of conviction the safer course was to look to see if there was any corroborative material available to determine its truthfulness

32. In the case of **Manjeet Singh V State** (PLD 2006 SC 30) a further requirement seemed to be added that in determining the truthfulness of the confession it had to be placed within the context of the whole of the prosecution evidence/case.

33. In our view therefore we are not in any doubt that a retracted confession before a magistrate can be the basis of convicting in a capital case however it must be;

(a) Voluntary i.e. without threat or inducement **and**

(b) Its object must be to state the truth; assistance for which can be ascertained from (i) whether the confession appears truthful within the context of the prosecution case and (ii) whether there is any other evidence on record which tends to corroborate the truthfulness of the confession **and**

(c) Only minor irregularities regarding the rules concerning the recording of judicial confessions can be permitted as determined on a case to case basis the main criteria being that such irregularities have not adversely effected the voluntariness or truthfulness of the confession.

34. The judicial confessions if relied upon by us are extremely damaging to the makers and the other co-accused who they name in the confessions even if there legal value vis a vis a co-accused is questionable without corroboration of an unimpeachable nature. In our view however we are **not** persuaded that we can safely rely on either confession since in our view there are **grave doubts** that they have been made voluntarily for the following reasons;

(a) Salman Saqib's statement was made on 01-03-2002 after his arrest on 04-02-2002 during which time he remained in police custody and no reason has been advanced as to why

he waited about 27 days to make his confession keeping in view that at that time there was limited evidence against him and he would have known that such a confession would have made him liable to face an offense carrying the death sentence.

(b) In the printed form the following Q and A is found

Question; Have you been beaten, tortured or mal treated by the police.

Answer; I have been beaten but not right now.

In our view this is a clear indication that this beating could only have happened whilst in police custody.

(c) In the printed Form another Q and A is found

Question; What are the circumstances which are inducing you to confess

Answer; I want to go to prison

In our view the implication taking into account the answer to the other question about beating is that he wants to make the confession so that he can go to jail and escape further beatings from the police.

(d) PW 9 Irum Jhanghir who was the judicial magistrate who recorded the judicial confession's of both Salman Saqib and Fahad Naseem during cross examination with regard to the voluntariness of the confessions of both Salman Saqib and Fahad Naseem states as under during cross examination (Paper book P.515 to 517)

"Since 1996 I am working as First Class Magistrate. I have tried some cases in which the accused had made judicial confessions. It is fact that in some cases of judicial confessions some have accepted as correct and some had not. It is fact that the confession is not correct if it appears to the court, in case of the confession accused says that he is beaten by the police such confession is discarded. It is fact that to my question that whether accused was beaten tortured or maltreated by the police he replied that he has been maltreated and beaten and not today and not now. I am shown the confession at Page No.02 it has been mentioned that body of the accused is examined which contains no finding and it is found that the finding as blank. At page No.03 the question put to the accused was what are the circumstances which are inducing you to confess. The reply was I want to go jail. I have granted remand in various cases. It is correct to suggest that when the accused is beaten by the police and he prays to go to the jail. It is allowed. I had put the question to the accused as to whether

as to since and where was in police custody. He replied as follows:-

He has remained in police custody since 4th February, 2002. It is fact that accused was not known to me. He was not produced before me earlier. The confession of accused was recorded on 1st March, 2002. It is fact that as soon as the accused was produced before the Magistrate for the purpose of confession he is told by the Magistrate that he should not any fear. It is fact that I have not written so at First Page. Voluntarily says that it is a proforma and this is not mentioned in the proforma accordingly. It is correct to suggest that accused persons who made a confession is to be told that whether he makes or does not make confession in both the way he is sent to the judicial custody. It is fact that it is not mentioned by me in the said confession. After recording the confession I sent him to the judicial custody. At the foot of the confession the Magistrate recorded the certificate. It is fact that in the second part of the certificate it is mentioned that the confession to which I am satisfied for reasons as follows: That the confession made by the accused is voluntarily. I am shown my certificate and it is fact that I have not written so or any reason or ground for believing the confession to be voluntarily. It is fact that when in the confession the accused has remained in police custody and that he is beaten by the police and he remained in police custody for a month and he wants to go to the jail it makes believing that the confession is not voluntarily.

Cross for the confession of accused Fahad Naseem:

It is fact that in the confession accused Fahad Naseem had mentioned that he remained in the police custody for 13/14 days. It is fact that Ex. 03 of the confession to my question as to what circumstances, which induced him for confessions. He replied as follows:

That it was purpose to save me I am making confessional statement. I have noted down that police at the time of arrest accused was arrested on 11.02.2002 at 0130 hours by Inspector Hameedullah Memon. This witness says that the same was recorded from police papers, which were brought by Hameedullah Memon. The question about the warning to be given to the accused and it is not mentioned because it is a proforma. It is also correct that I had not told the accused whether he makes or does not make confession he will not be handed over to the police. At the foot of the certificate I have not mentioned the reason for giving confession voluntarily. It is fact that from the confessional statement of the accused I am of the conclusion that the confession was not voluntarily because voluntarily says that it is according to the circumstances of the case. Now cross on the point of identification". (bold added)

(e) **Most crucially** therefore the judicial magistrate who recorded the judicial confession of Fahad Naseem has actually admitted in her evidence that the confession was not voluntary.

(f) With regard to Fahad Naseem in the printed Form another Q and A is found

Question; What are the circumstances which are inducing you to confess

Answer; I want to give this statement to protect myself.

In our view this begs the question who he wants to protect himself from. In our view this must only be from the police whose custody he is in in order to avoid maltreatment.

35. Judges no longer live in ivory towers. In looking into questions such as voluntariness we must also be cognizant of the particular facts and circumstances surrounding a particular case and its own particular dynamics. This case was an extremely high profile case where not only the high ups of this country wanted fast results i.e the safe recovery of Pearl and if not to bring to book those responsible for his abduction but so too did one of our closest allies who had even sent their own investigators and experts to assist the Pakistani police. In this back ground we are in no doubt that the Pakistani police were under huge pressure to "get results" quickly either in terms of the safe return of Pearl or the arrest of those responsible for his disappearance. Under these circumstances it would not be completely surprising if the police resorted to rough tactics in order to extract confessions. This is not a phenomenon only in developing societies but also in developed societies unless stringent laws are made to prevent such practices and are also implemented. For example, in the United Kingdom in the 1970's in the trials for terrorism and murder of the so called "Guildford Four" and "Birmingham Six" there was a strong public perception that the police most likely obtained confessions through coercion and strong arm tactics which played a role in the Police and Criminal Evidence Act 1984 being passed in order to protect a person's rights whilst in police custody which included tape recorded suspect interviews with a view to avoid confessions through coercion and other infringements on the rights of the accused or suspects whilst in police custody.

36. Thus, for the reasons mentioned above we find that neither the judicial confession of Salman Saqib nor the judicial confession of Fahad Naseem has been made voluntarily and thus we find that we cannot safely rely on them and as such place no reliance on either of the judicial confessions.

B. Turning to the next question whether Omar Sheikh aka Bashir aka Farooq Muzafer was arrested in Lahore on 6th February or in Karachi on the night of 13th February 2002.

37. According to the evidence of PW 23 Hameedullah who was the second IO of the case Omar Sheikh aka Bashir aka Farooq Muzafer was arrested in Karachi near the airport on 13.02.02 on the pointation of appellant Muhammad Adil which is corroborated by policemen PW 11 Muhammed Iqbal. On the other hand Omar Sheikh aka Bashir aka Farooq Muzafer insists that he was arrested on 6th February 2002 when he surrendered to the police at Lahore.

38. For the reasons mentioned below we find that appellant Omar Sheikh aka Bashir aka Farooq Muzafer was arrested at Lahore on 6th February 2002 where he surrendered to the police and was **not** arrested in Karachi on 13.02.2002 as alleged by the prosecution.

- (a) Newspaper clippings and PTV footage which were not rebutted by the prosecution clearly show that the appellant Omar Sheikh aka Bashir aka Farooq Muzafer was arrested in Lahore.
- (b) There was no independent mushirs to his arrest in Karachi.
- (c) Omar Sheikh's stance taken in his S.342 Cr.PC statement and his written statement on this issue is absolutely clear and is in great detail. Namely that he surrendered to the police in Lahore on 06.02.02 and was taken to Karachi by police on 12th February 2002 via Islamabad by a PIA flight. The prosecution has failed to rebut his version of events which it could easily have done by calling the relevant PW's and flight manifests. It is well settled that Omar Sheikh's explanation in his S.342 Cr.PC statement cannot be dismissed out of hand.
- (d) He also put this position to the relevant PW's during cross examination. For example, the police PW's 4 Faisal Noor, PW 5 Athar Rashid Butt, PW 11 Muhammed Iqbal and PW 23 Hameedullah who was

the last IO of the case. His stance therefore was not an afterthought.

- (e) His stance is corroborated by two DW's. Although one is his father and the other is an uncle being a District and Sessions Judge we find no reason to disbelieve their evidence on this point.
- (f) It also beggars belief that on 13.02.2002 appellant Omar Sheikh aka Bashir aka Farooq Muzafer was simply wandering around the airport area at night and it just so happens that appellant Muhammed Adil knew where to find him at that particular day, place and time despite Muhammed Adil being in custody.
- (g) Likewise it does not appeal to logic, common sense or reason that around 10 days after sending highly incriminating e-mails which the whole investigative machinery of the country was focusing on including the public of the country and other countries that Omar Sheikh aka Bashir aka Farooq Muzafer would be wandering around with a photocopy of the same in his possession along with so many other incriminating documents and as such it cannot be ruled out that these documents were planted on him.

39. Our finding that Omar Sheikh aka Bashir aka Farooq Muzafer surrendered to the police on 6th February in Lahore does **not** mean that he could not have committed the offense of kidnapping for ransom as he could have easily been in Karachi at the time of the kidnapping (as we have already found) or ordered the ransom demands to be sent etc, **but what is of significance** is that having disbelieved the police version of events that he was arrested on 13.02.02 in Karachi we also exclude from consideration the items which were allegedly recovered from him at the time of his arrest in Karachi. i.e photo copy of e-mail sent to Mrs Pearl concerning Pearl's abduction, receipt for camera and scanner, CNIC's of Bashir and Mohammed Rauf Siddiqui as based on the above discussion in our view these recoveries cannot be safely relied upon.

C. The next issue is whether the laptop from where the e-mails sent to Mrs Pearl were traced was recovered on the night of 11th February from where Fahad Naseem was staying.

40. According to PW 20 Zaheer Ahmed who in our view is a chance witness (who surprisingly accompanied the police throughout the night whilst they were going from place to place making arrests) who was mashir of the recovery of the laptop on 10-11 February 2002 accompanied the police on the pointation of PW 14 Sheikh Naeem to where Fahad

Naseem was staying where they recovered a laptop and two manuscripts. One in English and one in urdu which according to his evidence were the ransom demands which corresponded to the e-mails which were sent to Mrs. Pearl. This is corroborated by the evidence of IO PW 23 Hameedullah who also states that he also recovered a scanner and hard drive at the same time. The memo of arrest and recovery also reveals that the laptop was recovered on **10-11 February 2002**. PW 19 Muhammed Arif who was a computer expert working at the Anti car lifting cell (ACLC) in Karachi stated in his evidence that he received the recovered laptop and two e-mails at 1pm on **11.02.02** for examination from PW 23 Hamedullah who had recovered it and he was directed, since he did not have the required equipment, by his superiors to hand over the laptop to the US consulate as FBI officials had arrived to inspect it. According to his evidence he did this on **12.02.02** which is evidenced by his letter to the US consulate on the same date i.e. **12.02.02**.

41. The recovered laptop contained vital information as to where the e-mails which were sent to Mrs Pearl concerning Pearls kidnapping originated from on which a report was prepared by an FBI forensic expert PW 8 Ronald Joseph which incriminated the appellants in sending the ransom e-mails.

42. In this respect the evidence of PW 8 Ronald Joseph the FBI forensic examiner who examined the laptop is of significance.

43. According to the evidence in chief of PW 8 Ronald Joseph he was given the laptop by the US consulate on **04.02.02**. (i.e 8 to 9 days before it was allegedly recovered from where Fahad Naseem was staying). He also states during his cross examination in material part as under:

"On 4th February I arrived in Karachi. This ticket shows that I arrived in Islamabad on Feb. 4th 2002. On Jan. 31st I left United States for Pakistan. Two days before my departure from USA I was briefed to go to Pakistan I was called at my office for my briefing in USA. The Supervisor of Washington DC had met me on that day I was based in Sacramento. It is fact that I was called to come from Sacramento to Washington DC. I needed the viza Pakistani Embassy gave me viza and it shows that I was given multiple viza from Feb. 1 2002 for duration of three months at a time. When I arrived at Islamabad then I came to Karachi on same day at night hour. It is fact that I reported to my official at Islamabad to report at Karachi. I met with Mr. Barnet,

who is RSO at American Consulate and I also shook hands Consulate General at Karachi. I told him that I had come here to help in investigation of local police. I had also come to help the FBI. I believed that FBI office which is at Islamabad and some body will be there and such case is not in Karachi but when I came there FBI, people entered. I had visited the Pakistan before three times. It is my fourth trip in Pakistan. I visited Pakistan to teach the police Academy in Islamabad. It is fact that SDI is established its office in Islamabad. I do not know since FBI had established its office in Islamabad. I did not meet with Marien Pearl in Karachi. It is fact that I had personally not met with Marien Pearl. It is correct that I do not know personally Mr. Marien Pearl. I am shown envelop which is unsealed. Note. (Let the envelop be opened with consent of defence counsel). This is the Laptop when I saw it at Karachi. It has small floppy. I produce Laptop and the floppy drive as Article No.1 and 2. Laptop is a computer but it is a portable computer. In this case the Laptop has hard disk. If the material or data is fed in the computer through a floppy and if you want the hard disk the result of hard disk would take the data of the floppy. I further say that there are time and occasion when if a person working on the floppy hard drive take the data of floppy without command of the user. As forensic examiner depends on the happening of the user knowing but this process is not done loaded. I did not bring out all the data contained in the hard drive but in fact I made mirror image of the data on to other hard drive without disturbing the original hard drive. I obtained report from mirror images which are on the copy of hard drive and such is contained in my report. I have got print out of the data contains encase report Ex.49-B and 49-D. The encase report is one file and some arises what is contained in the hard drive. I received Laptop on the evening of 4th Feb. in American Consulate in Karachi. I do not know the person who had handed over to me but I was told that this Laptop is required to be process. This Laptop was available in a lock room at the American Consulate. I cannot say as to who delivered me Laptop. I do not remember the name of person who directed to take Laptop. He may be person of FBI. But I think the name was Cathy who told me that this was the Laptop. After taking the Laptop I was provided separate room to conduct my process as Forensic examination on the Laptop. For many days I had conducted the process. I had processed the same for 6 days. But it was not full time for 6 days. I spent approx. 4 to 6 hours of a day. No body had assisted me in this process. I brought equipment with me from USA for conducting the process generate. I then took the equipment from USA. I think equipment was heavy. The weight of the equipment was approx. 60 pounds. It did not cost any extra amount in transporting the same. I had not received any authority from Pakistan about that. The equipment was assigned to me on my demand and it was sent to me by them. I was not told on the day when equipment was assigned to me that I have to go to Pakistan in a mission for a Laptop. The same equipment has been assigned to me in the year 1997. I am a professional Processor of the computer in the FBI. It is correct to say that I had knowledge that when I came to Pakistan I would be required to process the computer. It is correct that when I

landed in Islamabad I went to Karachi for the same purpose". (bold added)

44. It is significant that in his evidence PW 8 Ronald Joseph states that before leaving the USA and arriving in Pakistan he knew that he had come to process a computer. According to his evidence he was briefed two days before he left for Pakistan which would be roughly 29th January 2002 (since he left USA on 31 January 2002 and reached Islamabad on February 4th as per his ticket and own evidence which means that the second e-mail which was sent on 30-01-02 had not even been sent by the time he left America. It is also relevant in this context that according to PW 3 Jawed Abbas who recovered both the e-mails from Mrs. Pearl that he only recovered such e-mails on 5th February which was after the FBI forensic expert started to examine the recovered laptop. It is also troubling and of concern that the e-mails which were sent on 27.01.02 and 30.01.02 which were some of the most important documents in the case which concerned the ransom demands for Pearl's release were recovered after a lapse of 9 and 12 days respectively of their receipt especially as the police were involved in this case as early as 21.01.02 (when Mrs Pearl had informed PIW 2 Jameel Younsaf that her husband was missing) at which time he already knew that he was coming to Pakistan to process a computer and thus brought the required equipment with him for this task. It would have been possible to interpret this as meaning that he was coming to Pakistan to examine the computer belonging to Mrs. Nomani to whom the e-mails had been sent concerning the kidnapping of Pearl as these e-mails had been received on her computer and addressed to her and copied to Mrs Pearl and Mrs Nomani's computer and e-mail address had even been used to communicate with and from Bashir and the kidnappers (Paper book P.659 and 661) and as such it would have been logical to expect him to be coming to Pakistan to examine this computer (or any laptop owned by Mrs Pearl as the e-mail messages were also copied to her) so that he could trace the senders of the e-mail from Mrs. Nomani's computer on which the e-mails had been received. However, surprisingly, there is no evidence that Mrs. Nomani's computer was ever recovered or taken into custody for such examination (and neither was any laptop (if any) in the possession of Mrs Pearl) and as such PIW 8 Ronald Joseph could not have been coming to Pakistan for that purpose. Notably it appears that no S.161

CxPC statement of Mrs. Norani was taken and she also did not appear as a prosecution witness. We find based on the evidence before us that the only purpose that FBI forensic expert PW 5 Ronald Joseph could have been coming to Pakistan for was to examine the laptop which was **allegedly recovered on 11/12 February 2002 by the Karachi police from the residence of Fahad Naseem.** Time and again in his evidence PW 8 Ronald Joseph has confirmed that he reached Karachi on 4th February which is corroborated by his ticket so there is no question of this date being a typo in his evidence. Furthermore, he states in his evidence that on arrival in Islamabad on 4th February he travelled straight to Karachi and was shown the computer which he examined in the US Embassy. In his evidence, PW 8 Ronald Joseph also states that he left Pakistan on 15th February 2002 which means that if the computer was recovered on 11th February as alleged by the prosecution and given to the FBI on 12th February via the US Embassy after PW 8 Ronald Joseph's 6 days of examining the computer the date would have been 18th February by which time PW 8 Ronald Joseph according to his own evidence would have already left Pakistan 3 days before this time which simply does not add up. Either the prosecution evidence regarding the recovery of the laptop is not truthful or the evidence of PW 8 Ronald Joseph is not truthful regarding the time when he examined the recovered laptop. Either way the time of the recovery of the laptop by the police and the time of its examination by PW 8 Ronald Joseph is in doubt.

45. Thus, in our view there is a major and material contradiction in the prosecution evidence concerning when the laptop was recovered and when it was examined by the FBI forensic expert.

46. If the prosecution version regarding the recovery of the laptop on the night of 10/11 February is to be believed then it would not have been possible for the same laptop to have been examined by the FBI expert on 4th February. On the other hand if the FBI expert did examine the recovered laptop there is no evidence from where, from whom and when this laptop was recovered and under what circumstances.

47. Interestingly, according to the evidence of the FBI expert (PW 8 Ronald Joseph) his examination of the laptop started on 4th February and continued for 6 days i.e. up till 10 February 2002. It is then some what co-

incidental that when he returns the laptop to the Pakistani police it is recovered the next day from where Fahad Naseem is staying.

48. The above discussion leads us to the conclusion that we cannot rule out the possibility that the FBI was given a doctored laptop by the Pakistani police who then conveniently recovered it from where Fahad Naseem was residing once it was returned by the FBI. Thus, we have grave doubts about the recovery of this laptop and as such do not place any reliance on the expert report generated from it.

D. The next issue is whether the handwriting expert's report can be safely relied upon in terms of its accuracy in matching appellant Omar Sheikh's and appellant Muhammed Adil's hand writing.

49. Having already found earlier in this judgment that the time when the laptop was recovered and from where and from whom is doubtful this automatically raises doubt as to the recovery and authenticity of the ransom demands made in manuscript in English and urdu which were allegedly recovered at the same time as the laptop.

50. To prove that the manuscripts which were in effect the ransom demands which were sent by e-mail to Mrs. Tani were written by Adil Muhammed in urdu and Omar Sheikh in English the prosecution relied on PW 10 Ghulam Akbar who was a hand writing expert according to whose report the handwriting samples taken from Adil Muhammed in urdu and Omar Sheikh in English matched with the manuscript transcripts which were recovered from where Fahad Naseem was staying along with the laptop on the night of 10/11 February 2002.

51. During cross examination PW 10 Ghulam Akbar the handwriting expert has stated as under:

"I am post graduate in Sindhi Literature from Karachi University. In that course the process of comparison is not taught to me. I have obtained no degree in this connection. It is fact that there are persons who can write the same in similar hand writing. I am shown Ex.51-C addressed by police officials. I.O has brought himself Ex.51-B and 51-C and three annexure, and so also Ex.51-C with annexure. It is fact that in the opinion I had not mentioned the ground in support of my opinion, but I have brought which are in my file."

52. Having regard to the above cross examination we have found that the prosecution has not proved that PW 10 Ghulam Akbar had the necessary qualifications, knowledge, experience or expertise to be regarded as a handwriting expert who had the competence and ability to correctly match hand writing samples to original hand writing from the same persons. **Furthermore, he has not given the reasons or grounds or basis in his report as to how and why he has reached his conclusions.** Usually in a hand writing experts report you would expect to see the grounds/reasons leading to the conclusion e.g. the letter "T" is identical and has been made from the same hand as can be seen by its natural flow and formation of the letter or word etc.

53. Thus, for the above reasons we do not consider that we can safely **rely on the conclusions reached in the handwriting experts report and disregard the same.**

The next issue is what other evidence is there in respect of the kidnapping for ransom of Pearl by the appellants.

54. Following our above discussion after discarding the judicial confessions of Salman Saqib and Fahad Nassem, discarding the recoveries made from Omar Sheikh on his alleged arrest in Karachi including photo copy of e-mail allegedly sent to Mrs. Pearl, discarding the laptop and its report from the FBI and the report of the handwriting expert we need to consider what other evidence the prosecution may have lead to link the appellants to the offense of kidnapping for ransom keeping in view that it is sufficient to prove the offense if it can be proved that a demand was made even if that demand was not fulfilled as in this case.

55. There is no direct evidence that any of the appellants sent the e-mails in respect of the kidnap for ransom and the laptop from which it was allegedly sent is also in doubt for the reasons discussed above.

56. PW 14 Sheikh Nassem who is the proprietor of speedy internet gave evidence that he had given a connection to Fahad Nassem and that this was connection 66 however this does not prove that Fahad Nassem sent the e-mails. PW 16 Muhammed Arif who owned an electronic shop gave

evidence that he sold two cameras to Fahad Naseem and Salman Saqib and produced an invoice but these cameras have not been recovered and there is no evidence that these camera was used to take any photo's or video's of Pearl after his abduction. The receipt book of the purchase of the cameras is also suspicious as most of the pages in it are blank except in so far as it relates to the receipts of Fahad Naseem and Salman Saqib. Even if these camera were purchased by Fahad Naseem and Salman Saqib these camera's could have been purchased for any purpose. Appellant Omar Sheikh's confessions before the police are inadmissible in evidence and even then they are not recorded in any remand order despite allegedly being made before the remand judge. The concerned remand judge was called by the prosecution to corroborate these confessions which were allegedly made before him by the appellant Ahmed Omar Sheikh at the time of his remand but he was given up by the prosecution which tends to indicate that under Article 129 (2) Qanoon-e-Shahadat Ordinance 1984 he may not have supported the prosecution case in this respect and as such no reliance can be placed on appellant Omar Sheikh's alleged confessions before the police at the time of his remand which have since been retracted by appellant Omar Sheikh.

The law on circumstantial evidence.

57. With regard to circumstantial evidence leading to a conviction in a capital case it was held as under in *Fayyaz Ahmed V State* (2017 SCMR 2026) at P.2030 para's 5 and 6 which are reproduced as under;

"To believe or rely on circumstantial evidence, the well settled and deeply entrenched principle is, that it is imperative for the Prosecution to provide all links in chain an unbroken one, where one end of the same touches the dead body and the other the neck of the accused. The present case is of such a nature where many links are missing in the chain.

To carry conviction on a capital charge it is essential that courts have to deeply scrutinize the circumstantial evidence because fabricating of such evidence is not uncommon as we have noticed in some cases thus, very minute and narrow examination of the same is necessary to secure the ends of justice and that the Prosecution has to establish the case beyond all reasonable doubts, resting on circumstantial evidence. "Reasonable Doubt" does not mean any doubt but it must be accompanied by such reasons, sufficient to persuade a judicial mind for placing reliance on it. If it is

short of such standard, it is better to discard the same so that an innocent person might not be sent to gallows. To draw an inference of guilt from such evidence, the Court has to apply its judicial mind with deep thought and with extra care and caution and whenever there are one or some indications, showing the design of the Prosecution of manufacturing and preparation of a case, the Courts have to show reluctance to believe it unless it is judicially satisfied about the guilt of accused person and the required chain is made out without missing link, otherwise at random reliance on such evidence would result in failure of justice.

It may also be kept in mind that sometimes the investigating agency collects circumstantial evidence seems apparently believable however, if the strict standards of scrutiny are applied there would appear many cracks and doubts in the same which are always inherent therein and in that case Courts have to discard and disbelieve the same." (bold added)

58. In the case of Azeem Khan (Supra) the following was reiterated with respect to circumstantial evidence at P.290 as under;

"In cases of circumstantial evidence, the Courts are to take **extraordinary care and caution before relying on the same.** Circumstantial evidence, even if supported by defective or inadequate evidence, cannot be made basis for conviction on a capital charge. More particularly, when there are indications of design in the preparation of a case or introducing any piece of fabricated evidence, the Court should always be mindful to take extraordinary precautions, so that the possibility of it being deliberately misled into false inference and patently wrong conclusion is to be ruled out, therefore hard and fast rules should be applied for carefully and minutely examining circumstantial evidence in such cases because chances of fabricating such evidence are always there. **To justify the inference of guilt of an accused person, the circumstantial evidence must be of a quality to be incompatible with the innocence of the accused.** If such circumstantial evidence is not of that standard and quality, it would be highly dangerous to rely upon the same by awarding capital punishment. The better and safe course would be not to rely upon it in securing the ends of justice."

59. Thus, based on our above discussion of the evidence and keeping in view the above guidelines on circumstantial evidence we are of the view that the prosecution has not been able to make a case out under S.365 A against any of the appellants on the basis of circumstantial evidence as there are many missing links in the chain of evidence from the abduction of Pearl to his ultimate murder.

The law on last seen evidence.

60. The prosecution has contended that the appellant Omar Ahmed Sheikh can be convicted for kidnapping for ransom and even murder based on the doctrine of "last seen" evidence. We have already found earlier in this judgment that Omar Ahmed Sheikh guilty of abducting Pearl under S.362 PPC and that he was the last person who saw Pearl alive. When determining whether any of the appellants can be additionally convicted for kidnapping for ransom or murder under this doctrine we need to consider the relevant law.

61. In Fayyaz's case (Supra) at P.2030 at Para 7 it was held as under regarding last seen evidence;

"The last seen evidence is one of such categories of evidence. In this category of cases some fundamental principles must be followed and the Prosecution is under legal obligation to fulfill the same, some of which may be cited below:-

- (i) There must be cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused and those reasons must be palpable and prima facie furnished by the Prosecution.
- (ii) **The proximity of the crime seen plays a vital role because if within a short distance the deceased is done to death then, ordinarily the inference would be that he did not part ways or separated from the accused and onus in this regard would shift to the accused to furnish those circumstances under which, the deceased left him and parted ways in the course of transit.**
- (iii) The timing of that the deceased was last seen with the accused and subsequently his murder, must be reasonably close to each other to exclude any possibility of the deceased getting away from the accused or the accused getting away from him.
- (iv) There must be some reasons and objects on account of which the deceased accompanied the accused for accomplishment of the same towards a particular destination, otherwise giving company by the deceased to the accused would become a question mark.
- (v) **Additionally there must be some motive on the part of the accused to kill the deceased**

otherwise the Prosecution has to furnish evidence that it was during the transit that something happened abnormal or unpleasant which motivated the accused in killing the deceased.

- (vi) The quick reporting of the matter without any undue delay is essential, otherwise the prosecution story would become doubtful for the reason that the story of last seen was tailored or designed falsely, involving accused person.

Beside the above, circumstantial evidence of last seen must be corroborated by independent evidence, coming from unimpeachable source because uncorroborated last seen evidence is a weak type of evidence in cases involving capital punishment.

- (vii) The recovery of the crime weapon from the accused and the opinion of the expert must be carried out in a transparent and fair manner to exclude all possible doubts, which may arise if it is not done in a proper and fair manner.
- (viii) The Court has also to seriously consider that whether the deceased was having any contributory role in the cause of his death inviting the trouble, if it was not a pre-planned and calculated murder."(Bold added)

62. In the later case of *Muhammed Abid V State* (PLD 2018 SC 813) which delved further into the doctrine of "last seen together" evidence, it was held as under at P.817 Para 6:

"The foundation of the 'last seen together' theory is based on principles of probability and cause and connection and requires 1. cogent reasons that the deceased in normal and ordinary course was supposed to accompany the accused, 2. proximity of the crime scene, 3. small time gap between the sighting and crime, 4. no possibility of third person interference, 5. motive, 6. date of death of victim. The circumstance of last seen together does not by itself necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime" (bold added)

63. As can be seen both tests are relatively similar. In this case Pearl was abducted on 23-01-2002 which was the time he was last seen with Omar Ahmed Sheikh. The e-mails concerning his kidnap for ransom were received on 27 and 30th January 2002 along with photo's of Pearl showing

that he was alive at that time with the last e-mail stating that Pearl would be killed in 24 hours unless the demands were met i.e. on 31st January 2002 i.e. 7 or 8 days after he was last seen with Sheikh Ahmed Omar. The video of Pearl's execution was given by a source to FBI agent PW 12 John Mulligan on 21-02-02 and according to PW 21 Randal Bennett there was no date shown when the video of the execution was made.

64. Thus, taking into account the law on "last seen" evidence or "last seen together" evidence we are of the view that on account of the relatively long proximity in time from when Omar Ahmed Sheikh was last seen with Pearl and the fact that it is unknown where and when Pearl was murdered it would not be safe to convict him for kidnapping, for ransom or murder on the basis of "last seen" or "last seen together" evidence without strong unimpeachable corroborative evidence which is lacking in this case. **For example, Pearl could have attended a meeting with Geelani and then left and have been abducted by some one else in this intervening period. The time of death and place of death of Pearl have not even been conclusively determined and his body has still not been found.**

65. Thus, based on our above discussion and re assessment of the evidence we acquit all the appellants for the offense of kidnapping Pearl for ransom under 8.363 A PTC.

Turning to the murder of Pearl and whether there is any evidence to prove that any of the appellants were involved in the murder.

66. To prove this the prosecution produced a video which PW 12 John Mulligan had acquired from a source on 21-02-02 (which is corroborated by PW 21 Randal Bennett) which showed Pearl being executed by having his head cut off by a churri. **No one else is shown in the video. No murder weapon has been found**

67. Even if the video is authentic at best it only proves that Pearl was murdered and the manner of his murder.

68. No evidence has been brought on record by the prosecution to link any of the appellants to the murder of Pearl and as such all the appellants are acquitted of murder u/s 302 PTC.

69. It is a golden principle of criminal jurisprudence that the prosecution must prove its case against the accused beyond a reasonable doubt and that the benefit of doubt must go to the accused by way of right as opposed to concession. In this respect reliance is placed on the case of *Tarlo Pervez V/s. The State* (1995 SCMR 1343), wherein the Supreme Court has observed as follows:-

"It is settled law that it is not necessary that there should be many circumstances creating doubts. If there is a single circumstance, which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused will be entitled to the benefit not as a matter of grace and concession but as a matter of right."

70. In our view in many key aspects of the prosecution case as discussed in this judgment there is doubt which must go to the benefit of the appellants which have lead us to the findings which we have reached in this judgment.

Summary.

71. The appeals are allowed and the impugned judgment is set aside as slightly modified in that all the appellants are acquitted of all charges except appellant Omar Ahmed Sheikh who is only convicted under S.362 PPC and as such is sentenced to 7 years RI and a fine of RS 2,000,000 (Twenty lacs) which shall be paid to the widow of Daniel Pearl and also to his orphan son and in the event that such fine is not paid he shall serve a further 2 years RI. He shall have the benefit of S.382 B Cr.PC. The confirmation reference is answered in the negative. The application for enhancement of sentences is also dismissed.

72. Since S.362 PPC would not fall within the purview of the ATA as there was no design, object or purpose to cause terror by such act the provisions of the ATA will not apply and as such the appellant Omar Ahmed Sheikh will be entitled to remission in accordance with law.

73. The appeals and confirmation reference stand disposed of in the above terms

Approved in open Court on 02/04/20

JUDGE

JUDGE 02/04/20

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JUDGE